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CONCLUSION

Tymar served and offered unanswered requests for admissions, which were received in evidence. Under applicable law, the substance of the unanswered requests should be deemed admitted by the protestants. The Commission erred under Rule 36 when it did not give legal effect to the substance of unanswered requests Nos. 8 and 13 regarding, respectively, fitness and necessity under § 75-311(1). The district court erred as a matter of law when it failed to correct the Commission's rulings regarding these requests for admissions and affirmed the Commission's denial of Tymar's application. We reverse the decision of the district court and remand this cause to the district court with directions to remand the action to the Commission with directions to reconsider Tymar's application consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

KEVIN J. PETERSON AND PATTI J. PETERSON, APPELLEES, V. STACIA E. SANDERS, ALSO KNOWN AS STACIA E. WOODS, ET AL., APPELLANTS.

806 N.W.2d 566

Filed November 10, 2011. No. S-10-1170.

1. **Equity: Appeal and Error.** On appeal from an equity action, an appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the conclusion reached by the trial court.

Appeal from the District Court for Scotts Bluff County: RANDALL L. LIPPSTREU, Judge. Affirmed.

Rick L. Ediger, Katie S. Baltensperger, and John F. Simmons, of Simmons Olsen Law Firm, P.C., for appellants.

Pamela Epp Olsen, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellees.

HEAVICAN, C.J., CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ., and SIEVERS, Judge.

STEPHAN, J.

Record owners of surface property brought this equitable action pursuant to Nebraska's dormant mineral statutes.[1] The surface owners claimed the property's severed mineral interests had been abandoned and sought an order vesting title in the severed mineral interests in them. We affirm the judgment of the district court for Scotts Bluff County which vested title to the mineral interests in the surface owners after determining the mineral interests had been abandoned.

FACTS

Kevin J. Peterson and Patti J. Peterson, husband and wife, reside in Scotts Bluff County, Nebraska. The Petersons are the record owners of real property described as: "East Half (E 1/2) of the Southeast Quarter (SE 1/4) of Section Twenty-Eight (28) and the West Half (W 1/2) of the Southwest Quarter (SW 1/4) of Section Twenty-Seven (27), Township Twenty-Two (22) North, Range (58) West of the 6th P.M., Scotts Bluff County, Nebraska."

In 1953, Stacia E. Sanders and Floyd M. Sanders sold this property and a warranty deed was filed in Scotts Bluff County. At the time of the 1953 sale, Stacia and Floyd severed and reserved unto themselves an undivided one-half interest in all oil, gas, and mineral rights in and under the property. Floyd died in 1960, and the mineral rights passed to Stacia. On or about November 8, 1985, Stacia transferred the severed mineral rights to her children, Kenneth E. Sanders, Alice F. Martin, Loree Mann, Myra Gaines, Alva Richard Sanders, and Theodore C. Sanders, appellants herein. Stacia died in 2000.

On July 23, 2010, the Petersons filed a complaint in equity naming Stacia's children as defendants. The complaint alleged that all claims to the mineral rights had been abandoned pursuant to § 57-229 and sought a court order vesting title to all severed mineral rights in the Petersons. The parties agree that in the 23 years preceding the filing of the complaint, none of the named defendants nor anyone acting on their behalf publicly exercised a right of ownership in the mineral interests in any

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[1] Neb. Rev. Stat. §§ 57-228 to 57-231 (Reissue 2010).

of the ways specified by § 57-229. The parties also agree that in the 23 years preceding the filing of the complaint, no person has recorded a verified claim of interest to the mineral rights in Scotts Bluff County.

After an answer was filed, the district court held a bench trial. The Petersons offered the complaint, the answer, and a joint stipulation of facts into evidence; all were received without objection. Stacia's children offered the 1953 warranty deed that created the severed mineral interests and the 1985 quitclaim deed from Stacia to her children. Both were received without objection. Theodore testified that he and his siblings were unaware of any restriction on the mineral interests that Stacia deeded to them.

After considering the evidence, the district court entered an order finding appellants had abandoned the mineral interests pursuant to § 57-229. The court declared the Petersons the owners of the mineral interests. The court reasoned that the provisions of Nebraska's dormant mineral statutes applied, because for more than 23 years preceding the filing of the complaint, appellants had not publicly exercised rights of ownership. It specifically found that the case did not involve retroactive application of the dormant mineral statutes, because the transfer whereby appellants acquired their ownership interest occurred in 1985, years after the statutes were enacted. Appellants filed this timely appeal.

ASSIGNMENT OF ERROR

Appellants assign that the district court erred in failing to find that application of Nebraska's dormant mineral statutes against their severed mineral interests was an unconstitutional retroactive application of the statutes.

STANDARD OF REVIEW

[1] On appeal from an equity action, an appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the conclusion reached by the trial court.[2]

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[2] See *Schauer v. Grooms*, 280 Neb. 426, 786 N.W.2d 909 (2010).

ANALYSIS

Appellants argue that the district court erred in applying Nebraska's dormant mineral statutes to them, because the application was retroactive and therefore unconstitutional. They contend that applying the statutes to them interferes with their contractual rights and deprives them of both substantive and procedural due process.

Several Nebraska statutes affect dormant mineral rights. The primary statute at issue in this case is § 57-229, which provides:

> A severed mineral interest shall be abandoned unless the record owner of such mineral interest has within the twenty-three years immediately prior to the filing of the action provided for in sections 57-228 to 57-231, exercised publicly the right of ownership by (1) acquiring, selling, leasing, pooling, utilizing, mortgaging, encumbering, or transferring such interest or any part thereof by an instrument which is properly recorded in the county where the land from which such interest was severed is located; or (2) drilling or mining for, removing, producing, or withdrawing minerals from under the lands or using the geological formations, or spaces or cavities below the surface of the lands for any purpose consistent with the rights conveyed or reserved in the deed or other instrument which creates the severed mineral interest; or (3) recording a verified claim of interest in the county where the lands from which such interest is severed are located. Such a claim of interest shall describe the land and the nature of the interest claimed, shall properly identify the deed or other instrument under which the interest is claimed, shall give the name and address of the person or persons claiming the interest, and shall state that such person or persons claim the interest and do not intend to abandon the same. The interest of any such owner shall be extended for a period of twenty-three years from the date of any such acts; *Provided*, that the provisions of this section shall not apply to mineral interests of which the State of Nebraska or any of its political subdivisions is the record owner.

The procedure by which a severed mineral interest may be extinguished and canceled is set out in § 57-228:

> Any owner or owners of the surface of real estate from which a mineral interest has been severed, on behalf of himself and any other owners of such interest in the surface, may sue in equity in the county where such real estate, or some part thereof, is located, praying for the termination and extinguishment of such severed mineral interest and cancellation of the same of record, naming as parties defendant therein all persons having or appearing to have any interest in such severed mineral interest, and if such parties defendant are not known and cannot be ascertained, they may be proceeded against as unknown defendants under the provisions of Chapter 25, article 3.

And according to § 57-230:

> If the court shall find that the severed mineral interest has been abandoned, it shall enter judgment terminating and extinguishing it, canceling it of record, and vesting the title thereto in the owner or owners of the interest in the surface from which it was originally severed in the proportions in which they own such interest in the surface.

These statutes were intended to address title problems that developed after mineral estates were fractured.[3]

The mineral interests at issue in this case were created in 1953, when they were severed from the surface property. The essence of appellants' argument is that because Nebraska's dormant mineral interest statutes were not enacted until 1967, after the creation of the mineral interests at issue here, the statutes can never be applied to those interests.

Appellants' argument is based on *Wheelock & Manning OO Ranches, Inc. v. Heath* (*Wheelock*),[4] a 1978 case which was one of the first to address Nebraska's dormant mineral statutes. *Wheelock* involved an application of the statutes to mineral

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[3] *Ricks v. Vap*, 280 Neb. 130, 784 N.W.2d 432 (2010).

[4] *Wheelock & Manning OO Ranches, Inc. v. Heath*, 201 Neb. 835, 272 N.W.2d 768 (1978).

interests which were severed from the surface property in 1950. The action to declare the severed interests abandoned was filed more than 23 years after the defendants acquired their mineral interests, but less than 23 years after enactment of the dormant mineral statutes. Those statutes provided that in an action filed within 2 years after enactment, "the owner of a severed mineral interest may enter his appearance and assert his interest therein, and he shall be deemed thereby to have timely and publicly exercised his right of ownership."[5] In *Wheelock*, this court concluded:

> In other words, the record title owners [of the mineral interests] were required within 2 years from October 23, 1967, to take some affirmative action or lose their property. In all actions filed after October 23, 1969, if no affirmative action had been taken within 23 years, the severed interest is to be considered abandoned. The owner does not have any remedy. The statute, insofar as it attempts to operate retroactively, is unconstitutional as violative of the due process and contract clauses of the United States and the Nebraska Constitutions.[6]

Several years after we decided *Wheelock*, the U.S. Supreme Court reached a different conclusion with respect to dormant mineral statutes which operate in a manner similar to Nebraska's. In *Texaco, Inc. v. Short*,[7] the Court affirmed a decision of the Indiana Supreme Court rejecting a constitutional challenge to Indiana's Dormant Mineral Interests Act, which became effective in 1971. That act provided that mineral interests which were unused for a period of 20 years would be extinguished and revert to the owner of the surface estate, unless the owner of the mineral interest filed a statement of claim in accordance with the statute. The act further provided a 2-year grace period from the date of enactment in which owners of mineral interests that were unused and subject to lapse could preserve those interests by filing a claim.

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[5] § 57-231.

[6] *Wheelock, supra* note 4, 201 Neb. at 845, 272 N.W.2d at 773-74.

[7] *Texaco, Inc. v. Short*, 454 U.S. 516, 102 S. Ct. 781, 70 L. Ed. 2d 738 (1982).

The Indiana act was challenged by parties who acquired mineral interests at the time of severance in 1942, 1944, and 1954, but had neither "used" the interests within the meaning of the act nor filed a statement of claim within the 2-year grace period. They challenged the constitutionality of the act on grounds that the lack of prior notice of the extinguishment of their mineral interests deprived them of property without due process of law, affected a taking of private property for public use without just compensation, and constituted an unconstitutional impairment of contract. The Indiana Supreme Court rejected those claims. Prior to *Texaco, Inc.*, several other state supreme courts, including this court in *Wheelock*, had considered similar statutes and found them unconstitutional, at least in part.[8]

The *Texaco, Inc.* Court held that while severed mineral estates were considered to be vested property interests under Indiana law and were entitled to the same protection as fee simple titles, the state clearly had the power "to condition the permanent retention of [a] property right on the performance of reasonable conditions that indicate a present intention to retain the interest."[9] The Court determined that retroactive application of the statutes did not amount to a taking without just compensation, because "[i]t is the owner's failure to make any use of the property—and not the action of the State—that causes the lapse of the property right . . . ."[10] And the Court rejected the contention that the application of the statutes affected a contractual right, finding that the right at issue was a property right, not a contractual one.

With respect to whether the dormant mineral statutes gave sufficient notice to comport with due process, the Court stated: "Generally, a legislature need do nothing more than enact and publish the law, and afford the citizenry a reasonable

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[8] See, *Wilson v. Bishop*, 82 Ill. 2d 364, 412 N.E.2d 522, 45 Ill. Dec. 171 (1980); *Contos v. Herbst*, 278 N.W.2d 732 (Minn. 1979); *Wheelock, supra* note 4; *Chicago & N. W. Transp. Co. v. Pedersen*, 80 Wis. 2d 566, 259 N.W.2d 316 (1977).

[9] *Texaco, Inc. v. Short, supra* note 7, 454 U.S. at 526.

[10] *Id.*, 454 U.S. at 530.

opportunity to familiarize itself with its terms and to comply."[11] Further, it reasoned that it was "well established that persons owning property within a State are charged with knowledge of relevant statutory provisions affecting the control or disposition of such property."[12] The Court held that "it has never been suggested that each citizen must in some way be given specific notice of the impact of a new statute on his property before that law may affect his property rights."[13] It also noted that according to the Indiana act, before any judgment could be entered quieting title in the surface owner, the full procedural protections of the Due Process Clause, including notice and an opportunity to be heard, would be afforded.

The dissent in *Texaco, Inc.* concluded that retrospective application of the Indiana act to persons who owned severed mineral interests prior to its enactment deprived them of due process. But in reaching this conclusion, the dissent drew the following distinction, which is important to our resolution of this case:

> As to one class of mineral interest owners, there is no question that the statute is a constitutionally proper exercise of the State's power. Every mineral interest in land carved from the fee after the effective date of the statute was carved subject to the statute's limitations. In *prospective* application the statute simply provides that any instrument purporting to transfer a mineral interest carries with it the implicit condition that unless the transferee uses the land within the meaning of the statute, his interest will revert to the transferor. It is only where the State seeks to change the fundamental nature of a property interest already in the hands of its owner that the operative restrictions of both the Takings Clause and the Due Process Clause come into play.[14]

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[11] *Id.*, 454 U.S. at 532.

[12] *Id.*

[13] *Id.*, 454 U.S. at 536.

[14] *Id.*, 454 U.S. at 542 (Brennan, J., dissenting; White, Marshall, and Powell, JJ., join).

We need not decide whether *Wheelock* remains good law after *Texaco, Inc.* with respect to retroactive application of Nebraska's dormant mineral statutes, because we agree with the district court that the statutes have not been applied retroactively to appellants. The critical date in this case is not 1953, when the mineral interests were severed, but, rather, 1985, when they were transferred by Stacia to appellants. Prior to 1985, appellants had no right of ownership in the severed mineral interests that could have been affected by the dormant mineral statutes. The transfer by Stacia and acquisition by appellants in 1985 occurred years after the enactment of the dormant mineral statutes and prevented the abandonment of the severed mineral interests for at least 23 years into the future.[15] At the time of the transfer, appellants were presumed to have knowledge of the law then in effect which affected their *prospective* enjoyment and retention of the mineral interests.[16] Unlike the plaintiffs in *Wheelock*, appellants had the full 23-year period specified in § 57-229 to publicly exercise their right of ownership so as to prevent abandonment of the mineral interests. They failed to do so, and the district court did not err in determining that those interests had been abandoned under the provisions of § 57-229.

CONCLUSION

For the reasons discussed, we affirm the judgment of the district court.

AFFIRMED.

WRIGHT, J., not participating.

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[15] See § 57-229(1).

[16] See, *Texaco, Inc. v. Short, supra* note 7; *State ex rel. Counsel for Dis. v. Wintroub*, 277 Neb. 787, 765 N.W.2d 482 (2009); *State v. Veiman*, 249 Neb. 875, 546 N.W.2d 785 (1996).