

WEST VIRGINIA LEGISLATURE

2021 REGULAR SESSION

Introduced

Senate Bill 403

BY SENATOR AZINGER

[Introduced February 23, 2021; referred
to the Committee on the Judiciary]

1 A BILL to amend the Code of West Virginia, 1931, as amended, by adding thereto a new chapter,
2 designated §37D-1-1, §37D-1-2, §37D-1-3, §37D-1-4, §37D-1-5, §37D-1-6, §37D-2-1,
3 §37D-2-2, §37D-2-3, §37D-2-4, §37D-2-5, §37D-2-6, §37D-2-7, and §37D-2-8, all relating
4 to creating the Timber Co-tenancy Modernization and Majority Protection Act and the
5 Unknown and Unlocatable Timber Interest Owners Act; permitting the harvest of timber
6 by fewer than all the interest owners under certain conditions; providing an exception to
7 waste and trespass; providing short titles; providing declarations of public policy and
8 legislative findings; providing definitions; providing that consent for the lawful use and
9 harvesting of timber by the persons owning an undivided three fourths of the royalty
10 interests, as defined, in the timber estate is permissible, is not waste, and is not trespass;
11 providing that nonconsenting co-tenants may elect a harvest royalty interest or a working
12 interest share of harvest; providing that interests owned by unknown or unlocatable
13 owners be reserved, reported, and deposited in a fund hereby created, known as the
14 Unknown and Unlocatable Timber Interest Owners Fund to be administered by the State
15 Treasurer in conjunction with the West Virginia Uniform Unclaimed Property Act; providing
16 methods for determination of leasehold and contractual terms, including reviews and
17 determinations; providing liability protection for damages resulting from the lawful use or
18 harvesting of timber; requiring surface use agreements in specified circumstances;
19 providing a mechanism for surface owners to acquire title to certain harvested timber
20 interests; preserving common law rights; providing reporting requirements and
21 administrative duties, including civil penalties for noncompliance under the West Virginia
22 Uniform Unclaimed Property Act; providing for rule-making authority; providing crediting
23 of interest to owner's accounts; and providing an effective date of July 1, 2021.

Be it enacted by the Legislature of West Virginia:

ARTICLE 1. TIMBER HARVEST BY A MAJORITY OF COTENANTS.

§37D-1-1. Short title.

1 This article shall be known as the Timber Cotenancy Modernization and Majority
2 Protection Act.

§37D-1-2. Declaration of public policy; legislative findings.

1 It is declared to be the public policy of this state and in the public interest to:

2 (1) Foster, encourage, and promote exploration for the harvesting and conservation of the
3 state's timber;

4 (2) Prohibit waste of the state's timber and unnecessary surface loss related to that timber;

5 (3) Encourage the maximum recovery of the state's timber;

6 (4) Safeguard, protect, and enforce the correlative rights of operators and timber owners
7 in that each such operator and timber owner may obtain his or her just and equitable share of
8 harvest;

9 (5) Safeguard, protect, and enforce the integrity of the passive royalty owner's interest in
10 his or her timber;

11 (6) Safeguard, protect, and enforce the rights of surface owners; and

12 (7) Protect and enforce the clear provisions of contracts lawfully made.

§37D-1-3. Definitions.

1 As used in this article:

2 "Consenting cotenant" means a tenant in common, joint tenant, or parcener having an
3 interest in the timber property who consents in writing to a lawful use of the timber property
4 through a bona fide lease made in an arms-length transaction.

5 "Nonconsenting cotenant" means an owner who for any reason chooses not to consent to
6 a lawful use of the timber property agreed to by the consenting cotenants owning, cumulatively,
7 at least an undivided three-fourths interest in and to the timber property.

8 "Operator" means any owner of at least an undivided three-fourths interest of the right to
9 harvest timber in this state.

10 "Person" means any individual, corporation, partnership, joint venture, limited liability

11 company, association, receiver, trustee, executor, administrator, guardian, fiduciary, or other
12 representative of any kind, and includes any government, political subdivision, or any agency
13 thereof.

14 “Post-harvest expense” means an expense or cost subsequent to harvest including, but
15 not limited to, an expense or cost related to harvest taxes, surface facilities, harvesting, or
16 marketing of timber.

17 “Pro rata share” means the allocation of revenues and costs attributable to the lawful use
18 of a timber property that is calculated based on the total amount of timber harvested on that timber
19 property.

20 “Royalty owner” means any owner of timber, owners of timber leasing rights, and owners
21 vested with any leasehold estate of less than 25 percent of the total, to the extent that the owners
22 are not an operator as defined in this section. A royalty owner does not include a person whose
23 interest is limited to: (1) Overriding royalties; (2) nonparticipating royalty interests; (3)
24 nonexecutive timber interests; or (4) net profit interests.

25 “Unknown or unlocatable interest owner” means a person vested with a present ownership
26 interest in the timber in place on a timber property whose present identity or location cannot be
27 determined from:

28 (A) A reasonable review of the records of the clerk of the county commission, the sheriff,
29 the assessor, and the clerk of the circuit court in the county or counties in which the interest is
30 located, and includes unknown heirs, successors, and assigns known to be alive;

31 (B) A reasonable inquiry in the vicinity of the owner’s last known place of residence;

32 (C) A diligent inquiry into known interest owners in the same tract; and

33 (D) A reasonable review of available internet resources commonly utilized by the industry.

§37D-1-4. Lawful use and harvest by cotenants; election of interests; reporting and
remitting of interests of unknown or unlocatable cotenants; establishment of terms
and provisions for harvest.

1 (a) In cases where there are seven or more royalty owners, if an operator or owner makes
2 or has made reasonable efforts to negotiate with all royalty owners in a timber property and royalty
3 owners vested with at least three-fourths of the right to harvest that timber consent to the lawful
4 harvesting of timber, the operator's or owner's harvest of timber is permissible, is not waste, and
5 is not trespass. In that case, the consenting cotenants and their lessees, operators, agents,
6 contractors, or assigns are not liable for damages for waste or trespass due to the lawful harvest
7 and shall pay the nonconsenting cotenants in accordance with subsections (b) and (c) of this
8 section, reserve the amounts specified in subsection (d) of this section for the benefit of unknown
9 or unlocatable interest owners, and report and remit the reserved interests as provided in
10 subsection (d) of this section.

11 (b) A nonconsenting cotenant is entitled to receive, based on his or her election, either:

12 (1) A pro rata share of harvest royalty, paid on the gross proceeds received at the first
13 point of sale to an unaffiliated third-party purchaser and free of post-harvest expenses, equal to
14 the highest royalty percentage paid to his or her consenting cotenants in the same timber property,
15 under a bona fide, arms-length lease transaction and lease bonus, or other nonroyalty timber
16 payments, calculated on the amount of timber harvested; or

17 (2) Participation in the harvest and receipt of his or her pro rata share of the revenue and
18 cost equal to his or her share of the harvest royalty attributable to the tract or tracts being timbered
19 according to the interest of such nonconsenting cotenant, exclusive of any royalty or overriding
20 royalty reserved in any lease, assignments thereof, or agreements relating thereto, after the
21 market value of such nonconsenting cotenant's share of the harvest royalty, exclusive of such
22 royalty and overriding royalty, equals double the share of such costs payable or charged to the
23 interest of such nonconsenting cotenant.

24 (c) A nonconsenting cotenant has 45 days following the operator's written delivery of its
25 best and final offer in which to make his or her election for either a harvest royalty or participation
26 in the harvest as specified in subsection (b) of this section. If the nonconsenting cotenant fails to

27 deliver a written election to the operator prior to the expiration of the 45-day period, he or she is
28 considered to have made the election set forth in subdivision (1), subsection (b) of this section.
29 Within 30 days of the date a nonconsenting cotenant chooses or has chosen the harvest royalty
30 option, the nonconsenting cotenant has the right to appeal to the director of the Division of
31 Forestry regarding the issue of whether there has been compliance with subdivision (1),
32 subsection (b) of this section to verify the highest royalty paid in the same timber property:
33 *Provided, That the operations upon the parcel may continue during the proceedings.*

34 (d) Unknown or unlocatable interest owners are considered to have made the election
35 provided by subdivision (1), subsection (b) of this section and are only entitled to receive the
36 amount provided by that subdivision. Within 120 days of the date upon which an amount is
37 reserved for an unknown or unlocatable interest owner pursuant to subsection (a) of this section,
38 the consenting cotenants and their lessees, operators, agents, contractors, or assigns shall make
39 a report to the State Treasurer as the unclaimed property administrator and each calendar
40 quarter, thereafter, concerning each reserved interest for each unknown or unlocatable interest
41 owner and shall concurrently remit the amount reserved, in accordance with §37D-2-1 *et seq.* and
42 §36-8-1 *et seq.* of this code as determined by the State Treasurer. The quarterly report and
43 remittances shall be submitted by the first day of the month following each calendar quarter.

44 (e) Unless otherwise agreed to in writing or defined by this section, any nonconsenting
45 cotenant and any unknown or unlocatable interest owner who elects or is considered to elect a
46 harvest royalty under subdivision (1), subsection (b) of this section is subject to and shall benefit
47 from the other terms and provisions defined by the lease executed by a consenting cotenant which
48 contains terms and provisions most favorable to the nonconsenting cotenant or the unknown or
49 unlocatable interest owner: *Provided, That nonconsenting cotenants and unknown or unlocatable*
50 *interest owners are not subject to or liable under any warranty of title, jurisdictional or choice of*
51 *law provisions, and arbitration provisions.*

52 (f) Unless otherwise agreed to in writing or defined by this section, a nonconsenting

53 cotenant who elects to participate under subdivision (2), subsection (b) of this section, is subject
54 to and benefits from other terms and provisions determined to be just and reasonable by the
55 director of the Division of Forestry. Notwithstanding the determination of participation terms by
56 the director, an operator may proceed with the harvesting of timber pursuant to this section.

57 (g) Within seven years of the date of the first report to the Treasurer, a bona fide surface
58 owner may file an action to quiet title to the interests of all unknown and unlocatable interest
59 owners of the timber estate on the surface tract. To the extent relevant and practical, such action
60 shall follow §55-12A-1 et seq. of this code. Upon presentation of sufficient proof, a bona fide
61 surface owner is entitled to receive a special commissioner's deed transferring title to the interest
62 of any or all unknown or unlocatable interest owners in a timber estate. The surface owner is only
63 entitled to their proportionate share of all future proceeds and is not entitled to any of the accrued
64 funds which have been remitted to the Treasurer prior to the execution of the special
65 commissioner's deed. The unknown or unlocatable interest owners are not entitled to any
66 amounts paid to the grantees of the special commissioner's deed after delivery of said deed.

§37D-1-5. Limitations of liability for certain cotenants.

1 Nonconsenting cotenants who elect to receive a harvest royalty pursuant to §37D-1-
2 4(b)(1) of this code and unknown or unlocatable interest owners have no liability for bodily injury,
3 property damage, warranty of title, or environmental claims arising out of site preparation, timber
4 harvesting, maintenance, reclamation, and other operations with respect to timber harvested from
5 the cotenant's property, except nonconsenting cotenants and unknown or unlocatable interest
6 owners are liable for their intentional acts.

§37D-1-6. Surface use.

1 (a) When any tract of timber property where an interest in the timber in place is owned by
2 a nonconsenting cotenant is used or harvested pursuant to §37D-1-4 of this code, in no event
3 may timbering be initiated upon, or other surface disturbance occur, without the surface owner's
4 consent regardless of whether such surface owner possesses any actual ownership in the timber

5 interest: *Provided*, That this subsection does not require surface owner consent for tracts on which
 6 surface disturbance does not occur or tracts otherwise subject to an existing surface use
 7 agreement, timber lease which includes surface use rights, or other valid contractual arrangement
 8 in which the owner has granted rights to the operator to use the surface or any other use for which
 9 this article is used.

10 (b) Except as specifically described in subsection (a) of this section, nothing contained in
 11 this chapter is intended to alter in any way, and this chapter does not diminish or increase, the
 12 rights of the owners of the surface of the timber harvested in this state. Except as specifically
 13 described in subsection (a) of this section, in enacting this chapter in 2021, it is the intention of
 14 the Legislature to leave unchanged the common law of this state as it relates to the timber owner's
 15 right to utilize the surface for the timber harvest.

ARTICLE 2. UNKNOWN AND UNLOCATABLE TIMBER INTEREST OWNERS ACT.

§37D-2-1. Short title.

1 This article shall be known and may be cited as the Unknown and Unlocatable Timber
 2 Interest Owners Act.

§37D-2-2. Relationship between unknown and unlocatable interest provisions and unclaimed property provisions.

1 The provisions of this article shall be read in conjunction and not in conflict with §36-8-1
 2 *et seq.* of this code, the West Virginia Uniform Unclaimed Property Act.

§37D-2-3. Definitions.

1 Terms used in this article have the meanings as provided in §36-8-1 *et seq.* and §37D-1-
 2 1 *et seq.* of this code. In addition, as used in this article:

3 “Reserved interests” means all amounts payable for the harvesting or sale of timber due
 4 for an unknown or unlocatable interest owner. The term includes amounts payable:

5 (A) For the acquisition and retention of a timber lease, including bonuses, royalties,
 6 compensatory royalties, and minimum royalties;

7 (B) For the harvesting or sale of timber, including net revenue interests, royalties,
8 overriding royalties, and harvest payments; and

9 (C) Under an agreement or option, including a joint operating agreement, unit agreement,
10 pooling agreement, and farm-out agreement.

§37D-2-4. Report of unknown and unlocatable interest owners.

1 (a) The holder shall make a report to the administrator each calendar quarter concerning
2 each reserved interest for each unknown or unlocatable interest owner and shall concurrently
3 remit the amount reserved to the administrator. The quarterly report and remittances shall be
4 submitted by the first day of the month following each calendar quarter.

5 (b) The report shall contain:

6 (1) A full legal description of the real property interest and any other information that
7 identifies the interest, including without limitation, any orders;

8 (2) If known, the name, last known address, and Social Security number or taxpayer
9 identification number of the unknown or unlocatable interest owner or apparent owner;

10 (3) The date or dates on which the reserved interest became payable with respect to the
11 property; and

12 (4) All other information the administrator by rule prescribes as necessary for the
13 administration of this article.

14 (c) Before the date for filing the report, the holder of the reserved interests may request
15 the administrator extend the time for filing the report. The administrator may grant the extension
16 for good cause.

17 (d) The holder is not liable to any person for the wrongful use or appropriation of personal
18 information of interest owners by another person described in the reports required under this
19 section.

20 (e) With respect to all unknown or unlocatable interest owners, all obligations under this
21 chapter of the holder are satisfied once an adequate report is filed and reserved interests are

22 remitted to the administrator.

§37D-2-5. Unknown and Unlocatable Interest Owners Fund; duties of State Treasurer.

1 (a) The Unknown and Unlocatable Timber Interest Owners Fund is created in the State
2 Treasury as a special revenue and interest-bearing account to be administered by the State
3 Treasurer for the purposes prescribed in this article.

4 (b) The administrator shall deposit all moneys received pursuant to §37D-1-1 et seq. and
5 §37D-2-1 et seq. of this code into the fund. All expenditures from the fund shall be in accordance
6 with §37D-2-1 et seq. of this code and as otherwise determined by the Legislature.

7 (c) The administrator may invest the moneys in the fund with the West Virginia Board of
8 Treasury Investments. All earnings shall accrue to the fund and are available for expenditure in
9 accordance with §37D-2-1 et seq. of this code.

10 (d) The administrator shall pay all lawful claims of unknown and unlocatable interest
11 owners from the fund.

12 (e) The administrator may deduct the following expenses from the fund:

13 (1) Expenses incurred identifying, locating, and returning the property to owners, including,
14 without limitation, the costs of mailing, publication, and real estate title investigations within this
15 state and in other jurisdictions;

16 (2) Reasonable service charges; and

17 (3) Expenses incurred in examining the reports of the holder and in collecting the reserved
18 interest from the holders.

19 (f) After deducting the claims paid and the expenses specified in subsection (e) of this
20 section and maintaining a sum of money which the administrator estimates will be needed to pay
21 claims and expenses duly allowed from the reserved interests received and deposited in the fund,
22 the administrator shall determine the amount that is transferrable from the fund. Beginning July
23 1, 2026, and every six months thereafter, the administrator shall deposit 50 percent of the amount
24 the administrator determines is transferrable from the fund into the Public Employees Insurance

25 Agency Financial Stability Fund and expended pursuant to §11B-2-32 of this code.

26 (g) At least 60 days prior to the seven-year anniversary of the first report to the
 27 administrator concerning the property of an unknown or unlocatable interest owner, the
 28 administrator shall publish a notice in a newspaper of general circulation in each county of this
 29 state where the timber property is located once a week for two successive weeks as provided by
 30 the West Virginia Rules of Civil Procedure. That publication shall provide notification of the
 31 impending seven-year anniversary to all possible surface owners and unknown or unlocatable
 32 interest owners.

§37D-2-6. Crediting of interest to owner's account.

1 (a) The administrator shall credit the amount of interest earned to each owner's account
 2 and shall pay the interest earned when a claim is paid on that account.

3 (b) In no event may the administrator be required to pay the owner any income or gain
 4 realized or accruing on the account after the third anniversary of the payment of the owner's
 5 interest to the administrator.

6 (c) Nothing in this section may be construed to entitle an owner to interest on property
 7 which did not realize or accrue income or gain while in possession of the administrator.

§37D-2-7. Rules.

1 On or before July 1, 2021, the administrator shall promulgate emergency legislative rules
 2 in accordance with the provisions of §29A-3-15 of this code. The administrator shall propose
 3 legislative rules for promulgation in accordance with the requirements of the Secretary of State
 4 and the provisions of §29A-1-1 et seq. of this code to otherwise effectuate the purposes of §37D-
 5 2-1 et seq. of this code.

§37D-2-8. Effective date.

1 This chapter takes effect on July 1, 2021.

NOTE: The purpose of this bill is to create the Timber Cotenancy Modernization and

Majority Protection Act and the Unknown and Unlocatable Timber Interest Owners Act. The bill permits the severance of timber by fewer than all the interest owners under certain conditions. The bill provides an exception to waste and trespass.

Strike-throughs indicate language that would be stricken from a heading or the present law, and underscoring indicates new language that would be added..