

# **WEST VIRGINIA LEGISLATURE**

**2019 REGULAR SESSION**

**Introduced**

## **Senate Bill 415**

BY SENATORS AZINGER, CLINE, MAYNARD, AND TARR

[Introduced January 24, 2019; 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-1-7,  
3 §37D-2-1, §37D-2-2, §37D-2-3, §37D-2-4, §37D-2-5, §37D-2-6, §37D-2-7, §37D-2-8,  
4 and §37D-2-9, all relating to creating the Timber Cotenancy Modernization and Majority  
5 Protection Act and the Unknown and Unlocatable Timber Interest Owners Act; permitting  
6 the severance of timber by fewer than all the interest owners under certain conditions;  
7 providing an exception to waste and trespass; providing short titles; providing declarations  
8 of public policy and legislative findings; providing definitions; providing that consent for the  
9 lawful use and harvesting of timber by the persons owning an undivided three fourths of  
10 the royalty interests, as defined, in the timber estate is permissible, is not waste, and is  
11 not trespass; providing that nonconsenting cotenants may elect a severance royalty  
12 interest or a working interest share of severance; providing that interests owned by  
13 unknown or unlocatable owners be reserved, reported, and deposited in a fund hereby  
14 created, known as the Unknown and Unlocatable Timber Interest Owners Fund, to be  
15 administered by the State Treasurer in conjunction with the West Virginia Uniform  
16 Unclaimed Property Act; providing methods for determination of leasehold and contractual  
17 terms, including reviews and determinations; providing liability protection for damages  
18 resulting from the lawful use or harvesting of timber; requiring surface use agreements in  
19 specified circumstances; providing a mechanism for surface owners to acquire title to  
20 certain severed timber interests; preserving common law rights; providing for severability  
21 of provisions; providing reporting requirements and administrative duties, including civil  
22 penalties for noncompliance under the West Virginia Uniform Unclaimed Property Act; and  
23 providing for rule-making authority.

*Be it enacted by the Legislature of West Virginia:*

1 **CHAPTER 37D. TIMBER SEVERANCE.**

**ARTICLE 1. TIMBER SEVERANCE 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, severance, and  
3 conservation of the 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 severance;

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  
6 to 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 sever or 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 or any political subdivision or any  
13 agency thereof.

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

17 “Prorata 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 severed 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 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: (A) Overriding royalties; (B) nonparticipating royalty interests; (C)  
24 nonexecutive timber interests; or (D) 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 severance by cotenants; election of interests; reporting and**

**remitting of interests of unknown or unlocatable cotenants; establishment of terms and provisions for severance.**

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 sever that timber consent to the lawful  
4 harvesting of timber, the operator's or owner's severance of timber is permissible, is not waste,  
5 and 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 severance  
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 prorata share of severance royalty, paid on the gross proceeds received at the first  
13 point of sale to an unaffiliated third-party purchaser and free of post-severance expenses, equal  
14 to the highest royalty percentage paid to his or her consenting cotenants in the same timber  
15 property, under a bona fide, arms-length lease transaction and lease bonus or other nonroyalty  
16 timber payments, calculated on the amount of timber harvested; or

17       (2) To participate in the severance and receive his or her prorata share of the revenue and  
18 cost equal to his or her share of the severance royalty attributable to the tract or tracts being  
19 timbered according to the interest of such nonconsenting cotenant, exclusive of any royalty or  
20 overriding royalty reserved in any lease, assignments thereof or agreements relating thereto, after  
21 the market value of such nonconsenting cotenant's share of the severance royalty, exclusive of  
22 such royalty and overriding royalty, equals double the share of such costs payable or charged to  
23 the 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 severance royalty or  
26 participation in the severance as specified in subsection (b) of this section. If the nonconsenting  
27 cotenant fails to deliver a written election to the operator prior to the expiration of that 45-day  
28 period, he or she is deemed to have made the election set forth in subdivision (1), subsection (b)  
29 of this section. Within 30 days after a nonconsenting cotenant has chosen or is deemed to have  
30 chosen the severance royalty option, the nonconsenting cotenant has the right to appeal to the  
31 Director of Natural Resources regarding the issue of whether there has been compliance with  
32 subdivision (1), subsection (b) of this section, to verify the highest royalty paid in the same timber  
33 property: *Provided*, That the operations upon the parcel may continue during the proceedings.

34 (d) Unknown or unlocatable interest owners are deemed 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 from 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 the provisions of  
42 §37D-2-1 et seq. and §36-8-1 et seq. of this code and as determined by the State Treasurer. The  
43 quarterly report and remittances shall be submitted by the first day of the month following each  
44 calendar quarter.

45 (e) Unless otherwise agreed to in writing or defined by this section, any nonconsenting  
46 cotenant and any unknown or unlocatable interest owner who elects or is deemed to elect a  
47 severance royalty under subdivision (1), subsection (b) of this section is subject to and shall  
48 benefit from the other terms and provisions defined by the lease executed by a consenting  
49 cotenant which contains terms and provisions most favorable to the nonconsenting cotenant or  
50 the unknown or unlocatable interest owner: *Provided*, That nonconsenting cotenants and

51 unknown or unlocatable interest owners are not be subject to or liable under any warranty of title,  
52 jurisdictional or choice of law provisions, and arbitration provisions.

53 (f) Unless otherwise agreed to in writing or defined by this section, a nonconsenting  
54 cotenant who elects to participate under subdivision (2), subsection (b), of this section, is subject  
55 to and benefits from other terms and provisions determined to be just and reasonable by the  
56 Director of the Division of Natural Resources. Notwithstanding the determination of participation  
57 terms by the director, an operator may proceed with the harvesting of timber pursuant to this  
58 section.

59 (g) After seven years from the date of the first report to the Treasurer, a bonafide surface  
60 owner may file an action to quiet title to the interests of all unknown and unlocatable interest  
61 owners of the timber estate on the surface tract. To the extent relevant and practical, such action  
62 shall follow the provisions of §55-12A-1 et seq. of this code. Upon presentation of sufficient proof,  
63 a bonafide surface owner is entitled to receive a special commissioner's deed transferring title to  
64 the interest of any or all unknown or unlocatable interest owners in a timber estate. The surface  
65 owner is only entitled to their proportionate share of all future proceeds and is not entitled to any  
66 of the accrued funds which have been remitted to the Treasurer prior to the execution of the  
67 special commissioner's deed. The unknown or unlocatable interest owners are not entitled to any  
68 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 severance 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 severed pursuant to §37D-1-4 of this code, in no event may  
 3 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 severed in this state. Except as specifically  
 13 described in subsection (a) of this section, in enacting this chapter in 2019, 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 severance.

**§37D-1-7. Severability.**

1           The provisions of this article are severable and accordingly, if any part of this article is  
 2 adjudged to be unconstitutional or invalid, that determination does not affect the continuing validity  
 3 of the remaining provisions of this article.

**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 the



2 provisions of the West Virginia Uniform Unclaimed Property Act in §36-8-1 et seq. of this code.

**§37D-2-3. Definitions.**

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

3 “Reserved interests” means all amounts payable for the harvesting, severance or sale of  
4 timber due 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, severance or sale of timber, including net revenue interests,  
8 royalties, overriding royalties, and severance 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 the 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 this article 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 this article.

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, 2024, and every six months thereafter, the administrator shall transfer 50 percent of the amount  
24 the administrator determines is transferrable shall be deposited into the Public Employees  
25 Insurance Agency 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 should 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, 2019, 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 this  
 5 article.

**§37D-2-8. Severability clause.**

1 The provisions of this article are severable and accordingly, if any part of this article is  
 2 adjudged to be unconstitutional or invalid, that determination does not affect the continuing validity  
 3 of the remaining provisions of this article.

**§37D-2-9. Effective date.**

1 This article takes effect on July 1, 2019.

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. The bill provides short titles. The bill provides declarations of public policy and legislative findings. The bill provides definitions. The bill provides that consent for the lawful use and severance of timber by the persons owning an undivided three fourths of the royalty interests, as defined, in the timber estate is permissible, is not waste, and is not trespass. The bill provides that nonconsenting cotenants may elect a severance royalty interest or a working interest share of severance. The bill provides that interests owned by unknown or unlocatable owners be reserved, reported, and deposited in a fund hereby created, known as the Unknown and Unlocatable Timber Interest Owners Fund, to be administered by the State Treasurer in conjunction with the West Virginia Uniform Unclaimed Property Act. The bill provides methods for determination of leasehold and contractual terms, including reviews and determinations. The bill provides liability protection for damages resulting from the lawful use or harvesting of timber. The bill requires surface use agreements in specified circumstances. The bill provides a mechanism for surface owners to acquire title to certain severed timber interests. The bill preserves common law rights. The bill provides for severability of provisions. The bill provides reporting requirements and administrative duties, including civil penalties for noncompliance under the West Virginia Uniform Unclaimed Property Act. The bill provides for rule-making authority.

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