

ORIGINAL

In The Supreme Court of Ohio

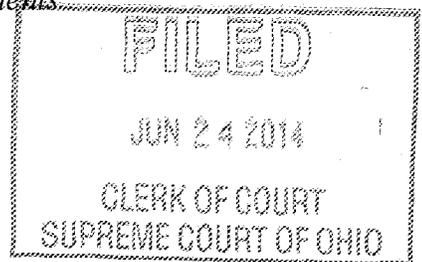
CHESAPEAKE EXPLORATION, L.L.C., et al.,)	Case No. 2014-0067
)	
Petitioners,)	On Certified Questions of State Law from
vs.)	the United States District Court for the
)	Southern District of Ohio Eastern Division
KENNETH BUELL, et al.,)	
)	S.D. Ohio Court Case No. 2:12-cv-00916
Respondents.)	

**PETITIONERS CHESAPEAKE EXPLORATION, L.L.C.'S, CHK UTICA, L.L.C.'S,
LARCHMONT RESOURCES, L.L.C.'S, DALE PENNSYLVANIA ROYALTY, LP'S,
DALE PROPERTY SERVICES PENN, LP'S AND TOTAL E&P USA, INC.'S REPLY
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INTRODUCTION

There is no dispute that the main purpose of Ohio's Dormant Mineral Act, R.C. § 5301.56 ("ODMA") is to "clear[] ... title to allow for production ... [and] development of Ohio's minerals." Respondents' Merit Brief, p. 4 n. 4 (citing H.B. 223 Sponsorship Testimony, p. 3). The ODMA was enacted so that (1) it was clear who owned the right to produce minerals, because (2) without that knowledge minerals cannot be produced. In this matter, from 1984 to 1989 there was no dispute as to who owned those rights and production could have occurred at any time. Similarly, from 2008 to present day there has been no dispute about the record owner of the mineral interest or its lessees, and those interests are currently in production. This case is thus a clear exemplar that from the day an oil and gas lease is signed and recorded, to the day it expires or is released, and every day in between, (1) a clear record is provided as to who owns the mineral rights and who has leased those mineral rights, and (2) production of minerals can take place. An oil and gas lease is the most common of any instrument that serves both purposes of the ODMA, and as such the beginning, the middle, and the end of that transaction must be found to make the mineral interest the subject of a title transaction and toll the ODMA; any other ruling completely abrogates the purpose of the statute. When this simple truth is kept in mind, all of Respondents' and *Amicus*' arguments fail.¹

¹ The Merit Brief of *Amicus Curiae* State of Ohio in Support of Respondents ("*Amicus* Brief") is not the objective position of the State of Ohio in this matter, but instead a position set forth by a biased party with a significant financial interest in the questions before the Court. *See, e.g., Amicus* Brief, p. 3 ("[A]s a property owner itself, the State's interest in the outcome of this case is similar to the interest of many other property owners throughout Ohio. In many instances, ownership of the mineral rights underlying state land has reverted to the State by operation of the Dormant Minerals Act. Thus the state has an interest in preserving ownership of those mineral interests that have vested in itself ... "). If its position is accepted, the State stands to take thousands of acres of mineral rights without paying any compensation. Indeed, the State has long been involved in similar disputes, with many of the same parties to this very case.

This Court should answer each of the District Court's certified questions in the affirmative, and find that both the execution and termination of a recorded oil and gas lease make a mineral interest the subject of a title transaction, thereby tolling the 20-year ODMA period.

ARGUMENT

I. An Oil and Gas Lease Makes a Mineral Interest the Subject of a Title Transaction Under the ODMA.

An oil and gas lease is the transfer of a fee simple determinable interest, and thus meets the Ohio Marketable Title Act's ("OMTA") definition of a "title transaction," making a mineral interest the subject of that transaction. This finding is not superfluous, and comports with the intent of the ODMA as an oil and gas lease provides affirmative record evidence stating the mineral owner's claim of the ownership of the minerals, and allows for those minerals to be produced, fulfilling each of the statute's purposes.²

A. An Oil and Gas Lease Meets the Definition of a Title Transaction.

Both *Amicus* and Respondents argue that an oil and gas lease does not fit the definition of a "title transaction," and therefore cannot effectuate a savings event under the ODMA. *See* Respondents' Brief, pp. 13-16; *Amicus* Brief, pp. 7-11. Because an oil and gas lease satisfies *both* of the major goals of the ODMA – clarifying title and the production of mineral resources – an oil and gas lease clearly fits within the definition of a title transaction.

² *Amicus* argues that "[t]he purpose behind the Act's adoption was to create a mechanism by which a severed mineral estate could be deemed abandoned and ownership of the mineral interest could be restored to the owner of the surface property." *Amicus* Brief, pp. 3-4 (citing Ohio Legislative Service Commission Bill Analysis, Sub.S.B. 223 (1988)). However, the Bill Analysis cited for this proposition – missing from the *Amicus* Brief but attached here as App. Ex. 1 – says nothing whatsoever about "the purpose behind the Act[] ... [,]" and neither *Amicus* nor Respondents cite to anything to support *Amicus*' interpretation of the ODMA as a vehicle to redistribute mineral interest ownership. Instead, as stated above, the purpose of the ODMA was to clarify ownership such as to promote production. *See, e.g.,* Petitioners' Brief, pp. 7-11.

The *Amicus* Brief first argues that the word “title” as used in R.C. §5301.47 means ownership, and that therefore the requirement that a title transaction “affect title” means a title transaction must “affect” ownership. *See Amicus* Brief, p. 8. The case cited by *Amicus* in support of this proposition – *Bloom v. Wides*, 164 Ohio St. 138 (1955) – was a dispute brought by residential realty owners in opposition to the placement of a mechanized car wash. No mention is made of oil, gas, or minerals of any kind, nor the ODMA or OMTA. *See Bloom*. This conclusion is nonetheless supported, states *Amicus*, because all of the exemplars of title transactions in R.C. § 5301.47 “affect” ownership in some manner. *See id.*, p. 9. Because ownership is not “affected” by an oil and gas lease, goes the argument, an oil and gas lease cannot be a title transaction. *See id.*, pp. 9-10. This argument fails. First, the entire conclusion requires a reading of the word “affect” as a synonym of *transfer*, and assumes that an oil and gas lease does not transfer any kind of ownership; that assumption is incorrect, as an oil and gas lease does in fact transfer a fee simple determinable interest, and this transfer of course affects a mineral interest, defined as a “fee interest in at least one mineral” under R.C. 5301.56 (A)(3).³ *See below*, § I.B; Petitioners Chesapeake Exploration, L.L.C.’s, CHK Utica, L.L.C.’s, Larchmont Resources, L.L.C.’s, Dale Pennsylvania Royalty, LP’s, Dale Property Services Penn, LP’s and TOTAL E&P USA, INC.’S Merit Brief (“Petitioners’ Brief”), pp. 12-17. Second, *Amicus* admits that R.C. § 5301.47’s list “is not exhaustive,” *Amicus* Brief, p. 8, but if its argument is accepted there are no other transactions that would qualify as title transactions.

³ In support of its proposition that an oil and gas lease does not affect fee ownership, the *Amicus* Brief cites five cases, four of which have nothing to do with an oil and gas lease. *See Amicus* Brief, pp. 9, 10 (citing *Rawson v. Brown*, 104 Ohio St. 537 (1922), *Smith v. Harrison*, 42 Ohio St. 180 (1884), *Hempel v. Zabor*, 2007 -Ohio- 5320 (6th Dist. 2007), and *Broerman v. Blanke*, 1999 -Ohio- 762 (3rd Dist. 1999)).

The *Amicus* Brief also fails entirely to account for the fact that a transaction can “affect” ownership – and thus title, per the *Amicus* brief – without *transferring* that ownership. *See, e.g.* Black’s Law Dictionary (9th ed. 2009) (defining “affect” as “[m]ost generally, to produce an effect on; to influence in *some way*”) (emphasis added); *City of Cleveland ex rel. Baker v. City of Cleveland*, 22 Ohio C.D. 257, 260 (C.C. Ohio 1910) (“The per cent limitation ... mathematically affects the net debt, that is, it acts upon it, which is the etymological meaning of the term ‘affects’”); *Carnahan v. SCI Ohio Funeral Services, Inc.*, 2001 WL 242555, at *8 (10th Dist. Mar. 13, 2001) (“‘Affect’ is defined as ‘to act on; produce an effect or change in’”) (quoting Webster’s Encyclopedic Dictionary of the English Language, 2nd Ed. (1996), 24); *McLaughlin v. CNX Gas Co.*, 2013 WL 6579057, at *3 (N.D. Oh. Dec. 13, 2013) (“Plaintiff again incorrectly assumes that an actual transfer of real property is required under the ODMA when the plain language of the statute requires far less”). *See also Amicus* Brief, p. 11 (noting that if the General Assembly desired to include certain language in a statute it can easily do so, relevant here because the General Assembly used the word “affect” and *not* “transfer”). An oil and gas lease unquestionably influences ownership in some way. *See, e.g.*, 68 Oh. Jur. 3d (ed 2011) Mines and Minerals § 29 (“[A]pplying the principle that a good and indefeasible title imports such ownership of the land as enables the owner to exercise absolute control and dominion of it as against all others, an outstanding oil or gas lease renders title to the surface land defective”). Thus every day of an oil and gas lease can render title defective in the same manner that a “decree of any court ... or mortgage” can, R.C. § 5301.47(F), and to the extent that an oil and gas lease renders title “defective,” it of course “affects” that ownership – title, per *Amicus*.

Respondents also argue that an oil and gas lease does not meet the definition of a title transaction, stating that because the ODMA as originally written explicitly included a lease as a

savings event, but the final text of the statute does not contain that reference, the General Assembly did not intend for an oil and gas lease to toll the statute. *See* Respondents' Brief, pp. 13-14. What this argument fails to note, however, is that the manner in which the ODMA was written in its final form is actually *broader* than the form of the statute that listed a lease as a savings event. Specifically, the ODMA in its final form does not list specific transactions that toll the statute, but instead incorporates the definition of a title transaction which, as discussed above, is both broad and inclusive of an oil and gas lease because the General Assembly could obviously recognize that it would not be possible to list every potential instrument or type of transaction. *See also* Petitioners' Brief, pp. 24-25. Respondents further argue that the ODMA includes production of oil and gas as a savings event, and therefore finding an oil and gas lease to also be a savings event would be superfluous. *See* Respondents' Brief, pp. 15-16. However, the execution of a lease and production pursuant to that lease are different events, occurring at different times, and each separately preserves the mineral interest. *See* R.C. § 5301.56(B)(3) (the ODMA clock can be started by the occurrence of "one *or more*" of the enumerated events) (emphasis added). *See* Petitioners' Brief, pp. 12-13.

An oil and gas lease "affects title," both by transferring a fee simple determinable interest in that title and by influencing that title. Further, the severed mineral owner has made an affirmative statement of record by executing an oil and gas lease that said severed mineral owner claims those rights and they are not lying dormant. Thus an oil and gas lease meets the broad and inclusive definition of a title transaction, and such a reading does not render any part of the ODMA superfluous. No matter how finely Respondents and *Amicus* want to pare the words of the statute, its intent is to clear title to mineral interests so they can be developed, which is

exactly what an oil and gas lease does; as such, it is unquestionable that the execution of an oil and gas lease must make a mineral interest the subject of a title transaction and toll the ODMA.

B. An Oil and Gas Lease Grants the Lessee a Fee Simple Determinable Interest, Thereby Affecting Title Such as to Make the Mineral Interest the Subject of a Title Transaction and Tolling the ODMA.

Under Ohio law, an oil and gas lease transfers a fee simple determinable interest to the lessee, thus making clear that an oil and gas lease “affects title” to a mineral interest such as to make that interest the subject of a title transaction. Even were this not the case, and Respondents and *Amicus* were correct in arguing that an oil and gas lease is only a license, *see* Respondents’ Brief pp. 16-21,⁴ *Amicus* Brief pp. 11-13, an oil and gas lease nonetheless “affects title,” and is therefore sufficient to make the mineral interest conveyed the subject of a title transaction. *See* above, § I.A; Petitioners’ Brief, pp. 12-17. Respondents’ and *Amicus*’ arguments to the contrary are unavailing, particularly in this context, as an oil and gas lease is the most common instrument that concurrently meets both goals of the ODMA: title clarity and production of minerals.

1. An Ohio Oil and Gas Lease Grants a Fee Simple Determinable.

More than 100 years ago this Court explicitly and precisely addressed the nature of an oil and gas lease, finding that it conveys “a vested, though limited, estate in the lands for the purposes named in the lease.” *Harris v. Ohio Oil Co.*, 57 Ohio St. 118, 130 (1897). Both *Amicus* and Respondents argue that *Harris* has been overruled by *Back v. Ohio Fuel Gas Co.*, 113 N.E.2d 865 (Ohio 1953), despite the fact that *Back* makes no mention whatsoever of *Harris*, and also despite noting that *Back* “did not involve an instrument labeled as a ‘lease’ ...” while *Harris* “involved an instrument specifically labeled as an ‘oil and gas lease’ ...” Respondents’

⁴ Respondents cite Williams & Meyers, *Oil and Gas Law* § 601 in support of this contention. *See* Respondents’ Brief, p. 17. No such statement is found therein, and in fact the text of that section of that treatise does not even use the word “license.”

Brief, pp. 16, 17. Both Respondents and *Amicus* also omit from their discussion of *Back* the fact that in *Back* this Court stated that “[t]he instrument noted in question *is not a ‘lease’* because it grants rights in perpetuity, reserved nothing in the nature of rent, and the rights granted are not subject to defeasement upon the happening of any conditions.” *Back*, 113 N.E.2d at 867 (emphasis added). This Court was correct in noting that, with these features, the instrument at issue in *Back* was not properly classified as an oil and gas lease. See, e.g., *Williams and Meyers, Manual of Oil and Gas Terms*, § 8-H (stating that a typical habendum, or term clause, in an oil and gas lease provides that “this lease shall remain in force for a term of *ten years from date and as long thereafter as oil, or gas ... or either of them is produced ...* [.]” an arrangement which does not grant rights in perpetuity, instead providing that rights will be returned to the lessor upon certain conditions) (emphasis added); *id.* at § 8-R (a “royalty” is “[t]he landowner’s share of production, free of expenses of production”); *Brown v. Fowler*, 65 Ohio St. 507, 521 (1902) (“The instrument grants the oil and gas, and also the land for the purpose of operating thereon for said oil and gas, and is therefore a lease, and *not merely a license*”) (citing *Woodland Oil Co. v. Crawford*, 55 Ohio St. 161, 176 (1896)) (emphasis added).

Respondents and *Amicus* also omit any discussion of the actual documents at issue in this case, which are representative of modern oil and gas lease forms. Specifically, the 1984 Lease stated that the mineral interest owner “by these presents does grant demise, lease and let unto lessee, exclusively, for the purposes of prospecting and exploring by geophysical and other methods, drilling, mining, operating for and producing oil and gas ... *all that certain tract of land ...* described as follows” (Emphasis added). This language is substantively identical to the oil and gas lease in the *Harris* case – which this court held conveyed “a vested, though limited, estate in the lands for the purposes named in the lease[.]” *Harris*, 57 Ohio St. at 130 –

stating that the lessor “granted, demised, and let onto the said party of the second part, for the purpose and with the exclusive right of drilling, operating for petroleum oil and gas, *all that certain tract of land* ... known and described as follows:” *Id.* at 119 (emphasis added). Thus *Harris* – specifically addressing oil and gas leases substantively identical to those before the Court – and not *Back* – which by its own admission did not address *any kind* of lease – governs Ohio’s treatment of oil and gas leases, which is that the instruments convey a fee simple determinable. Additionally, both the 1984 Lease and the lease in *Harris* use the word “exclusive,” an indication that the lessee – and only the lessee – was being granted the right to explore for and produce oil and gas from the property. This means (1) the mineral interest owner no longer held that stick in his bundle, thereby affecting the mineral interest owner’s title, and (2) during the term of the lease oil and gas can *only* be produced pursuant to that lease.

The cases cited by Respondents and *Amicus* which rely on *Back* to characterize a lease are clearly flawed. Instead, it is those cases that rely on *Harris*, and rightfully hold that an oil and gas lease creates a fee simple determinable, which this Court should follow. *See, e.g., Kramer v. PAC Drilling Oil & Gas, L.L.C.*, 2011 -Ohio- 6750 (9th Dist.) (“In a typical oil or gas lease, the lessor is a grantor and grants a fee simple determinable interest to the lessee, who is actually a grantee”); *Bender v. Morgan*, Columbiana C.P. No. 2012-CV-378, at pp. 4-5 (“[A]n oil and gas lease does actually convey (a determinable fee interest) in the oil and gas (severed mineral interest in this case) in place, ... ”). *See also* R.C. § 5301.09 (requiring recording of “[a]ll leases[or] licenses ... by which any right is granted to operate or to sink or drill wells thereon for natural gas and petroleum or either ... [,]” a recognition by the legislature that (1) oil and gas “leases” are not “licenses,” as both terms are used in the statute and (2) oil and gas leases – which per the statute must be recorded – are *not* equivalent to a simple real estate lease –

which no Ohio statute appears to require to be recorded); *Binder v. Trinity OG Land Development and Exploration, LLC*, 2012 WL 1970239, at *3 (N.D. Oh. May 31, 2012) (“[R]eal estate includes leaseholds as well as any and every interest or estate in land situated in this state, whether corporeal or incorporeal, whether freehold or nonfreehold. Real estate, under Ohio law, has been held to include mineral rights ...”) (citations and quotations omitted); *Barclay Petroleum, Inc. v. Perry*, 1990 WL 79029, at *2 (5th Dist. May 31, 1990) (applying R.C. § 5301.01 – regarding the “lease of any interest in real property” – to an oil and gas lease); *Karas v. Brogan*, 55 Ohio St. 2d 128, 129 (1978) (“[A]n oil lease is an encumbrance”); *Curtis v. Hard Knox Energy, Inc.*, 2005 -Ohio- 6287, ¶ 5 (11th Dist. Nov. 25, 2005) (“Following termination of the Lease, lessee stands in the position of a licensee ...”) (emphasis added); § 47:4 Execution and Recordation of Oil or Gas Lease, Baldwin’s Oh. Prac. Real Est. (2013) (attached as App. Ex. 2) (describing an oil and gas lease as “an interest in real estate”).⁵

Respondents also point to two⁶ states which they allege have found an oil and gas lease *not* to be a property interest. *See* Respondents’ Brief, pp. 20-21. Respondents fail to cite, however, the apparent majority of states who have found otherwise. *See, e.g., Borden v. Case*, 118 So.2d 751, 753 (Ala. 1960); *State v. Superior Court for Maricopa County*, 550 P.2d 626, 628 (Ariz. 1976); *Clark v. Dennis*, 291 S.W. 807, 808 (Ark. 1927); *Hagood v. Haeckers*, 513

⁵ *Amicus* cite *Nonamaker v. Amos*, 73 Ohio St. 163 (1905) as “holding that an oil and gas lease involved neither ‘title to the land’ nor ‘any interest or estate therein.’” *Amicus* Brief, pp. 11-12. This is not a proper reading of *Nonamaker*. That case involved the question of whether or not a parol contract to reduce a royalty paid under an oil and gas lease was barred by the statute of frauds as involving a “contract or sale of lands ...” *Nonamaker*, 73 Ohio St. at 169. The language that *Amicus* quotes from that decision is in regard to the *parol contract*, which in turn addressed only the royalty to be paid as barrels of oil, not the oil and gas lease itself. *See id.* at 170 (“Therefore the parol contract related to personal property, and not real estate, or an interest in or concerning the same”).

⁶ Per the terms of Respondents’ Brief, *Johnson v. Sourignamath*, 90 Conn. App. 388, n. 11 (Conn. App. Ct. 2005) addresses whether or not an oil and gas lease is a transfer of “fee simple title[,]” a contention not made here.

P.2d 208, 214 (Colo. 1973); *Test Drilling Service Co. v. Hanor Co., Inc.*, 322 F.Supp.2d 965, 970 (C.D. Ill. 2004) (applying Illinois law); *Kiser v. Eberly*, 88 A.2d 570, 572 (Md. 1952); *Thomas v. Rex A. Wilcox Trust*, 463 N.W.2d 190, 193 (Ct. App. Mich. 1990); *Shoaff v. Gage*, 163 F.Supp. 179, 181 (D. Neb. 1958); *Staplin v. Vesely*, 72 P.2d 7, 8 (N.M. 1937); *Petroleum Exchange v. Poynter*, 64 N.W.2d 718, 722 (N.D. 1954); *Brown v. Haight*, 255 A.2d 508, 510-11 (Pa. 1969); *Anadarko Petroleum Corp. v. Thompson*, 94 S.W.3d 550, 554 (Tex. 2002); *Amerada Petroleum Corp. v. Rio Oil Co.*, 225 F.Supp. 907, 910 (D. Wyo. 1964) (applying Wyoming law).

2. Neither Ohio Trial Court Decisions Nor Treatment of Non-Oil and Gas Leases Weigh in Favor of Finding That an Oil and Gas Lease Does Not Toll the ODMA.

Respondents state that the “issue of whether a lease is a title transaction under the ODMA has created a clear split in the Ohio trial courts.” Respondents’ Brief, p. 19. In support of this contention Respondents cite to two cases, which were issued by the same court, on the same day, regarding a substantively identical set of facts, in which an oil and gas lease was found not to make a mineral interest the subject of a title transaction. See Respondents’ Brief, p. 20. This finding was based on the fact that “no activities were ever commenced” under the leases at issue. See *Swartz v. Householder*, Jefferson C.P. No. 12 CV 328, p. 5 (July 17, 2013) and *Shannon v. Householder*, Jefferson C.P. No. 12 CV 226, p. 6 (July 17, 2014). However, there is no requirement that “activities” be commenced in order for a title transaction savings event to occur, and therefore *Swartz* and *Shannon* are flawed.⁷ See Petitioners’ Brief, p. 19. On the other hand, in *nine* separate trial court decisions an oil and gas lease has been found to make the mineral interest the subject of a title transaction, for many of the same reasons discussed above. See

⁷ Two days before the Respondents filed their brief, *Swartz* and *Shannon* were affirmed by the Seventh District of the Court of Appeals of Ohio in a decision that makes no reference to this issue. See *Swartz v. Householder*, 2014 -Ohio- 2359, ¶¶ 9-11 (7th Dist. June 2, 2014).

Respondents' Brief, pp. 17-19. Thus, while there is no legitimate "split" in Ohio trial courts regarding this issue, it is indeed "clear" how those courts have addressed the issue: Ohio trial courts find that oil and gas leases make a mineral interest the subject of a title transaction.

Finally, throughout the *Amicus* Brief an attempt is made to equate an oil and gas lease with any and all other kinds of leases. *See Amicus* Brief, pp. 2 ("[I]n the end there is no reason that a lease of mineral interests should be treated differently than a lease of any other type of property"); 13 ("[T]here is no reason to treat oil-and-gas leases differently than any other lease for purposes of the Dormant Minerals Act"). *See also* above, § I.A (noting *Amicus*' discussion of a non-oil and gas lease and analogizing to the issue before this Court); n. 3 (same). This is a mistake of "the uninformed." *Williams and Meyers, Manual of Oil and Gas Terms*, § 8-L ("A 'lease' is *not the same* as an oil and gas lease. The very name, 'lease,' is unfortunate as it tends to give the impression to the uninformed that the 'oil and gas lease' is of the same genus as the common law 'lease' of land, whereas ... the dissimilarities are more important than the similarities") (emphasis added). Simply put, a document granting residential tenants the right to live on a property, or commercial tenants the right to conduct their business on a property, is not credibly compared to a document allowing an exploration and production company to take any and all steps necessary to extract and sell mineral resources from miles beneath the surface of that same property. Comparisons made by *Amicus* to non-oil and gas leasing, including downplaying the interest exchanged by an oil and gas lessor and lessee, must be disregarded.

II. The Expiration of an Oil and Gas Lease and Reversion of the Rights Granted Under that Lease Makes a Mineral Interest the Subject of a Title Transaction that Tolls the Twenty Year Forfeiture Clock Under the ODMA at the Time of the Reversion.

When an oil and gas lease expires, the process that took place at its execution moves in reverse: the rights that had been transferred to the lessee revert to the lessor, in a transaction of

which any one reviewing the recorded lease will have knowledge. Thus, the expiration of an oil and gas lease makes the mineral interest the subject of a title transaction.

A. The Expiration of an Oil and Gas Lease is a “Transaction” that Makes the Mineral Interest the “Subject of” a Title Transaction.

Amicus argues that the expiration of an oil and gas lease cannot make the mineral interest the subject of a “title transaction” because that event is not actually a “transaction” at all. *See Amicus* Brief, pp. 14-15. This is incorrect. Specifically, in support of this contention *Amicus* quotes, among others, Black’s Law Dictionary for the idea that “the term transaction means ‘the act or an instance of conducting business’ as well as ‘a business agreement or exchange’” and then argues that because a “transaction” is a “singular and discrete event[,]” the execution and expiration of an oil and gas lease cannot both be title transactions. *See id.* However, *Amicus* fails to cite each definition of the term “transaction” in Black’s Law Dictionary, as that source also defines a “transaction” as “[a]ny activity involving two or more persons.” Black’s Law Dictionary (9th ed. 2009) (emphasis added). The expiration of an oil and gas lease is unquestionably an “activity” – indeed, it is something that occurs – and by definition it must involve at least “two or more persons” – the lessee and the lessor. As such, the expiration of an oil and gas lease is in fact a “transaction,” and more specifically a “title transaction.” *See* below.

Similarly, Respondents argue that the expiration of an oil and gas lease cannot make a mineral interest the “subject of” a title transaction because “the mineral interest holder neither conveys a mineral interest nor retains a mineral interest upon the expiration of an oil and gas lease[] Any rights that the lessee had under the lease simply terminate.” Respondents’ Brief, p. 26. This argument ignores the clear language of the ODMA. Specifically, the statute does *not* require that the mineral interest holder *himself* “convey[] ... or retain[]” the mineral interest, *id.* (quoting *Walker v. Shondrick-Nau*, 2014 -Ohio- 1499 (7th Dist.)), as all that is required is that

“[t]he mineral interest *has been* the subject of a title transaction” R.C. § 5301.56(B)(3)(a) (emphasis added). Even if such a requirement did exist, however, the termination of an oil and gas lease is in fact a retention, or reacquisition, of rights by the lessor. Although Respondents argue that “[a]ny rights that the lessee had under the lease simply terminate[.]” Respondents’ Brief, p. 26, that is false. The bundle of rights once held by the lessor are a zero sum proposition, and when a portion of rights are granted to a party (the lessee), and at a later point in time that party no longer retains those rights (the termination of the lease), they must go somewhere. In this case they return to the lessor; any other proposition would make it impossible for the lessor to then re-lease their mineral interest. The expiration of an oil and gas lease makes a mineral interest the “subject of” a title transaction by transferring rights back to the lessor.

B. The Expiration of a *Recorded* Oil and Gas Lease is a Savings Event.

Faced with the truth that the expiration of an oil and gas lease makes a mineral interest the subject of a title transaction by transferring, in reverse, the same interest provided at the commencement of an oil and gas lease, *Amicus* and Respondents attempt to argue that the expiration of an oil and gas lease cannot toll the ODMA unless that expiration is separately recorded. *See Amicus* Brief, pp. 15-18; Respondents’ Brief, pp. 22-26, 31-34. Because what is expiring is an oil and gas lease, and that oil and gas lease *is recorded*, these arguments fail.

1. The Language of the ODMA Does Not Require the Termination of an Oil and Gas Lease to be Separately Recorded.

Respondents and *Amicus* first argue that the plain language of R.C. § 5301.56 (B)(3)(a) prevents the termination of an oil and gas lease from being a savings event if that release is not recorded. This argument fails, however, because the savings event at issue is the termination of a *recorded* oil and gas lease, which gives notice of (at least) two savings events: a transfer of a fee simple determinable interest, *see above*, and the reversion of that interest at the termination

of the lease. Neither Respondents nor Amicus point to any authority, or provide any argument, indicating that one document cannot satisfy the recording requirement for two separate title transaction saving events. *See, e.g.*, Respondents' Brief, p. 24 (discussing the assertion that a recorded oil and gas lease "is a one-time event that occurs on a definitive date at a definitive time and which is unaffected, not only by the purported length of the underlying title transaction, but also by the number of unrecorded 'transfers' that take place under the recorded document[.]" but failing to cite *any* authority throughout). Indeed, when an oil and gas lease is recorded, both its commencement and expiration are "filed or recorded," pursuant to the terms of the ODMA.

2. Finding That the Termination of an Oil and Gas Lease is a Savings Event Comports With the Purposes of the ODMA.

Next, *Amicus* and Respondents argue that allowing the expiration of a recorded oil and gas lease to qualify as a savings event contravenes one of the purposes of the statute – the simplification of the record title – because the date of lease termination is not necessarily clear at the time a recorded oil and gas lease is filed. While it is true that the termination date of an oil and gas lease is not always a certain date set in the language of that document, it is certainly *not* the case, as Respondents have argued, that "[i]t is impossible for title examiners to determine whether an oil and gas lease expired under the secondary term contained in the lease or whether an oil and [gas] company tendered delay rental payments in order to maintain an oil and gas lease beyond the first twelve month period." Respondents' Brief, p. 34. Were this the case, title could not be searched in any of those states which record oil and gas leases; that is obviously not the case. Instead, as the oil and gas lease is recorded, a trained title searcher has all the information he or she will need – the names and addresses of both lessee and lessor – to ascertain whether or not events like the payment of delay rentals, or the production of oil and gas, have occurred such as to extend the lease beyond the expiration of the primary term explicitly

elucidated in the lease. *See* Ohio Title Standards, 4.4 Encumbrances-Leases, available at <https://www.ohioabar.org/ForLawyers/MemberResources/LegalResources/Pages/StaticPage-219.aspx> (“Problem A: Should an oil, gas or coal lease be shown when satisfactory *evidence* is furnished that rentals are in default and that minerals are not being produced? Standard A: No, provided further that the primary term of the lease has expired. . . . Problem B: May an examiner omit from his opinion reference to a recorded lease when the terms expressed in the lease have expired? Standard B: Yes, in the absence of notice of renewal arising from possession, record *or otherwise*”) (emphasis added); Joseph Shade, *Petroleum Land Titles: Title Examinations & Title Opinions*, 46 *Baylor L. Rev.* 1007, 1045-46 n. 144 (attached as App. Ex. 3) (“[I]n [the] primary term, the cloud can be removed by *evidence* of expiration of the lease, such as by non-production and non-payment of delay rentals. After the primary term . . . expires, the cloud can possibly be removed *through physical inspection of the property . . .*”) (emphasis added) (citing Lewis G. Mosburg, Jr., *Landman’s Handbook on Petroleum Land Titles*).

A title searcher can easily discern *at least* two different dates which toll the ODMA: the execution of an oil and gas lease and the termination of that lease. This is the process that a title examiner follows in Ohio and elsewhere before a well is drilled. *See, e.g., id.* The problem that the ODMA was aimed at correcting is where the mineral interest owner and lessees cannot be identified – a problem that *never* existed here.

This kind of extra effort beyond a mere review of record title is specifically permissible under the ODMA, as numerous events work to toll the statute that cannot be confirmed *solely* by examining title records. *See, e.g.,* R.C. § 5301.56 (B)(3)(b) (production of minerals), (c) (storage of gas), (d) (the issuance of a permit), and (f) (the creation of a tax parcel number). *See also* Petitioners’ Brief, pp. 23, 26-27; *Energetics, Ltd. v. Whitmill*, 497 N.W.2d 497, 504 (Mich. 1993)

(“When a lease is recorded, the provisions of the lease are available to anyone who conducts a title search. The terms of the lease indicate whether further inquiry may be required to determine if the lease continues in force. We are not prepared to say that such an inquiry is significantly more burdensome than determining whether ... the land ... has actually produced oil or gas, was used for underground storage, or was covered by a drilling permit”).

Finally, Petitioners have previously argued that, because “[t]here is no dispute that the primary method to effectuate the extraction and sale of oil and gas is by entering into an oil and gas lease[,]” Respondents’ Brief, p. 11, for the purposes of the ODMA “[t]he existence of an oil and gas lease is the opposite of dormancy.” Petitioners’ Brief, p. 25. *Amicus* takes issue with this characterization, relying on *Ionno v. Glen-Gery Corp.*, 2 Ohio St. 3d 131, 134 (1983) and *Energetics*. See *Amicus* Brief, p. 18. *Amicus* cite *Ionno* for the proposition that “annual payment under lease did not ‘relieve the lessee of his obligation to reasonably develop the land[,]’” a finding that, if anything, drives home the point that a lease of oil and gas will lead to the development of oil and gas, and therefore is antithetical to the concept of “dormancy.” Additionally, while the *Energetics* court did find, in *dicta*, that the entire duration of an oil and gas lease did not to toll Michigan’s statute, it also stated that “if the Legislature had intended that result, it easily could have provided explicitly that the twenty-year dormancy period shall not run during a period when a severed interest is ‘subject to a lease.’” *Energetics*, 497 N.W.2d at 501-02. This language is nearly identical to the ODMA’s language that a mineral interest be the “subject of a title transaction.” R.C. § 5301.56(B)(3)(a). *Energetics* weighs in favor of the idea that an oil and gas lease is, for purposes of the ODMA, the opposite of dormancy.

C. *Energetics*, Interpreting an Analogous Statute Which was as a Model for the ODMA, and Not *Ricks v. Vap*, 784 N.W.2d 432 (Neb. 2010), Interpreting a Statute Entirely Apart From the ODMA, is Persuasive Here.

Both Respondents and *Amicus* argue that this court should ignore the *Energetics* case, the only on-point decision regarding this issue by any high court in the country, because it is based on “the unique language of the Michigan Dormant Mineral Act.” Respondents’ Brief, p. 27. *See also Amicus* Brief, pp. 18-19. Specifically, it is asserted that because the Michigan Act used language regarding the “s[ale], leas[ing], mortgag[ing], or transferr[ing]” of the severed mineral interest, while the ODMA discusses the mineral interest being the “subject of a title transaction,” the ODMA is to be more narrowly read than the Michigan Act, and therefore cannot support a finding – like the one made by the *Energetics* court – that the expiration of an oil and gas lease tolls the statute. *See* Respondents’ Brief, p. 27-29, *Amicus* Brief, p. 19. Respondents also point out that an initial draft version of the ODMA contained language similar to the Michigan Act, but such language was not ultimately adopted. *See* Respondents’ Brief, pp. 27-28. What Respondents and *Amicus* don’t realize is that the ODMA – adopting the definition of a title transaction (“any transaction affecting title to any interest in land” R.C. § 5301.47(F) (emphasis added)) – is *broader* than the Michigan Act’s language, and the draft ODMA’s language, which only list tolling events. A finding that the ODMA is to be more narrowly read than Michigan’s Act, thus rendering *Energetics* unpersuasive, is flawed. *See* Petitioners’ Brief, pp. 23-25.

Respondents also argue against *Energetics* by asserting that the Michigan Supreme Court’s reasoning should not be followed here. First, Respondents state that because the *Energetics* court found the language of the Michigan statute to be ambiguous, and there is no ambiguity in the ODMA, *Energetics* is inapplicable. *See* Respondents’ Brief, p. 30. However, by its very nature the definition of a “title transaction” must be ambiguous, as it allows for the

inclusion in its definition of terms not explicitly stated. *See, e.g., Amicus* Brief, p. 8 (admitting that the terms provided in R.C. § 5301.47(f) are “not exhaustive”). Second, the Respondents further argue that the *Energetics* court “erred when it found that an unrecorded expiration of an oil and gas lease qualified as a savings event under its dormant mineral act” because the Michigan Act “requires any transfer of the mineral interest [to] be recorded” Respondents’ Brief, p. 30. As discussed above the *Energetics* court explicitly addressed this point, finding that its state’s statute was not “merely a ‘recording statute’ ... [.]” *Energetics*, 497 N.W. 2d at 501, and that the lack of a separate recording did not defeat a finding that the expiration of a lease could toll the statute. *Id.* at 504. *See also* Petitioners’ Brief, pp. 22-23, 26-27.

Finally, both *Amicus* and Respondents reference *Ricks*, a decision by the Nebraska Supreme Court interpreting language in that state’s dormant mineral act mandating that “the record owner” must be the party to take actions to toll the statute, a requirement found nowhere in the ODMA. *See* Petitioners’ Brief, pp. 27-29. Neither *Amicus* nor the Respondents make any real attempt to persuade this Court that *Ricks* is of value here, and as such it should not be considered. *See Amicus* Brief, p. 19 (stating only that *Ricks* “was and is persuasive”); Respondents’ Brief, p. 31 (mistakenly comparing Nebraska’s *requirement* that no savings event could take place absent activity by the mineral owner with Ohio’s *allowance* that *one* of six ways the statute can be tolled is through action taken by the mineral owner).

D. Although the Question is Not Before the Court, There is No Doubt That the Entire Duration of an Oil and Gas Lease Tolls the ODMA.

An oil and gas lease is the most common transfer of rights that can satisfy both of the goals of the ODMA – clarity of title and production of minerals – in a singular document. Indeed, from the very first day an oil and gas lease is signed, until the day it expires, it is clear from the record title of the mineral interest who owns and holds the *exclusive* rights to develop

that interest, and there are no impediments to that development. Respondents argue that the duration of an oil and gas lease cannot work to toll the statute because if it did “oil and gas companies and landowners could easily avoid abandonment under the ODMA by entering into oil and gas leases with a primary term in excess of twenty years” Respondents’ Brief, p. 35. Respondents are correct that, if both a mineral interest owner and his or her lessee desire to enter into a 20+ year oil and gas lease they can, and still avoid abandonment under the ODMA, because “[t]he presumption under Ohio law is the freedom to contract.” *Eastham v. Chesapeake Appalachia, L.L.C.*, -- F.3d --, 2014 WL 2535385, at*6 (6th Cir. June 6, 2014) (citing *Cincinnati City Sch. Dist. Bd. of Ed. v. Conners*, 974 N.E.2d 78, 82-83 (Ohio 2012)). An oil and gas lease, regardless of the length of its primary term, meets the ODMA goals of clearing title and allowing for production. Indeed, had the intent of the ODMA been to ensure that either production took place within twenty (20) years or the mineral interests were abandoned, there would have been no reason for the drafters of the statute to allow a mineral interest owner to maintain his rights by merely filing a claim to preserve them. R.C. § 5301.56(B)(3)(e). Neither Respondents nor *Amicus* have pointed to any pronouncement of the General Assembly that a goal of ensuring production within a twenty (20) year time period was so crucial that it would overturn Ohio’s general presumption that parties are free to contract. *See, e.g. Eastham*, at*6 (“[T]he legislative branch ... is the ultimate arbiter of public policy”) (quoting *Conners*, 974 N.E.2d at 83)).

Further, there is no dispute that when oil or gas are produced pursuant to an oil and gas lease, the mineral interest cannot be rendered abandoned. R.C. § 5301.56(B)(3)(b). Like production, the payment of delay rentals – either on a yearly or upfront basis – works to continue the existence of the lease through its primary term, no matter how long. *See, e.g. Williams and Meyers, Oil and Gas Law*, § 8-D (defining a delay rental as “[a] sum of money payable to the

lessor by the lessee for the privilege of deferring the commencement of drilling operations or the commencement of production during the primary term of the lease”). It is generally the case that either the payment of delay rentals, or production, are required to allow a lease to run to the end of its primary term, *see, e.g., Beer v. Griffith*, Syl. Pt. 2, 61 Ohio St.2d 119 (1980) (“[a]bsent express provisions to the contrary” – i.e. the payment of delay rentals – “an oil and gas lease includes an implied covenant to reasonably develop the land”) (citations omitted), and thus whichever option the parties to an oil and gas lease choose, in exercising their freedom of contract, should work to toll the ODMA as long as the lease remains in effect. The payment of delay rentals to maintain the primary term of a lease, no matter how long that term, is not “ignor[ing]” the mineral interest, *see* Respondents’ Brief, p. 36; it is a parties’ choice, through a contractual vehicle, to delay any obligation it may have to develop that mineral interest.

Because every day of an oil and gas lease meets both purposes of the ODMA, the duration of that transaction – no matter how long – tolls the statute’s abandonment period.

CONCLUSION

This Court should answer each of the questions certified to it in the affirmative, and find that the execution and the expiration of a recorded lease of a severed subsurface mineral interest makes that interest the subject of a title transaction under the ODMA, thus tolling the statute.

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EXHIBIT 1

Sub. S.B. 223*
(As Reported by H. Civil & Commercial Law)

Sens. Cupp, Schafrath, Nettle, Drake, Burch

Provides that, in the absence of certain specified occurrences within the preceding 20-year period, such as the filing of a written notice to preserve a claim of a sub-surface mineral interest, any such interest that is not in coal or not of a governmental entity will be deemed abandoned and its title vested in the surface owner.

CONTENT AND OPERATION

Existing law

When a person buys an interest in land, the Marketable Title Act (secs. 5301.47 to 5301.56) generally makes it unnecessary to do a title search back further than the date that is known as the "effective date of the root of title" (see below). This is because the Act generally cuts off interests existing prior to the effective date of the root of title, unless they have been preserved by the recording of a preserving notice as provided in the Act.

The "root of title" is the conveyance or other title transaction, in the seller's chain of title, that was most recently recorded as of a date 40 years before the date on which marketability is being determined. The "effective date" of the root of title is the date on which the conveyance or transaction was recorded. (Sec. 5301.47(E).)

Current section 5301.56 provides that, regardless of when the 40-year period expires, for the purpose of recording a preserving notice of a right, title, estate, or interest in (subsurface) minerals, "with the exception of coal, such period shall not be considered to expire until after December 31, 1976." The bill would repeal this dated provision and substitute the provisions described below for determining when a mineral interest (other than coal or of a governmental entity) has become dormant and when the interest vests in the owner of the surface land.

Changes proposed by the bill

* This analysis was prepared before the report of the House Civil and Commercial Law Committee appeared in the House Journal.

"Deemed" abandonment. The bill would not change existing law concerning marketable title to, or the filing of preserving notices for, an interest in surface lands. However, under the bill, any mineral interest held (see COMMENT 1) by any person other than the owner of the surface lands would be deemed abandoned and would vest in the owner of the surface lands if none of the following applies (sec. 5301.56(B)(1)):

(1) The mineral interest is in coal, or in mining or other rights pertinent to or exercisable in connection with an interest in coal (division (B)(1)(a));

(2) The mineral interest is held by the United States, Ohio, or any of their political subdivisions, body politics, or agencies (division (B)(1)(b));

(3) Within the preceding 20 years, one or more of the following has occurred (division (B)(1)(c)):

--The mineral interest has been the subject of a title transaction (see COMMENT 2) filed or recorded in the office of the recorder of the county in which the lands are located;

--There has been actual production or withdrawal of minerals by the holder from the lands, from lands covered by a lease to which the mineral interest is subject, or, in the case of oil or gas, from lands pooled, unitized, or included in unit operations in which the mineral interest is participating. In the latter situation, the instrument or order creating or providing for the pooling or unitization of oil or gas interests would have to have been filed or recorded in the office of the recorder of the county in which the lands that are subject to the pooling or unitization are located. (A related cross-reference change would be made in section 317.08(A).)

--The mineral interest has been used in underground gas storage operations by the holder;

--A drilling or mining permit (see COMMENT 3) has been issued to the holder, and an affidavit stating the name of the permit holder, the type of permit and its number, and a legal description of the lands affected by the permit has been filed or recorded, in accordance with law (sec. 5301.252), in the office of the recorder of the county in which the lands are located;

--A claim to preserve the interest has been filed in compliance with the bill (see below);

--In the case of a separated mineral interest, a separately listed tax parcel number has been created for the mineral interest in the auditor's tax list and the treasurer's duplicate tax list in the county in which the lands are located.

A mineral interest would not be "deemed abandoned" because none of the listed circumstances applies until three years from the bill's effective date (sec. 5301.56(B)(2)).

Preserving notice. A claim to preserve a mineral interest from being deemed abandoned could be filed by its holder with the recorder of the county in which the particular lands are located. The claim would consist of a notice that states the nature of the mineral interest and any recording information upon which the claim is based, otherwise complies with section 5301.52 (contents of a preserving notice), and states that the holder does not intend to abandon, but instead to preserve, his rights in the mineral interest (sec. 5301.56(C)(1)). An exception to the latter "notice" requirements would be that any holder of an interest for use in underground gas storage operations could preserve his interest, and those of any lessor, by a single claim that defines the boundaries of the storage field or pool and its formations, without describing each separate interest claimed. Such a single claim would be prima-facie evidence of the use of each separate interest in underground gas storage operations. (Sec. 5301.56(C)(3).)

A claim would have to be filed and recorded as provided in sections 317.18 to 317.201 (indexes maintained by a county recorder) and in section 5301.52 (preserving notices) (secs. 317.18, 317.20(E), 317.201, and 5301.56(C)(1)). A claim that complies with the above-described notice content, filing, and recording requirements would preserve the rights of all holders of a mineral interest in the "same lands" (sec. 5301.56(C)(2)).

A mineral interest could be preserved indefinitely from deemed abandonment by the occurrence of any of the previously listed events within the preceding 20-year period. Successive filings of claims to preserve a mineral interest would be specified as one example of those events. (Sec. 5301.56(B)(1)(c) and (D)(1).)

Miscellaneous provision. The filing of a claim to preserve a mineral interest from being deemed abandoned would not affect the right of a lessor of an oil or gas lease to obtain a forfeiture pursuant to section 5301.332 (the basis and procedure for forfeiture and cancellation of natural gas and oil land leases) (sec. 5301.56(D)(2)).

COMMENT

1. Proposed section 5301.56(A)(1) would define a holder as the record holder of a mineral interest, and any person who derives his rights from, or has a common source with, the record holder and whose claim does not indicate, expressly or by clear implication, that it is adverse to the interest of the record holder.

2. A title transaction, as defined in existing section 5301.47(F), means any transaction affecting title to any interest in land, including title by will or descent, by tax deed, by trustee's, assignee's, guardian's, executor's, administrator's, or sheriff's deed, by decree of any court, or by warranty deed, quit claim deed, or mortgage.

3. A drilling or mining permit would be defined as a permit issued under Chapter 1509., 1513., or 1514. of the Revised Code (Oil and Gas, Coal Surface Mining, and Other Surface Mining, respectively) to the holder to drill an oil or gas well or to mine other minerals (sec. 5301.56(A)(2)).

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Reported, S. Judiciary	02-16-88	p. 1389
Passed Senate (32-0)	02-23-88	p. 1407
Reported, H. Civil & Commercial Law	--	--

83 10/1/76 11:00 AM

Sub. S.B. 223
(As Passed by the Senate)

Sens. Cupp, Schafrath, Nettle, Drake, Burch

Provides that, in the absence of certain specified occurrences within the preceding 20-year period, such as the filing of a written notice to preserve a claim of a sub-surface mineral interest, any such interest that is not in coal or not of a governmental entity will be deemed abandoned and its title vested in the surface owner.

CONTENT AND OPERATION

Existing law

When a person buys an interest in land, the Marketable Title Act (secs. 5301.47 to 5301.56 of the Revised Code) generally makes it unnecessary to do a title search back further than the date that is known as the "effective date of the root of title" (see below). This is because the Act generally cuts off interests existing prior to the effective date of the root of title, unless they have been preserved by the recording of a preserving notice as provided in the Act.

The "root of title" is the conveyance or other title transaction, in the seller's chain of title, that was most recently recorded as of a date 40 years before the date on which marketability is being determined. The "effective date" of the root of title is the date on which the conveyance or transaction was recorded. (Sec. 5301.47(E).)

Current section 5301.56 provides that regardless of when the 40-year period expires, for the purpose of recording a preserving notice of a right, title, estate, or interest in (subsurface) minerals, "with the exception of coal, such period shall not be considered to expire until after December 31, 1976." The bill would repeal this dated provision and substitute the provisions described below for determining when a mineral interest (other than coal or of a governmental entity) has become dormant and when the interest vests in the owner of the surface land.

Changes proposed by the bill

"Deemed" abandonment. The bill would not changes existing law concerning marketable title to, or the filing of preserving notices for, an interest in surface land. However, under the bill, any mineral interest held (see COMMENT 1) by any person other than the owner of the surface land would be deemed abandoned and would vest in the owner of the surface land if neither of the following applies (sec. 5301.56(B)):

(1) The mineral interest is one in coal, or mining or other rights pertinent to such an interest (division (B)(1));

(2) Within the preceding 20 years, one or more of the following has occurred (division (B)(2)):

--The mineral interest has been the subject of a title transaction (see COMMENT 2) filed or recorded in the office of the recorder of the county in which the land is located;

--There has been actual production or withdrawal of minerals by the holder from the lands, from land covered by a lease to which the mineral interest is subject, or, in the case of oil or gas, from lands pooled, unitized, or included in unit operations in which the mineral interest is participating. In the latter situation, the instrument creating or providing for the pooling or unitization of oil or gas interests would have to have been filed or recorded in the office of the recorder of the county in which the lands that are subject to the pooling or unitization are located.

--The mineral interest has been used in underground gas storage operations by the holder;

--A drilling or mining permit (see COMMENT 3) has been issued to the holder, and an affidavit stating the name of the permit holder, the type of permit and its number, and a legal description of the land affected by the permit has been filed or recorded, in accordance with law (sec. 5301.252) in the office of the recorder of the county in which the land is located;

--A claim to preserve the interest has been filed in compliance with the bill (see below);

--In the case of a separated mineral interest, a separately listed tax parcel number has been created for the mineral interest in the auditor's tax list and the treasurer's duplicate tax list in the county in which the land is located.

A mineral interest would not be considered abandoned based on a failure of compliance with the latter provision until three years from the bill's effective date (sec. 5301.56(B)). See also the governmental entity circumstance described in "miscellaneous provisions" below.

Preserving notice. A claim to preserve a mineral interest from being deemed abandoned could be filed with the recorder of the county in which the land is located. The claim would have to be filed in accordance with section 5301.52 (contents of preserving notice), state any recording information upon which the claim is based, and state that the claimant does not intend to abandon, but rather to preserve, his rights in the mineral interest. A properly filed claim would preserve the rights of all holders of a mineral interest in that land. (Sec. 5301.56(C).)

Any holder of an interest for use in underground gas storage operations could preserve his interest, and those of any lessor, by a single claim that defines the boundaries of the storage field or pool and its formations, without describing each separate interest claimed. This claim would establish prima-facie evidence of the use of the interest in underground gas storage operations. (Sec. 5301.56(C).)

A claim filed pursuant to the procedure described above would have to be recorded as provided in sections 317.18 to 317.201 (indexes maintained by a county recorder) and in section 5301.52 (preserving notices) (secs. 317.18, 317.20(E), 317.201, and 5301.56(D)).

A mineral interest could be preserved indefinitely from "deemed abandonment" by the occurrence of any of the previously listed events within the preceding 20-year period (sec. 5301.56(B)(2)). Successive filings of claims to preserve a mineral interest would be specified as one of those events. (Sec. 5301.56(E).)

Miscellaneous provisions. The filing of a claim to preserve a mineral interest from being "deemed abandoned" would not affect the right of a lessor of an oil or gas lease to obtain a forfeiture pursuant to section 5301.332 (the basis and procedure for forfeiture and cancellation of natural gas and oil land leases) (sec. 5301.56(E)). Also, the bill would exclude any mineral interest held by a governmental entity from its provisions (sec. 5301.56(F)).

COMMENT

1. Proposed section 5301.56(A)(1) would define a holder as including not only the record holder of a mineral interest, but also any person who derives his rights from, or a common source with, the record holder and whose claim does not indicate, expressly or by clear implication, that it is adverse to the interest of the record holder.

2. A title transaction, as defined in existing section 5301.47(F), means any transaction affecting title to any interest in land, including title by will or descent, by tax deed, by trustee's, assignee's, guardian's, executor's, administrator's, or sheriff's deed, by decree of any court, or by warranty deed, quit claim deed, or mortgage.

3. A drilling or mining permit would be defined as a permit issued under Chapter 1509., 1513., or 1514. of the Revised Code (Oil and Gas, Coal Surface Mining, and Other Surface Mining, respectively) to the holder to drill an oil or gas well or to mine other minerals (sec. 5301.56(A)(2)).

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Introduced	05-28-87	p. 404
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Sub S.B. 223
(As Reported by S. Judiciary)

Sens. Cupp, Schafrath, Nettle, Drake

Provides that, in the absence of certain specified occurrences within the preceding 20-year period, including failure to file a written notice of claim in subsurface minerals, a mineral estate (other than in coal) is considered abandoned and the title vests in the surface owner.

BACKGROUND

When a person buys an interest in land, the Marketable Title Act (sections 5301.47 to 5301.56 of the Revised Code) makes it unnecessary for the most part to do a title search back further than the date that is known as the effective date of the root of title. This is so because the Act generally cuts off interests existing prior to the effective date of the root of title, unless those interests have been preserved by the recording of a preserving notice as provided in the Act.

The "root of title" is the conveyance, in the seller's chain of title, that was most recently recorded as of the date 40 years before the date on which marketability is determined. The "effective date of the root of title" is the date on which was recorded the conveyance that is the root of title.

Current section 5301.56 provides that regardless of when the Marketable Title Act's 40-year period expires, for the purpose of recording a preserving notice of a claim in the right, title, estate or interest in and to subsurface minerals, with the exception of coal, such period shall not be considered to expire until after December 31, 1976. The bill would repeal this section because it no longer applies to conveyances of interests in minerals and would replace it with guidelines for determining when an interest in a mineral estate (other than coal) has become dormant and the interest would vest in the owner of the surface land.

CONTENT AND OPERATION

The bill would not change existing law concerning marketable title to or the filing of preserving notices for an interest in surface land. Under the bill, any mineral interest held (see COMMENT 1) by any person other than the owner of the surface land, would be deemed abandoned and would vest in the owner of the surface land if neither of the following applies (sec. 5301.56(B)):

(1) The mineral interest is one in coal, or mining or other rights pertinent to or exercisable in connection with the mining of coal;

(2) Within the preceding 20 years, one or more of the following has occurred:

(a) The mineral interest has been the subject of a title transaction (see COMMENT.2) which has been filed or recorded in the office of the county recorder of the county in which the land is located;

(b) There has been actual production or withdrawal of minerals by the holder from the lands, from lands covered by a lease to which such interest is subject, or, in the case of oil or gas, from lands pooled, utilized, or included in unit operations in which the interest is participating, provided that the instrument creating or providing for the pooling or unitization of oil or gas interests has been filed or recorded in the office of the county recorder of the county in which the lands that are subject to the pooling or unitization are located;

(c) The interest has been used in underground gas storage operations by the holder;

(d) A drilling or mining permit (see COMMENT 3) has been issued to the holder, provided that an affidavit stating the name of the permit holder, the type of permit and its number, and a legal description of the land affected by the permit has been filed or recorded, in accordance with section 5301.252 (filing affidavits on facts relating to title), in the office of the county recorder of the county in which the land is located;

(e) A claim to preserve the interest has been filed in compliance with the provisions of the bill (see below);

(f) In the case of a separated mineral interest, a separately listed tax parcel number has been created for the mineral interest in the auditor's tax list and the treasurer's duplicate tax list in the county in which the land is located.

No mineral interest would be considered abandoned based on failure to comply with this provision prior to three years from the bill's effective date (sec. 5301.56(B)).

A claim to preserve a mineral interest from being deemed abandoned could be filed for record with the county recorder of the county in which the land is located. The claim would have to be filed in accordance with section 5301.52 (contents of notice), state the recording information, if any, upon which the claim is based, and state that the claimant does not intend to abandon but rather to preserve his rights in the mineral interest described. The properly filed claim would preserve the rights of all holders of a mineral interest in the same land. Any holder of an

interest for use in underground gas storage operations could preserve his interest, and those of any lessor, by a single claim, defining the boundaries of the storage field or pool and its formations, without describing each separate interest claimed. This claim also would establish prima-facie evidence of the use of such interest in underground gas storage operations. (Sec. 5301.56(C).)

A claim filed pursuant to the procedure described above also would have to be recorded as provided in sections 317.18 to 317.201 (governing indexes maintained by a county recorder) (see COMMENT 4) and 5301.52 (contents of notice claiming to preserve an interest in land) (sec. 5301.56(D)). A mineral interest could be preserved indefinitely from the bill's presumption of abandonment by the continuing occurrence of any of the items listed in the bill (the mineral is coal or the events listed occurred within the preceding 20 years). Indefinite preservation also could be accomplished by successive filings of claims to preserve a mineral interest by the method provided by the bill. (Sec. 5301.56(C).)

The filing of a claim to preserve a mineral interest from being deemed abandoned as provided by the bill would not affect the right of a lessor of an oil or gas lease to obtain a forfeiture pursuant to section 5301.332 (provides basis and procedure for forfeiture and cancellation of natural gas and oil land leases) (sec. 5301.56(E)). The bill specifies that its provisions would not apply to any mineral interest held by a governmental entity (sec. 5301.56(F)).

COMMENT

(1) Section 5301.56(A)(1) defines a holder as including not only the record holder of a mineral interest, but also any person who derives his rights from, or a common source with, the record holder and whose claim does not indicate, expressly or by clear implication, that it is adverse to the interest of the record holder.

(2) Title transaction, as defined in division (f) of section 5301.47, means any transaction affecting title to any interest in land, including title by will or descent, title by tax deed, or by trustee's, assignee's, guardian's, executor's, administrator's, or sheriff's deed, or decree of any court, as well as warranty deed, quit claim deed, or mortgage.

(3) A drilling or mining permit is a permit issued under Chapter 1509., 1513., or 1514. (Oil and Gas, Coal Surface Mining, and Other Surface Mining, respectively) of the Revised Code to the holder to drill an oil or gas well or mine other minerals (sec. 5301.56(A)(2)).

(4) Sections 317.18 to 317.201 of the Revised Code set forth guidelines to be followed by a county recorder in maintaining the records of all real estate located in the county. For example, section 317.19 requires that a daily register of deeds and a daily register of mortgages be kept. The county recorder also is responsible for maintaining an alphabetical index, both direct and reverse, of the names of both parties to all instruments affecting county real estate (sec. 317.18). . In addition, section 317.201 provides that every notice of preservation of claims filed in the recorder's office be logged in a record book called a "Notice Index." The bill adds references to section 5301.56 filings in sections 317.18, 317.20, and 317.201.

ACTION	DATE	JOURNAL ENTRY
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Reported, S. Judiciary	02-16-88	p. 1389

S.B. 223
(As Introduced)

Sens. Cupp, Schafrath, Nettle

Provides that, in the absence of certain specified occurrences within the preceding 20-year period, including failure to file a written notice of claim in subsurface minerals, a mineral estate (other than in coal) is considered abandoned and the title vests in the surface owner.

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Background

When a person buys an interest in land, the Marketable Title Act (sections 5301.47 to 5301.56 of the Revised Code) makes it unnecessary for the most part to do a title search back further than the date that is known as the effective date of the root of title. This is so because the Act generally cuts off interests existing prior to the effective date of the root of title, unless those interests have been preserved by the recording of a preserving notice as provided in the Act.

The "root of title" is the conveyance, in the seller's chain of title, that was most recently recorded as of the date 40 years before the date on which marketability is determined. The "effective date of the root of title" is the date on which was recorded the conveyance that is the root of title.

Current section 5301.56 provides that regardless of when the Marketable Title Act's 40-year period expires, for the purpose of recording a preserving notice of a claim in the right, title, estate or interest in and to subsurface minerals, with the exception of coal, such period shall not be considered to expire until after December 31, 1976. The bill would repeal this section because it no longer applies to conveyances of interests in minerals and would replace it with guidelines for determining when an interest in a mineral estate (other than coal) has become dormant and the interest would vest in the owner of the surface land.

CONTENT AND OPERATION

The bill would not change existing law concerning marketable title to or the filing of preserving notices for an interest in surface land. Under the bill, any mineral interest held (see COMMENT 1) by any person

other than the owner of the surface land, would be deemed abandoned and would vest in the owner of the surface land if neither of the following applies (sec. 5301.56(B)):

(1) The mineral interest is one in coal, or mining or other rights pertinent to or exercisable in connection with the mining;

(2) Within the preceding 20 years, one or more of the following has occurred:

(a) The interest has been conveyed, leased, transferred, or mortgaged by an instrument filed or recorded in the recorder's office of the county in which the lands are located;

(b) There has been actual production or withdrawal of minerals by the holder from the lands, from lands covered by a lease to which such interest is subject, or, in the case of oil or gas, from lands pooled, utilized, or included in unit operations in which the interest is participating;

(c) The interest has been used in underground gas storage operations by the holder;

(d) A drilling or mining permit has been issued to the holder (see COMMENT 2);

(e) A claim to preserve the interest has been filed in compliance with the provisions of the bill.

No mineral interest would be considered abandoned based on failure to comply with this provision prior to three years from the effective date of this section (sec. 5301.56(B)).

A claim to preserve a mineral interest from being deemed abandoned could be filed for record with the county recorder of the county in which the land is located. It would consist of a notice, verified under oath, of the nature of the interest claimed, a description of the land, the volume and page of any recorded instrument on which it is based, the name and address of the holder, and a statement that the holder does not intend to abandon but to preserve his rights. The claim would preserve the rights of all holders of a mineral interest in the same land. Any holder of an interest for use in underground gas storage operations could preserve his interest, and those of any lessor, by a single claim, defining the boundaries of the storage field or pool and its formations, without describing each separate interest claimed. This claim also would establish prima-facie evidence of the use of such interest in underground gas storage operations. (Sec. 5301.56(C).)

A claim filed pursuant to the procedure described above also would have to be recorded as provided in sections 317.18 to 317.201 (governing indexes maintained by a county recorder) (see COMMENT 3) and 5301.52 (contents of notice claiming to preserve an interest in land) of the Revised Code (sec. 5301.56(D)). A mineral interest could be preserved indefinitely from the bill's presumption of abandonment by the continuing occurrence of any of the items listed in the bill (the mineral is coal or the events listed occurred within the preceding 20 years). Indefinite preservation also could be accomplished by successive filings of claims to preserve a mineral interest by the method provided by the bill. (Sec. 5301.56(C).)

The filing of a claim to preserve a mineral interest from being deemed abandoned as provided by the bill would not affect the right of a lessor of an oil or gas lease to obtain a forfeiture pursuant to section 5301.332 (provides basis and procedure for forfeiture and cancellation of natural gas and oil land leases) (sec. 5301.56(E)). The bill specifies that its provisions would not apply to any mineral interest held by a governmental entity (sec. 5301.56(F)).

COMMENT

(1) Section 5301.56(A)(1) defines a holder as including not only the record holder of a mineral interest, but also any person who derives his rights from, or a common source with, the record holder and whose claim does not indicate, expressly or by clear implication, that it is adverse to the interest of the record holder.

(2) A drilling or mining permit is a permit issued under Chapter 1509., 1513., or 1514. (Oil and Gas, Coal Surface Mining, and Other Surface Mining, respectively) of the Revised Code to the holder to drill an oil or gas well or mine other minerals (sec. 5301.56(A)(2)).

(3) Sections 317.18 to 317.201 of the Revised Code set forth guidelines to be followed by a county recorder in maintaining the records of all real estate located in the county. For example, section 317.19 requires that a daily register of deeds and a daily register of mortgages be kept. The county recorder also is responsible for maintaining an alphabetical index, both direct and reverse, of the names of both parties to all instruments affecting county real estate (sec. 317.18). In addition, section 317.201 provides that every notice of preservation of claims filed in the recorder's office be logged in a record book called a "Notice Index."

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Introduced	05-28-87	p. 404

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EXHIBIT 2

Baldwin's Oh. Prac. Real Est. § 47:4

Baldwin's Ohio Practice%tc Ohio Real Estate Law
Database updated November 2013

Kenton L. Kuehnle, Jack S. Levey

Chapter 47. Leases—Oil and Gas
By Matthew W. Warnock*

§ 47:4. Execution and recordation of oil or gas lease

The Supreme Court of Ohio long ago recognized that “[t]he rights and remedies of the parties to an oil or gas lease, must be determined by the terms of the written instrument ... Such leases are contracts, and the terms of the contract with the law applicable to such terms, must govern the rights and remedies of the parties.”¹

Further, the United States Supreme Court explained that the “ordinary form of oil [and gas] lease has a dual character or purpose: (1) the conveyance of an estate in the land for development purposes; and (2) the future development and operation of the lease for oil [and gas] in accordance with the terms, express and implied ...”² As an interest in real estate, an oil and gas lease is subject to Ohio’s statute of frauds, which means it must be executed in writing.^{3,50}

Like other real property leases, oil and gas leases must be executed with the same legal formalities required by RC 5301.01; thus, they must be signed by the lessor,⁴ and acknowledged “before a judge or clerk of a court of record in this state, or a county auditor, county engineer, notary public, or mayor.”⁴ Although most oil and gas leases in Ohio are not signed by the lessee, many recent oil and gas leases relating to the development of the Marcellus and Utica/Point Pleasant Shale formations are signed by both the lessor and lessee.

Specific to oil and gas leasing, RC 5301.09 requires that all leases and assignments concerning the drilling for, or operation of, oil or gas wells include the “mailing address of both the lessor and lessee or assignee,” and be filed for record without delay. The statute adds that the “omission of the information required by this section does not affect the validity of any lease.” Although an unrecorded lease will be valid between the immediate parties to the lease, it will not be valid against third parties (e.g., a bona fide purchaser) unless there is actual and open possession under the unrecorded lease.⁵

A separate recording requirement also applies if the oil and gas lease pertains to land in a county that “maintains permanent parcel numbers or sectional indexes pursuant to [R.C.] section 317.20.” In this situation, the oil and gas lease must contain both the “permanent parcel number and the information required by section 317.20 of the Revised Code to index such lease in the sectional indexes.”⁶

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Footnotes

* Matthew W. Warnock is an associate in the Energy and Public Utilities group at Bricker & Eckler LLP in Columbus, Ohio, and co-chair of the firm’s Shale Task Force.

¹ Harris v. Ohio Oil Co., 57 Ohio St. 118, 129, 48 N.E. 502 (1897).

² Barwise v. Sheppard, 299 U.S. 33, 39, 57 S. Ct. 70, 81 L. Ed. 23 (1936), quoting to Group No. 1 Oil Corp. v. Sheppard, 89 S.W.2d 1021 (Tex. Civ. App. Austin 1935), writ refused. See also Streck v. Reed, 1983 WL 4132 (Ohio Ct. App. 9th Dist. Medina County

§ 47:4. Execution and recordation of oil or gas lease, Baldwin's Oh. Prac. Real Est. § 47:4

- 1983) (stating “[w]hen a lessor and lessee enter into an oil and gas lease, it is generally for the purpose of providing for the exploration, development and operation of the leasehold premises for the mutual profit and advantage of both the lessor and the lessee”).
- 2.50 R.C. 1335.04 (stating that “[n]o lease, estate, or interest, either of freehold or term of years, or any uncertain interest of, in, or out of lands, tenements, or hereditaments, shall be assigned or granted except by deed, or note in writing, signed by the party assigning or granting it, or his agent thereunto lawfully authorized, by writing, or by act and operation of law”). See also *Northwestern Ohio Natural Gas Co. v. City of Tiffin*, 59 Ohio St. 420, 54 N.E. 77 (1899).
- 3 For purposes of this chapter, the term “lessor” means the mineral rights owner and/or landowner entering into an oil and gas lease, while the term “lessee” refers to the oil and gas exploration and production company (the second party to an oil and gas lease).
- 4 Note that 2001 H.B. 279 amended RC 5301.01, eff. 2-1-02, to eliminate the former two-witness attestation requirement.
- 5 RC 5301.09.
- 6 R.C. 5301.09 (stating that the “omission of the information required by this section does not affect the validity of any lease”).

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EXHIBIT 3

46 Baylor L. Rev. 1007

Baylor Law Review

Fall, 1994

PETROLEUM LAND TITLES: TITLE EXAMINATION & TITLE OPINIONS

Joseph Shade²¹

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*1008 I. Scope and Purpose

This Article represents a broad overview of the process of examining title and rendering legal opinions on title in the context of oil and gas property development. However, it is not intended to be a comprehensive treatise which answers all questions that might be encountered in the title *1009 examination process.

This Article is directed not only to examining attorneys who render title opinions, but also to petroleum landmen who assist attorneys in the title examination process and to land managers of oil and gas exploration companies who review title opinions and make business decisions based on those opinions.¹ Each of these three groups of professionals plays a vital role in the title examination process, and each can perform that role better if he or she understands the roles played by the others.

II. Fundamental Concepts

At the most basic level, the Anglo-American system of land ownership and title transfer rests on two ancient institutions:

1. The Statute of Frauds, which requires land ownership to be evidenced by written instrument;² and
2. The Recording System, which says that even transactions evidenced by written instruments may be voidable unless notice of such transactions is given by recording the instruments.³

The recording requirement protects persons purchasing interests in real estate without knowledge of unrecorded claims ("bona fide purchasers for value"), even though the unrecorded transactions are valid and binding between the parties to the transaction.⁴ Similarly, the timely recording of a deed protects a purchaser against claims to the land by others who are charged with knowledge of the public record.⁵ Thus, a written instrument evidences ownership or title, and the recording system preserves evidence of that ownership.

Before consummating a transaction and paying for property, a buyer *1010 justifiably wants more than a deed from the seller. The buyer wants assurance that the seller really owns the interest that the seller purports to convey, that the interest is not encumbered, that by virtue of the conveyance the buyer will succeed to the seller's ownership, and that the buyer can later sell the property.⁶ A title examination will provide this information. Consequently, a party desiring to buy real property, make a loan secured by real property, or develop minerals on real property, will likely insist on examining the record prior to entering into the transaction. Obviously, few persons entering into real property transactions have the time, training, or capability to personally examine the public record to determine whether they are getting what they bargained for: "good" or "marketable" title.

Therefore, the professionals who examine the title record and render title opinions provide the essential link between the public record and potential buyers, sellers, lenders, lessors, lessees, purchasers of oil and gas production, and other interested parties. The means by which title attorneys, usually assisted by landmen, abstractors, and other professionals, provide this essential link in the context of petroleum land titles is the central question explored in this Article.

A. Recording Statutes

All states have recording statutes that prescribe what instruments may and must be recorded, where they should be recorded, and the protection afforded by recording them.⁷ The wording, nature, effect, and details of the statutes vary, but all embody essentially the same principle. Failure to record an instrument does not affect the instrument's validity as between the parties to the transaction, but such failure will cut off rights of the grantee against subsequent bona fide purchasers for value. Courts have consistently stated the rule with respect to recordation as follows: "[a] conveyance is valid, and passes the title without registration, except as to **1011* subsequent purchasers, for a valuable consideration paid, and without notice, and creditors; and as respects them it has no effect."⁸

Under most recording statutes, conveyances and other instruments affecting title to real property are filed with the county clerk of the county where the land is situated. The county clerk places a copy of the instrument in the public record and returns the original instrument to the property owner. In most cases, parties to real estate transactions rely on the public records for proof of title rather than on the original instruments maintained by the respective owners.⁹

B. Surface Titles -- Title Insurance

Generally, with respect to real estate transactions, title insurance companies provide the essential link between the public record and the parties to the transaction. A title insurance policy is essentially an indemnity contract in which the title insurance company agrees to indemnify the purchaser of real property for any loss or damage resulting from title defects existing at the date of the policy, except for title defects expressly excluded under the policy terms.¹⁰ Most title insurance policies measure "loss" by the consideration that the buyer paid for the property.

The insurer writes a title insurance policy only after its employees or agents conduct a search of title to the insured property. In general, title insurance companies maintain their own private tract indices and records, called "plants," covering all real estate in the county or counties in which they operate. The title company constantly updates these plants from the public record.

Typically, when a title company receives an order for title insurance on a specified tract of land, company employees or agents conduct an examination of title to that tract using the company's title plant. Based on that examination, the title insurance company decides whether to issue a policy insuring title and what exceptions, if any, that policy will contain. **1012* In effect, a title insurance policy is an opinion on title backed by an indemnity contract.¹¹

When title insurance is used, "insurability" rather than "marketable title" becomes the test of a title's acceptability. Insurability is the insurance company's willingness to insure title. Because the insurer typically accepts a degree of business risk when it issues title insurance, insurability is a broader and more flexible standard than marketable title. For example, a title insurance company will typically insure title to property if, in the insurer's opinion, the property title is sufficiently free of defects to justify issuing a policy indemnifying the insured against loss arising from potential title defects, even though the title does not meet the legal standard of "marketability."¹²

C. Petroleum Land Titles -- Overview

Generally, title insurance is not available to insure interests acquired in oil and gas.¹³ Thus, the essential link between the public record and persons desiring to acquire and develop oil and gas properties, explore for oil and gas, and market oil and gas production is provided through the process of title examination and opinion -- the process examined in this Article.

In a typical oil and gas transaction, an oil and gas exploration company **1013* leases lands geologically identified as "prospects."¹⁴ The basic rights acquired by a lessee under an oil and gas lease include the right to enter upon the land, to explore for oil and gas, to drill wells, and to produce and market oil and gas.¹⁵ Before expending large amounts of money to acquire leases, and certainly before drilling a well on the prospect, the operator will want assurance that the person from whom it is acquiring the lease has the power and authority to grant the lessee those rights.¹⁶ Similarly, when and if production is obtained, the production purchaser will require assurances as to the identity and title of the persons entitled to receive proceeds from

the sale of production.¹⁷ As more fully discussed below, these assurances are provided at several stages of the development process through title examination and title opinions.

D. Definitions

The following terms used in this Article have the meanings set forth below.

1. Title and Examination of Title

"Title" is defined as a bundle of rights which constitute the ownership of property.¹⁸ "Title" is also used to designate the means by which a property owner may evidence his or her ownership. In other words, title may relate either to ownership itself or to the acts, instruments, or records *1014 which prove ownership. When this Article speaks of "examining title" or "rendering an opinion on title," it speaks of title in the evidentiary sense rather than the pure ownership sense. "Examination of title" thus refers to examining evidence to prove title to real property.

2. Stand-up & Sit-down Examinations.

The two methods most often employed in examining petroleum land titles are (a) "examinations from abstract" or "sit-down" examinations and (b) "direct examinations of the county records" or "stand-up" examinations. Such title searches have been described as follows:

Mineral title opinions are based on either "stand-up" or "sit-down" searches. In a stand-up search, the examining attorney searches the official records of the county recorder's office and other county offices where the subject land is located. In a sit-down search, the attorney examines a verbatim abstract furnished by an abstract company. A verbatim abstract contains copies of all instruments affecting title to the property, copies of judgments rendered against persons in the chain of title, and statements concerning payment of taxes.¹⁹

3. Title Opinions

A title opinion consists of an attorney's conclusions concerning the ownership of a tract of land and the minerals underlying that land, based upon the attorney's examination of title. Title opinions are usually in letter form. Although they are expressed as statements of opinion with reservations, qualifications, and exceptions,²⁰ title opinions can expose the title attorney to malpractice liability for material errors and omissions.²¹

*1015 III. The Examination Process -- Persons Involved and Respective Responsibilities

The examination of petroleum land titles requires discipline, attention to detail, knowledge in several areas of the law, and an aptitude for gathering evidence. Further, examining the record, preparing a title opinion, and deciding whether to accept title requires business judgment and teamwork on the part of three professionals, all with different roles, who are usually involved in the process: the landman, the title attorney, and the company manager.

Landmen perform a number of key functions in the examination process. In stand-up examinations the landman typically conducts a search of the indices, establishes a chain of title based on his search, and prepares a run sheet reflecting the instruments in the chain of title.²² Although the landman's duties are generally less extensive in examinations from abstracts, he typically performs a number of valuable services in this sit-down examination as well.²³ In connection with either type of examination, the landman operates as a trained investigator and may be called on to close holes in the chain of title, develop additional facts, and cure title defects.²⁴

The title attorney examines the instruments in the chain of title and prepares a title opinion which sets forth the surface and mineral ownership.²⁵ The title opinion also notes any deficiencies in title and contains information as to the curative measures necessary to bring title up to the desired standard.²⁶

In this Article, "company management" refers to the land department of the oil and gas company that desires to develop property for oil and gas or to market production (or more specifically, the individual in that land department responsible for the prospect to which the title opinion relates). Company management determines what title risks are acceptable. Typically, the attorney will apply a "marketable title"²⁷ standard in examining title and preparing his opinion. Often, however, company management will accept a title which is less than "marketable" if the *1016 business risk in accepting such title appears reasonable.²⁸

The respective functions of the three professionals involved in the process of examining petroleum land titles frequently overlap. For example, the examining attorney should point out defects in title and let company management decide on whether to waive such defects. However, the attorney should not operate in a vacuum by raising problems of little practical significance. Although company management may consult with the examining attorney prior to deciding what business risk to accept relative to a particular title, the ultimate decision rests solely with company management. A working knowledge of the law is extremely helpful to the landman, but he should not take it upon himself to waive a defect simply because he thinks the attorney is wrong on the law. On the other hand, the landman may recommend waiving a defect based on facts known to him but not known to the attorney. Furthermore, the attorney's title opinion should not contain requirements couched in terms such as "satisfy yourself" when a legal determination is involved; however, such a requirement is proper as to factual matters such as a missing delay rental receipt.

Countless additional examples could be cited to illustrate the interdependence and overlap in the respective functions performed by the examining attorney, the landman, and company management. Thus, each of the three professionals should be aware of her own role as well as the role of the others in the overall process of examining petroleum land titles.

IV. Applicable Standards in Examining and Approving Titles

A. Marketable Title – The Standard Applied in Examining Titles

Long ago, the law established an objective standard called "marketable title," against which a title would be measured for purposes of title examination. Title approval requires a different standard. A marketable title is free from reasonable doubt such that a prudent person, with knowledge of all salient facts and circumstances and their legal significance, would be willing to accept it.²⁹ All title opinions in Texas *1017 must be rendered based on marketable title.³⁰ To be marketable, a title need not be absolutely free from every technical and possible suspicion. The mere possibility of a defect which, according to ordinary experience, has no probable basis does not show an unmarketable title.³¹

Generally, title will not be considered marketable if:

1. a reasonable chance exists that a third party could challenge the validity of title against the record owner;³²
2. parol evidence is necessary to remove doubt as to the validity and sufficiency of the owner's title;³³
3. the title rests on a presumption of fact that would probably become a fact issue to be decided by a jury in the event of a suit;³⁴ or
4. the record discloses outstanding interests claimed by third parties that could reasonably subject the property owner to litigation or compel the owner to resort to parol evidence *1018 to defend his title against outstanding claims.³⁵

In addition, to meet the standard of marketability, title must be unencumbered. Thus, prior oil and gas leases and mortgages should be released, taxes should be paid, and judgments should be satisfied. Where prior leases, liens, or encumbrances have

not been released, marketable title must be established by producing clear, readily accessible evidence of non-production of prior oil and gas leases that have expired, or similar evidence of payment of unreleased liens or encumbrances.

B. Business Risk -- The Standard Applied to Approving Titles

In practice, with respect to petroleum land titles, marketable title merely establishes the basis for rendering title opinions, not the type of title which must exist before accepting a lease or drilling a well. Customarily, an oil company will accept a title that is a reasonable "business risk" even though that title fails to meet the marketability standard. This does not mean a title will be accepted when serious doubts exist as to its validity. Acceptable business risk does mean that leases will be acquired and wells will be drilled on property when gaps in record title are bridged by apparently reliable affidavits of adverse possession, or proof of death or heirship, even though a remote legal possibility still exists that title could be attacked.³⁶

The degree of risk considered acceptable varies with the examination's purpose and the company management's business judgment. Obviously, an acceptable risk when one is "checkerboarding" leases for a bonus of ten dollars per acre may not be acceptable when the decision involves drilling a test well costing over a million dollars.³⁷ Company attitudes concerning acceptable risks vary with the management's differing analyses of the likelihood of title failure balanced against the cost of curing title defects.³⁸

C. Interplay Between Examination and Approval of Titles

Most oil companies follow a highly practical approach in approving or **1019* disapproving titles. The attorney prepares an opinion based on the relatively objective standard of marketability. Company management then makes the business decision whether to accept title. That decision is usually based on the more practical standard of business risk, rather than marketability. Thus, business risk is a subjective standard that may vary from case to case.³⁹

V. Methods of Examination, Indices, and Land Descriptions

A. Examinations from Abstract

In sit-down opinions, the examining attorney prepares a title opinion based on the attorney's examination of "abstracts of title." An abstract of title is a collection of verbatim copies of all instruments and proceedings contained in the public record which affect title to the land covered by the abstract.⁴⁰ With some variation, most abstracts consist of the following:

1. a caption sheet or title page which identifies the abstract by number and the legal description of the land;
2. a plat prepared by the abstractor which further identifies the land;
3. an index which lists all of the instruments contained in the abstract;
4. entries, which comprise the bulk of the abstract, consisting of verbatim copies (or in some cases excerpts or summaries) of each instrument affecting title to the land; and
5. an abstractor's certificate regarding the land abstracted, the records and time period covered, and the number of **1020* pages in the abstract.⁴¹

1. The Abstractor's Function

While the precise methods of compiling abstracts may vary, abstract company agents or employees generally compile abstracts using private tract indices similar to the plants maintained by title insurance companies. In many counties the same company operates as both a title insurance company and an abstract company.

Abstract companies typically maintain a set of cards (or their electronic equivalent) indexed by survey. In Texas, all lands situated in a particular county are within these surveys. Surveys typically consist of sections (640 acres), leagues (4428.4 acres), labors (177.1 acres), or fractions thereof. Originally, cards referenced under a given survey name reflected all transactions pertaining to land within that survey.⁴² Today, many abstract companies have replaced these card files with computer generated files that perform the same function.

From its plant and the public records, the abstractor compiles an abstract covering the specific tract under examination. The abstract should include not only all recorded conveyances, but also copies of any relevant judicial proceedings. In addition, copies of wills and related probate proceedings, proceedings to determine heirship, and proceedings relating to title passing through inheritance should be included, as should any affidavits of record such as affidavits of possession and heirship. The abstractor is not concerned with the consequences, legal interpretation, or effect of any of the instruments contained in the abstract.⁴³

2. Review of Abstracts

The title attorney is responsible for determining that the time period covered by the abstract has no gaps and that the abstract covers all of the land under examination. The attorney's responsibility may be complicated because several abstracts often cover the property under examination. For example, to save time or money, landmen sometimes borrow existing abstracts from landowners or prior lessees. The existing abstracts are then updated by "supplemental" abstracts,⁴⁴ and "base" abstracts⁴⁵ are ordered to **1021* cover portions of the property for which no existing abstracts are found.

The examining attorney does not need to know the precise details of how to compile abstracts. However, the examining attorney must carefully check the abstractor's certificate to determine that the land and time period covered by the abstract are correct, complete, and adequate. He should also check to determine whether abstract entries are properly indexed and whether the abstract covers all appropriate county records. Finally, if more than one abstract covers the land being examined, the attorney must determine how the various abstracts fit together and whether in total they cover all of the land under examination.

B. Stand-up Examinations

A "stand-up opinion" is a title opinion based on an examination of public records in the county where the land is situated.⁴⁶ The attorney may personally search the indices and records, as well as examine the instruments in the chain of title. Usually, however, the attorney delegates the task of performing the initial search of the indices and records to a landman.⁴⁷

Although procedures may vary to some degree,⁴⁸ a typical stand-up examination⁴⁹ is conducted as follows:

1. The landman establishes a "starting point" for the examination. The starting point is a past date such as sovereignty, fifty years ago, or the closing date of a prior opinion. The examination will cover the period between **1022* the starting point and the closing date of the opinion. The closing date is the last date covered by the records, typically a few days prior to the date of the examination.
2. The landman then ascertains the structure of the indices in the county where he is working. If the index maintained by the county clerk is a "grantor-grantee" index,⁵⁰ the landman uses the grantee indices to trace title from the present to the starting point and uses the grantor indices to research title from the starting point to the present.⁵¹
3. In addition to the indices and records in the county clerk's office, the landman will search several other indices and records outside the county clerk's office which may reveal information affecting the status of title. These records include probate, county, and district court records; Uniform Commercial Code filings and the records of the tax assessor/collector.

4. From these various indices, the landman compiles a list of the instruments that may affect title to the property. He must then go to the record books and review each instrument to determine its relevance. Some of the instruments found in the indices will be clearly irrelevant. If doubt exists as to relevance, however, the instrument should be included in the run sheet.⁵²

5. The landman's next task is to list the instruments in the chain of title in a run sheet.⁵³ A run sheet lists the instruments in chronological order and includes the type of instrument, parties, and recording data.

*1023 6. At this point, the examining attorney generally assumes the task of completing the title examination. Using the run sheet as a guide, she goes to the record books and examines each instrument listed on the run sheet. Among the things the examining attorney must look for are the current ownership of the surface and minerals, gaps in the chain of title, defects in the instruments, encumbrances, and legal requirements. The examining attorney should also check the indices, particularly if gaps exist or matters look suspect. While the landman's run sheet is an extremely valuable tool that can save the attorney countless hours, the attorney should not base her conclusions on the run sheet or the apparent content of the instruments it lists. The attorney must review each of the listed instruments and base her conclusions on her own examination.

The sequence of the above steps will vary significantly from examination to examination, although the order listed above is quite typical. Many of the steps take place more or less simultaneously or in varying order as to different chronological periods in the chain of title, which may span several decades if not centuries. Shortcuts, such as recital references to prior instruments, often speed up the search process. More often, though, the search reveals apparent gaps in the chain of title, apparent dead ends, or countless other problems which must be resolved.

The title examining process is one of evidence gathering and investigation. The result depends on the ingenuity, perseverance, and attention to detail exercised by the landman and the attorney involved in the stand-up examination. The result also depends on their ability to work together as a team. Like the abstractor, the landman locates all instruments and proceedings which may affect title. The abstractor places these instruments in his abstract, and the landman lists the instruments on his run sheet. The examining attorney bears sole responsibility for interpreting these instruments and determining their relevance, materiality, and legal effect.

C. Indices

The most common type of index in most states is the grantor-grantee index, in which each instrument is indexed under the names of the grantor *1024 and the grantee. In Texas, the legislature requires each county to maintain a grantor-grantee index.⁵⁴ Clerks periodically compile additions to the index which are set forth in supplemental indices.⁵⁵ Both the main and supplemental index books must be examined, and the instruments revealed by the index must be pulled and read to determine relevancy.

The public records in some states and counties have a tract index⁵⁶ in addition to the grantor-grantee index. When a tract index is not available in the public records, the local abstract or title insurance company may have a private tract index, which can usually be used for a fee. Tracts, of course, vary in size. Generally, a tract index that lists in one place the various instruments affecting title to a particular tract of land can be helpful, even when the tract is an entire survey and the title examiner is only interested in a small portion of the land in that survey.

Finally, the structure of both public records and indices varies from county to county. Some counties maintain one set of records and indices for all instruments, while others maintain separate sets of records such as deed records, deed of trust records, and oil and gas records.⁵⁷

*1025 D. Land Descriptions

The title examiner must examine the instruments in the chain of title to determine whether they contain adequate legal descriptions. Generally, a land description is legally adequate if the deed or other instrument contains sufficient information to

identify the described land with reasonable certainty.⁵⁸ If the description is not legally adequate, the instrument is void under the statute of frauds.⁵⁹

Most rural land⁶⁰ in the United States is described under the "rectangular survey system" which was established in 1796 when Congress passed the National Land Act.⁶¹ The National Land Act established a series of six square mile townships identified by township lines running east and west and range lines running north and south. Each township contained thirty-six 640 acre sections arranged in a square (i.e., 1 square mile). Each section was further subdivided into 160 acre quarter sections, each of which was further divided into forty acre quarters.⁶² The most prevalent method of describing land surveyed under the rectangular survey system is by reference to its location within the system; for example: the Northwest quarter of Section 10, Township 2 North, Range 4 West of the 31st principal meridian.

Various parts of the country recognize several exceptions to the rectangular survey system.⁶³ The most important exception to the rectangular survey system, in the context of petroleum land titles, is found in south and east Texas. Spanish and Mexican land grants subdivided vast portions of Texas into irregularly shaped surveys containing one or more leagues of land (4428.4 acres) or one or more **1026* labors of land (177.1 acres).⁶⁴ The Spanish vara was the unit of linear measurement. The legislature declared that the vara was equivalent to 33 1/3 inches.⁶⁵ This system described land within these surveys by metes and bounds.⁶⁶

Metes and bounds descriptions give precise boundaries by angle, distance, and course from a fixed and ascertainable starting point which can be located on the ground -- the "monument." The monument can be natural, such as a tree; artificial, such as a fence post; or a point established by reference to a recognized survey, such as "480 feet south of the northwest corner of the Jason Daniel survey." All metes and bounds descriptions must "close" so that the final point is the same as the starting point.⁶⁷

VI. Transferring Title

A. Conveyances

The most common way to transfer land title is conveyance.⁶⁸ Deeds and assignments are the types of conveyances most often used to transfer title to interests in oil and gas.⁶⁹

A conveyance must: (1) be written, (2) name the parties -- grantor and grantee, (3) contain present words of grant, (4) contain an adequate description of the property, and (5) be duly executed.⁷⁰

An effective conveyance must be delivered.⁷¹ Delivery contemplates a present intent to transfer title. An intent to transfer title at some future date or on the happening of some future contingency, such as the grantor's death, does not satisfy the delivery requirement.⁷² Usually, a title examiner **1027* cannot tell from the record whether a deed has been properly delivered. Deeds are presumed to have been properly delivered unless the record or other evidence indicates the contrary.⁷³ However, a lengthy lapse in time between the date on the deed and the recording date may rebut the presumption of proper delivery, and should put the title examiner on notice of possible delivery problems. The prime example of such a lapse is the "dresser drawer deed." In this situation, a grantor executes a deed in favor of his son, but instead of recording the deed, he places it in his safe deposit box with instructions to record the deed after the grantor's death. Such a deed does not legally satisfy the delivery requirement,⁷⁴ and should generate a requirement in the title opinion. Quitclaim deeds or disclaimers of interest from all the grantor's heirs other than the grantee named in the "dresser drawer deed" are the usual methods of curing title.⁷⁵

B. Other Means of Transferring Title

In addition to conveyance, ownership of oil and gas interests may be transferred through judicial action, inheritance, and involuntary transfers.

Judicial transfers generally occur in two situations. The first situation involves the sale of property pursuant to court order, such as mortgage or tax foreclosure proceedings. The second situation involves proceedings in which a court resolves real property ownership disputes such as quiet title suits or trespass to try title suits.⁷⁶

When a property owner dies, title to the decedent's property passes to his beneficiaries, heirs, administrators, executors, or successors in interest through probate of the decedent's will or under laws of descent and distribution. Section 37 of the Texas Probate Code provides that "[w]hen a person dies leaving a lawful will, all of his estate devised or bequeathed by such will . . . shall vest immediately in the devisees or legatees . . . ; and all the estate of such person, not devised or bequeathed, shall vest immediately in his heirs at law . . ."⁷⁷ Generally, the same considerations that govern title transfers by will or intestate succession govern transfers of interests in oil and gas.

Finally, title may be transferred involuntarily through adverse possession. All states have statutes of limitations which generally provide that if one who is not the owner occupies land in an open, notorious, and adverse manner for the statutory time period, then mere occupancy of land may ripen into ownership divesting the former owner of title.⁷⁸

The legal requirements associated with such transfers are beyond the scope of this Article. However, title examination requires a broad understanding of several legal areas other than oil and gas law, including conveyancing, probate, judgments, statutes of limitations and statutes of descent and distribution.

C. Establishing a Starting Point for the Title Run

What should be the starting point for a title search? The answer usually depends on a variety of practical factors, including considerations related to time, cost, examination purpose, business risk, custom, and company policy. In some cases, the examining attorney and client may partially rely on a prior title opinion covering the land being examined.

In the preparation of the original or initial opinions,⁷⁹ the question arises whether or not the examiner should run title back to sovereignty. The time and expense of running back to sovereignty is typically weighed against the risk involved in cutting the search short. The purpose of a particular opinion may determine how far back to run a title search. For example, companies that would not consider going back to sovereignty when acquiring leases for a ten dollar per acre bonus might do so prior to⁸⁰ spending in excess of a million dollars to drill a well. Some states have curative statutes which decrease the risk of cutting the search short.⁸⁰

The following situation illustrates some of the practical considerations involved in deciding how far back to run a title search. In connection with a proposed loan from the Reconstruction Finance Corporation ("RFC") secured by a lien on real estate owned by his client, a New Orleans attorney prepared an extensive title opinion based on a title examination going back to 1803. The RFC hesitated to approve the loan and requested that the attorney run the title search back further than 1803. The New Orleans attorney's classic reply read as follows:

Your letter regarding titles in case No. 189156 [was] received. I note you wish titles to extend further than I have presented them. I was unaware that any educated men in the world failed to know that Louisiana was purchased by the United States from France in 1803. The land came into possession of Spain by right of discovery made in 1492 by a Spanish-Portuguese sailor named Christopher Columbus, who had been granted the privilege of seeking a new route to India by the then reigning monarch, Queen Isabella. The good Queen being a pious woman and careful about titles (almost as careful, I might say, as the RFC) took the precaution of securing the blessings of the Pope of Rome upon the voyage before she sold her jewels to help Columbus. Now, the Pope, as you know, is the emissary of Jesus Christ, who is the son of God, and God, it is commonly accepted, made the world. Therefore, I believe it is safe to presume that He also made that part of the United States called "Louisiana" -- and I hope to hell you're satisfied.⁸¹

Although title-related literature probably over-quotes the above story, the story takes on a contemporary quality by substituting acronyms -- "RTC"⁸² for "RFC."

**1030* Every title must begin with a grant, such as a patent from the sovereign. In most states the original grant is a patent from the United States. The notable exceptions are the original thirteen states and Texas.

Four different sovereigns -- the Spanish government, the Mexican government, the Republic of Texas, and the State of Texas -- issued patents in Texas.⁸³ Texas entered the Union as an independent republic in 1845 and retained its public lands. Consequently, the federal government does not own land in Texas, except for "acquired lands." In other words, no part of the "federal public domain" is in Texas.⁸⁴ In most western states, such as New Mexico, the federal government still owns a large portion of the land.

A patent establishes that the sovereign has parted with legal title to the land. Since statutes of limitations do not run against the state, one cannot rely on limitation title to lands for which a valid patent was never issued.⁸⁵ Texas patents are registered in the general land office, and copies of patents should be (and usually are) recorded in the county where the land is situated. However, failure to record does not affect the patent's validity. Thus, if an examination reveals that a copy of the patent has not been recorded in the county where the land is situated, the title examiner should search the general land office records for evidence of the patent. Numerous other problems may arise concerning patents, including the procedures for granting and perfecting patents, the validity of such patents, whether the patent passed mineral rights, the Texas Relinquishment Act,⁸⁶ **1031* and vacancies.⁸⁷ However, these matters are outside the scope of this Article.⁸⁸

D. Chain of Title

The chain of conveyances or other transfers by which title passes from the patentee to the present owner is called the "chain of title." All instruments in the chain of title from the title search starting point to the title opinion closing date should be included in the abstract or run sheet and examined by the examining attorney. Gaps or defects often exist in the early chain of title. Following a gap or irregularity, title examiners usually take some comfort if a regular chain of title ensues for the limitations period, prior to any severance of minerals.⁸⁹ In this situation, title examiners often rely on an affidavit of possession containing facts sufficient to establish limitation title.⁹⁰

VII. The Attorney's Examination

Title examiners should understand the basic distinction between the duty of the examining attorney and that of the abstractor or landman. The duties of the landman and the abstractor are to search the record and find, report, and assemble the facts. The duties of the examining attorney are to:

1. examine the instruments revealed by the abstract or the record;
2. interpret the instruments in the chain of title;
3. formulate legal and factual conclusions based on the examination; and
4. reflect these conclusions in a title opinion.

**1032* Preceding sections of this Article focused on the practical steps involved in searching the record. This section and the following sections focus on the examination process and title opinion preparation.

The purpose of a title opinion is to advise the client of title defects and irregularities which might impair marketable title or expose the client to litigation and to suggest how those defects and irregularities may be cured. The examining attorney should strive to solve problems, not create them. The attorney's job is not to impress the client with his knowledge of obscure legal

points or with his ability to uncover facts of questionable relevance. Rather, the attorney should focus on problems that might expose the client to real world risks and focus on finding solutions to those problems.

One of the examining attorney's most difficult chores in the examination process is organization. The abstract or run sheet may cover a lengthy time period and reveal countless title transfers reflected by a plethora of instruments -- all of which need to be examined, sorted, and classified. The examining attorney is the master of relevancy and materiality. He must determine the importance of a particular instrument or transaction within the context of the chain of title.

The examining attorney must develop a system that reflects his title examination results as succinctly and efficiently as possible. Developing such a system avoids confusion, duplication of effort, and repeated searches through a thick abstract or set of instruments. Many examining attorneys find that making one or more graphic depictions of the chain of title is the most workable method for initially summarizing the examination results.⁹¹ The types of diagrams and worksheets vary according to the preferences of the attorney. Each examiner should develop his or her own methodology for summarizing his search results.

The attorney should include basic information such as the grantor and grantee, recording date, and date of instrument in the diagram. In complex title situations, two or three different diagrams may be necessary. For example, one diagram may show the basic chain of title; a second may show encumbrances, mortgages, liens, and unreleased oil and gas leases; and a third may show assignments of the present oil and gas lease. In a less complex chain of title, all transactions can be combined into one ^{*1033} diagram.⁹² Diagrams depicting the chain of title can be useful tools which, when used with the run sheet or abstract index, can ease the attorney's difficult task of systematically examining instruments in the chain of title.

VIII. Title Irregularities

Few titles are completely free from doubt. Consequently, the examination will likely reveal various types and degrees of title irregularities. This Section discusses some commonly-encountered title irregularities. However, a discussion of every type of irregularity exceeds the scope of this Article.

A. Nature of the Interest -- Mineral or Royalty

A title examiner often confronts the problem of determining the legal nature of an interest -- whether a particular grant or reservation in a chain of title instrument creates a mineral interest or a royalty interest. This determination is critical in establishing who must join in a lease, how production and costs of production are allocated, and who receives royalty, bonus, and delay rentals. Understanding how that determination is made goes to the heart of oil and gas jurisprudence.

The incidents of mineral ownership are well-established and consist of "development rights," "executive rights," and "rights to economic benefits under the oil and gas lease." The "development right" includes the right to explore for and develop minerals, as well as the obligation to pay any costs of exploration and development. The development right also includes the right to reasonable use of the surface estate and the right of ingress and egress.⁹³ Although the mineral owner can personally exercise the development right, he rarely does so because most mineral owners do not have the capital or technical knowledge to explore for oil and gas. Instead, the mineral owner usually conveys this right to an oil company through an oil and gas lease.⁹⁴

^{*1034} The "executive right" is the power to lease.⁹⁵ The "Right to Economic Benefits Under the Oil and Gas Lease" usually consists of bonus payments, delay rentals, and royalties.⁹⁶

A mineral interest encompasses some or all of the above incidents of mineral ownership. A royalty interest, on the other hand, is only one incident of mineral ownership. A royalty interest is a share of production free of the costs of exploration and production.⁹⁷ A royalty interest does not include any right to develop the minerals, to delay rentals, or to receive bonuses.⁹⁸

Through proper draftsmanship, interests which are clearly either mineral or royalty in nature can be easily created, reserved, or conveyed. However, any attorney or landman examining petroleum land titles will likely encounter many instruments which contain an endless variety of ambiguities relating to the nature of the interest conveyed or reserved.

When an instrument in the chain of title contains ambiguous language, title examiners face problems in determining whether the conveyance creates a mineral interest or a royalty interest.⁹⁹ What specific language *1035 determines whether a royalty or mineral interest was reserved or conveyed? The answer to this factual inquiry depends on the interpretation given to specific language in an infinite variety of combinations and circumstances.¹⁰⁰

The ultimate question in all cases is whether the parties intend to reserve or to convey a rock formation under the ground, or a can of oil at the surface. Some of the factors potentially influencing a court's interpretation of the parties' intent are discussed below.

Courts generally interpret "produced & saved" as royalty language while they generally interpret "in and under" as mineral language. These phrases are not universally controlling, and the ultimate determination often depends on whether the phrases are used alone or in combination with other words relating to the interest conveyed or reserved.

The label that the instrument places on the interest, either "mineral interest" or "royalty interest," is not controlling, but it may be some evidence of the parties' intent. Courts usually place little or no weight on the instrument's title. Many instruments entitled "Mineral Deed" have been held to convey royalty interests and vice versa. Thus, courts look to the instrument's substance, not the instrument's label, in determining whether a mineral or royalty interest was conveyed.

Courts usually consider whether the interest is cost-bearing and whether the instrument carries a right to lease or share in other economic benefits under the lease as controlling facts. Unfortunately, these factors are not usually clear from the instrument's language.

However, the presence of words indicating that the interest includes a right of ingress and egress or a right to drill suggests that the parties intended a mineral interest.¹⁰¹ The question of whether a particular interest is a mineral or a royalty interest also arises in situations where a deed's granting clause grants minerals, but later deed language reserves or strips away most of the incidents of mineral ownership.

For example, in *Altman v. Blake*,¹⁰² the granting clause provided:

W.R. Blake, Jr. . . . does hereby grant . . . unto W.R. Blake, Sr. . . . an undivided one-sixteenth (1/16) interest in *1036 and to all of the oil, gas and other minerals in and under and that may be produced But does not participate in any rentals or leases . . . with the rights of ingress and egress at all times for the purpose of mining, drilling, exploring¹⁰³

The Texas Supreme Court held that the deed conveyed a 1/16 mineral interest stripped of the executive right and the right to receive delay rentals.¹⁰⁴ In reaching that result, the court restated the component elements of the mineral estate¹⁰⁵ and reaffirmed the basic proposition that such component elements can be individually severed and transferred.

The court then ruled that the development right is the linchpin of the mineral estate. Although the right to develop is the most rarely used stick in the bundle of mineral rights, it is the right that is essential in distinguishing mineral interests from royalty interests. If the interest reserved or conveyed includes a right to develop, it is a mineral interest. Even when stripped of all apparent economic value, it remains a mineral interest rather than a royalty interest.¹⁰⁶

B. Size of the Interest -- Double Fraction Ambiguities

Title examiners may also encounter difficulty determining the size of the interest reserved or conveyed. Anytime someone who owns less than all of the minerals conveys or reserves a fractional interest, an ambiguity may exist as to whether the grant or reservation is intended to be a fraction of the whole estate or a fraction of that part of the estate owned by the grantor. This situation is called the "double fraction problem."¹⁰⁷

One subset of the double fraction problem may arise when O, who owns 1/2 the minerals in Blackacre, conveys to E an undivided 1/4 of the *1037 oil and gas "produced and saved" from the above described land. A lease on Blackacre provides for a 1/8

royalty. The question is raised: What is the size of E's royalty? Is it 1/4 of the entire lease royalty or merely 1/4 of O's 1/2? Expressed mathematically, E's royalty could be:

$1/4$ of $1/8 = 1/32$; or

$1/4$ of $1/2$ of $1/8 = 1/64$

Averyt v. Grande, Inc. illustrates this aspect of the double fraction problem.¹⁰⁸ In *Averyt*, the grantor, Grande, who owned the surface and 1/2 the minerals in a tract of land, conveyed the property to Averyt's predecessor in title, reserving 1/4 of the royalty on oil, gas, and other minerals produced from the "lands above described." The question was whether Grande reserved 1/4 of the royalty attributable to the entire tract or 1/4 of the royalty attributable to Grande's 1/2 interest in the tract.

The court held that Grande had reserved 1/4 of the royalty on the oil and gas produced from the entire tract.¹⁰⁹ The rule applicable to cases such as *Averyt*, sometimes called the "land conveyed/land described rule," has been restated as follows:

[W]here a fraction designated in a deed is stated to be a mineral interest [(or a royalty interest)] in land described in the deed, the fraction is to be calculated upon the entire interest. . . . Where a fraction designated in a reservation clause is stated to be a mineral interest in land conveyed by the deed, the fraction is to be calculated upon the grantor's fractional mineral interest. . . .¹¹⁰

Another subset of the double fraction problem may arise when inconsistent fractions appear in a conveyance. An example of this issue is found in the seminal case of *Alford v. Krum*.¹¹¹ The deed construed in *Alford* contained a "granting" clause which conveyed 1/2 of 1/8 of the minerals, a "subject to" clause which stated that the grantee was entitled to a 1/16 royalty interest under an existing lease, and a "future lease" clause¹¹² which stated that upon expiration of the existing lease the grantee would receive a 1/2 interest in the minerals.¹¹² The Corpus Christi Court of Appeals held that the deed conveyed a 1/16 mineral interest during the pendency of the existing lease. On termination of the lease, the interest increased to a 1/2 mineral interest. The Texas Supreme Court reversed, holding that the deed conveyed a 1/16 mineral interest. The Court reasoned that the fraction in the granting clause would prevail as a matter of law due to the application of a canon of construction known as the "repugnant to the grant" doctrine.¹¹³

Commentators severely criticized *Alford*¹¹⁴ and in 1991 the Texas Supreme Court overruled *Alford* in *Luckel v. White*.¹¹⁵ *Luckel*, like *Alford*, involved inconsistent fractions in the "granting," "subject to," and "future lease" clauses.¹¹⁶ In overruling *Alford*, the court rejected the "repugnant to the grant" approach and applied a well-known rule of construction known as the "four corners rule."¹¹⁷ This rule of construction seeks to give effect to all portions of the deed, not just the granting clause. The four corners rule is the canon applied today in construing inconsistent fractions.

C. Rules of Construction.

To deal effectively with mineral/royalty ambiguities, double fraction problems, and other construction problems, title examiners must understand how courts interpret ambiguities in instruments reserving or¹¹⁸ conveying interests in oil and gas.¹¹⁸ Although many judicial opinions construing deeds state that the court is trying to ascertain the parties' intent, the holdings of those opinions often do not turn on the parties' subjective or objective intent. Courts do not affirmatively seek to render decisions contrary to the parties' intent, nor are they wholly indifferent to the parties' intent. On the contrary, courts do seek to ascertain the parties' intent, but generally only to the extent that the four corners of the instrument evidence such intent. Courts rarely admit extrinsic evidence to ascertain intent.¹¹⁹ In oil and gas cases, when the parties' intent is not clear from the four corners of the instrument, courts generally apply rules of construction to interpret the instrument.¹²⁰ Rules or canons of construction are not rules of law. Because the choice and use of canons of construction is discretionary with the courts, results are not always consistent.¹²¹ Rather, canons of construction are mere statements of judicial preference used to resolve particular problems. They are based on common sense and human experience, and are designed to achieve what

courts believe should be the normal result for the problem under consideration. Although the ostensible function of rules of construction is to ascertain the parties' intent, frequently the application of these rules defeats the actual intent of the parties. In reality, rules of construction are applied to resolve disputes in which the parties' intent is not clear.¹²²

Courts apply rules of construction to lend a degree of certainty to the law. Although certainty is both a legitimate and powerful policy goal of property law, it is not necessarily related to intent. Results often do not reflect the parties' intent, irrespective of judicial statements to the contrary. An inverse relationship usually exists between a court's **1640* willingness to admit extrinsic or parol evidence and a court's use of canons of construction. "The more extrinsic evidence that is admitted, the less the court needs to resort to canons of construction."¹²³

The idea behind the popular expression, "[t]his is tantamount to a rule of property," is that such a rule creates certainty. Once the title examiner appreciates the quest for certainty, deed construction cases and the application of rules of construction to resolve those cases become somewhat easier to understand and manage.

Numerous rules of construction exist,¹²⁴ but the following three rules are frequently found in oil and gas cases and warrant special attention:

1. The "Greatest Estate" or "Greatest Interest Rule," states that courts will interpret a deed that does not specifically limit the size or nature of the interest conveyed as conveying everything the grantor owns. In other words, the grantor conveys everything he owns except that which is specifically reserved.
2. The "In Sequence Rule" states that the court will interpret the language describing the grant before it will interpret the language describing the reservation. Thus, courts interpret each portion of the conveyance in sequence, without reference to other portions of the document. If the language of the granting clause conflicts with the language of the reservation clause, the granting clause generally prevails.
3. The "Literal Meaning Rule" directs courts to give the words of a conveyance their literal meaning. The drafter is deemed to have meant exactly what he or she stated in the instrument.

*Averyt v. Grande*¹²⁵ illustrates the application of the "literal meaning rule." In *Averyt*, the deed literally reserved a fraction of the "land described," and the described land encompassed the entire tract, not a 1/2 interest in the tract. *Averyt* also illustrates the "in sequence rule." The **1041* court construed the grant before it interpreted the reservation, and the court resolved conflicts in favor of the grant.¹²⁶

*Altman v. Blake*¹²⁷ applied the "greatest estate rule." In *Altman*, the component parts of the mineral estate, which were not specifically reserved, passed to the grantee.

Courts apply dozens of other rules of construction. Some of the commonly applied rules of construction include the following:

1. Courts construe instruments against the party preparing the instrument. Accordingly, real estate leases are construed against the lessor, while oil and gas leases are construed against the lessee.
2. Typewritten or handwritten provisions prevail over printed provisions.
3. In the event of conflict between provisions, specific provisions prevail over general provisions.
4. Through the rule of *eiusdem generis*, courts interpret general words that follow specific words as referring to the same types of items described by the specific words.¹²⁸

Although rules of construction are not rules of law, some rules of construction have become so entrenched that some courts follow them as if they were rules of law. Unfortunately, these rules occasionally are applied blindly and in lieu of rational thought.

Justice Calvert aptly described rules of construction and their place in the larger process of judicial interpretation:

Courts try to solve disputes over the meaning of contracts by giving them the meaning the parties intended them to have. This is as it should be. But what meaning the parties to a contract intended it to have is often unclear. Once a dispute arises over meaning, it can hardly be expected that the parties will agree on what meaning was *1042 intended. It is for this reason that the courts have built up a system of rules of interpretation and construction to arrive at meaning, ignoring testimony of subjective intent. "Intention of the parties" is often guesswork at best. Sometimes the true intention of one or even of both parties may be defeated. . . . So, while use of rules of interpretation and construction may not always result in ascertaining the true intention of parties in using particular language . . . , their use yet must be better than pure guess-work in most cases else they would never have been evolved.¹²⁹

Knowledge of the process followed by courts when interpreting conveyances helps the title examiner make determinations in his title opinion. However, no title examiner has sufficient knowledge in this area to answer all interpretation questions that might arise in the course of a title examination. Potential conveyancing ambiguities in the chain of title are simply too broad and too varied. Further, judicial decisions in this area are inconsistent. As Professor Kramer propounded:

The continued adherence to outdated forms as well as continued confusion as to the nature of the interests owned by the parties after an oil and gas lease has been executed have created difficult interpretational issues. These difficulties have led to a jurisprudence with little predictability and doctrinal upheaval.¹³⁰

*1043 If an eminent legal scholar is unable to "discern the big picture or . . . categorize and rationalize the myriad canons of construction that have been used and abused in Texas case law,"¹³¹ it is unlikely that a title examiner, struggling to complete a title opinion under time pressure, could resolve all of the inconsistencies and uncertainties. Fortunately, the title examiner does not have to resolve all of these difficult questions with perfect certainty. If controlling precedent provides a clear solution to a particular problem, the attorney can set forth appropriate conclusions in the title opinion. Otherwise, the title attorney should not speculate on how a court may resolve a particular uncertainty. Instead, the attorney should state the problem and suggest curative steps that are necessary to insure good title regardless of how the courts interpret the conveyance.¹³²

D. Overconveyances and Estoppel by Deed: The Duhig Rule

All title examiners should be aware of the rule announced in *Duhig v. Peavy-Moore Lumber Co.*¹³³ The Duhig Rule, followed in Texas and most oil-producing states, is a rule of law rather than a rule of construction.¹³⁴ The rule rests on a of breach of warranty theory and estoppel by deed, and it applies with mathematical certainty, irrespective of actual knowledge or equities.

The Duhig Rule applies to overconveyances by general warranty deed. A clear statement of the Duhig Rule is as follows:

Where a grantor conveys an interest in the minerals and in the same instrument reserves a mineral interest, and where there is a prior interest outstanding that is not excepted from the operation of the deed, so that effect may not be given to both the interest that grantor has purported to convey and the interest grantor has attempted to reserve, *1044 under the rule of *Duhig v. Peavy-Moore Lumber Co.*, the grantee is not limited to a suit in damages for failure of title, but the attempted reservation will fail to the extent necessary to make the grantee whole. Where complete failure of the reserved interest is insufficient to make the grantee whole, he will also have a cause of action in damages for failure of title.¹³⁵

In other words, the grantor cannot grant and reserve the same interest. If the grantor does not own a large enough interest to satisfy both the grant and the reservation, the grant will be satisfied first under the rationale of breach of warranty and estoppel by deed. The grantor will be estopped from claiming any interest until the grantee is made whole.¹³⁶

The Duhig Rule only applies to conveyances by warranty deed. Because the rationale for the Duhig Rule rests on breach of warranty, the rule clearly does not apply to conveyances through quitclaim deeds, which do not warrant anything.¹³⁷

Similarly, the Duhig Rule does not apply to oil and gas leases. In *McMahon v. Christmann*,¹³⁸ the Texas Supreme Court reasoned that since lessors frequently execute oil and gas leases purporting to cover the entire mineral interest, even though the lessors own only an undivided interest in the leased premises, applying the Duhig Rule to leases would be unfair. Accordingly, if a lessor who owns only 1/2 the minerals executes a lease purporting to cover 100 percent of the minerals, courts will not take any part of the lessor's reserved royalty under the Duhig Rule. Of course, the lessor's interest might be reduced through operation of a proportionate reduction clause in the lease.¹³⁹

***1045 E. Other Commonly Encountered Title Problems**

Title examiners may encounter a plethora of title problems in addition to problems involving the nature and size of the interests reserved or conveyed. This Section briefly discusses some of the more commonly encountered title problems. The problems discussed in this Section represent only a small sampling of potential title problems and serve merely as examples.¹⁴⁰

1. Possession

When someone other than the record owner possesses a tract of land, persons dealing with the land are charged with knowledge of possession, and they have a legal duty to determine the rights or claims of persons in possession.¹⁴¹ The examining attorney normally has no knowledge of possession, and unless furnished with information of possession by the landman or client, the attorney should make a routine comment in the title opinion advising the client of its duty of inquiry.

2. Unreleased Oil and Gas Leases

The title examination may reveal prior unreleased oil and gas leases which have apparently expired but are still recorded. These unreleased leases constitute a cloud on title to the mineral estate.¹⁴² The best method of removing this cloud on title is to secure a recordable release from the prior lessee. If a release cannot be obtained, other solutions may be available depending upon whether the unreleased lease is in its primary or secondary term.¹⁴³ The title opinion should suggest specific methods for *1046 removing this cloud on title.¹⁴⁴

3. Mortgages, Deeds of Trust, and Other Liens

Mortgages, deeds of trust, and other liens against the property, including tax or judgment liens, recorded prior to the oil and gas lease, constitute clouds on title to property.¹⁴⁵ The title opinion should contain a requirement that the mortgage, deed of trust, or other lien be released of record or subordinated to the oil and gas lease. Few lienholders are willing to release their liens, but most are interested in the financial well-being of their debtors and the value of collateral securing payment of the loan. Since oil and gas development may enhance the property value, and thus the mortgagee's collateral, many knowledgeable mortgagees agree to subordinate their liens to the oil and gas lease. If a release cannot be obtained, or if the mortgagee is unwilling to subordinate her lien, and no satisfactory alternative solutions can be found, the lessee may exercise business judgment and waive the title requirement.¹⁴⁶ The lessee is particularly likely to waive the title requirement when the outstanding indebtedness secured by the mortgage is relatively small and the lease contains a subrogation clause.

4. Heirship and Probate

The death of the record property owner may raise numerous title issues. If the record owner dies intestate, her property passes to her heirs under the laws of descent and distribution. If the record owner dies with a valid will, her property passes to the decedent's devisees pursuant to the terms of the will, provided that the will is properly probated.

Succession between the decedent and her heirs or devisees is generally ¹⁴⁷ established under the probate law of the state in which the property is located. The title examiner must identify the heirs or devisees and determine whether their succession was established according to applicable law. Detailed consideration of the law of wills and estates is beyond the scope of this Article. In general, intestate succession is judicially determined through various actions in probate court.¹⁴⁸ In some circumstances judicial action may not be necessary to determine heirship -- proof of death and an affidavit of heirship may suffice as evidence of succession.¹⁴⁹ When property passes by will, the attorney must examine copies of the will and related probate proceedings to determine whether property title passed to the devisees named in the will, pursuant to such proceedings, and free of all liens.¹⁵⁰

Title examiners often face practical problems concerning succession by inheritance. For example, assume O, the record owner of property in Goliad County, dies either testate or intestate in Harris County. O's sons, A and B, live on the property and execute leases in favor of X Oil Co., but nothing recorded in Goliad County shows their succession to title. In this situation, the examining attorney routinely makes a requirement in the title opinion relating to proof of heirship. The opinion will generally require, if O died testate, that a certified copy of his will and the related probate proceedings be recorded in Goliad County. If O died intestate, a certified copy of any proceeding to determine heirship should also be filed in Goliad County. In most circumstances, if no formal proceeding to determine heirship took place, proof of death and a recordable affidavit of heirship will usually suffice.

***1048 5. Capacity of Parties**

Various questions may arise regarding the capacity of parties executing instruments in the chain of title. Instruments such as leases or deeds executed by agents, corporate officers, executors, guardians, or trustees should raise red flags for the title examiner relative to capacity issues. For example, if an agent or attorney executes a lease or deed, the title examiner will probably want to examine the power of attorney to determine whether the power of attorney gives the agent authority to execute the instrument and convey the interest.¹⁵¹ Similar considerations apply to instruments executed by guardians, executors, administrators, trustees, corporate officers, and other fiduciaries or representatives. In all of these cases, the title examiner must carefully check the record, applicable statutes, and court proceedings for evidence of the representative's or fiduciary's power and authority to execute the instrument in question and bind the estate or principal.¹⁵²

6. Name Discrepancy

Sometimes the record reveals discrepancies in the spelling of a name of a given grantee and a subsequent grantor in the chain of title. The title examiner must determine whether this name discrepancy creates a material title defect. The examiner should use common sense and reason to determine which name discrepancies are worth noting. If sufficient evidence in other chain of title instruments establishes the parties' identity, then minor discrepancies can probably be ignored, absent special circumstances. If legitimate uncertainty exists regarding the identity of a person in the chain of title, an affidavit of identity should be required in the title opinion.¹⁵³

7. Spouses

Numerous title problems may arise relating to spouses, such as a ¹⁰⁴⁹ spouse's non-joinder in a deed or lease. The gravity of these problems will depend on the nature of the property, such as homestead classification; local law, such as community property classification; or various other considerations.¹⁵⁴ The examiner must note specific problems and should suggest solutions in the title opinion.

8. Life Tenants and Remaindermen

Leases from life tenants and remaindermen may raise problems. Subject to certain exceptions, the property interest held by life tenants and remaindermen requires joinder of both parties to grant leases. The life tenant may not commit waste on the property, and the remaindermen have no possessory rights until the death of the life tenant. In addition, special rules govern the manner in which royalty, bonus, and delay rentals are allocated among life tenants and remaindermen, and the allocation should be reflected in the title opinion.¹⁵⁵

9. Roads and Easements

The examiner should carefully review instruments creating roads, streets, or other strips of land to determine whether the interest granted was a fee interest or an easement. The examiner should ascertain the easement's ground location and should read the instruments creating the easement in their entirety to determine whether the easement will interfere with oil and gas operations. Conveyances by grantors who own land bounded by public highways or railroad rights-of-way may own mineral rights to the center of such roads or rights-of-way.¹⁵⁶

F. Handling Title Irregularities: Title Standards

Although few titles are perfect, even fewer are fatally defective. The title attorney should not lose sight of the title examination's purpose and the applicable standards. The title attorney advises the client regarding **1050* marketability of title while exercising a high degree of judgment based on the title's vulnerability to attack. Title attorneys do not serve their client's best interest by raising objections of questionable materiality or by writing lengthy dissertations on esoteric points of law which have little practical effect. The attorney should provide the client with a title opinion that is a workable tool for rendering title acceptable. The opinion should summarize the title's current status and provide useful, relevant guidelines for dealing with title objections and making title acceptable.

In the context of this overriding objective, title attorneys routinely apply certain presumptions of fact and rules of law. For example, deeds are presumed delivered, signatures are presumed valid, and grantors are presumed competent unless the record indicates otherwise.¹⁵⁷ While these propositions are well-established, other propositions are weaker and may be viewed differently by different title examiners. For example, what is the impact on marketability if: (1) deeds are recorded but not acknowledged, (2) deeds fail to disclose a grantor's marital status, (3) deeds omit a spouse's signature or (4) deeds reveal name discrepancies? The answers to these and similar questions may vary significantly among title examiners. To foster a higher degree of uniformity among title examiners and to aid title examiners in distinguishing defects that impair marketability from minor irregularities which do not affect marketability, the bar associations of at least twenty-six states have promulgated "title standards" or "uniform title examination standards," terms used synonymously in this Article.¹⁵⁸ A title standard is a statement, officially approved by a professional organization of lawyers, which declares **1051* solutions to problems that regularly arise in the title examination process.¹⁵⁹ The State bar association is usually the approving organization. The scope and function of title standards have been described as follows: A title standard should represent the substantially unanimous opinion of bar association members experienced in conveyances. However, a title standard may cover questions upon which inexperienced conveyancers are uninformed or may cover questions with respect to which over-ambitious conveyancers may take a position contrary to that of the great majority of competent experienced conveyancers. In other words, title standards should not cover questions which are controversial among competent, experienced conveyancers. However, the standards should resolve questions that cause problems for inexperienced parties.¹⁶⁰

Title standards promote uniformity, establish realistic practice standards, represent the recognized practices of the organized profession, and provide useful checklists for inexperienced title examiners.¹⁶¹ While the scope of title standards varies substantially from state to state,¹⁶² they typically encompass several areas. Some commonly included areas are: (1) duration of the search; (2) effect of lapse of time on title defects; (3) presumptions of fact which title examiners ordinarily should recognize; and (4) law that applies to recurring situations.¹⁶³

Oklahoma, a leader in the adoption and application of title examination standards, recognizes two primary purposes of title standards: (1) alleviating disagreements among bar association members on matters which impact title and (2) setting forth

matters which most lawyers agree on when reviewing title. The Oklahoma Bar Association adopted its first title standards in 1946. Since 1962 these title standards have been published in the Oklahoma Statutes Annotated.¹⁶⁴ In 1982 the Oklahoma Supreme Court endorsed the Title Examination Standards of the Oklahoma Bar Association as follows:

**1052* While [the Oklahoma] Title Examination Standards are not binding upon this Court, by reason of the research and careful study prior to their adoption and by reason of their general acceptance among the members of the bar of this state since their adoption, we deem such Title Examination Standards and the annotations cited in support thereof to be persuasive.¹⁶⁵

Texas does not currently have title standards. However, in 1990, the Real Estate, Probate, and Trust Law Section of the Texas State Bar established a Title Examination Standards Subcommittee. That subcommittee was charged with the task of drafting a set of title examination standards for Texas. The subcommittee's initial draft of Proposed Texas Title Standards is now in its final stages of revision.¹⁶⁶ The Proposed Texas Title Standards are generally modeled after Oklahoma's Title Standards but are much less extensive in their scope and coverage. Finalization and approval of the Proposed Texas Title Standards will be a positive step toward promoting uniformity and providing needed guidelines for Texas title examiners.¹⁶⁷

**1053* IX. Title Opinions

A title opinion reflects the results of the title examination and advises the client as to the current status of title and what is required to make title marketable. Although title opinions vary somewhat, they generally advise the client regarding ownership of the surface, mineral, and leasehold interests. In the course of setting out ownership of all interests, the opinion should address all aspects of title emanating from such ownership.¹⁶⁸

A. Types of Title Opinions

At several stages in the course of leasing and developing land and marketing oil and gas production, title examinations and/or title opinions may be required. The most frequent of these stages are:

1. Lease purchase title opinions which are rendered before the lessee pays the lessor a bonus for executing an oil and gas lease.
2. Drilling title opinions which are rendered before drilling begins.
3. Division order title opinions which are rendered before production purchasers pay the owners of such production.¹⁶⁹

**1054* The first full title opinion rendered on a piece of property is the "original" title opinion. For example, if a full title opinion is rendered at the lease purchase stage, then that opinion will be the "original" opinion, and a subsequent opinion rendered on the same property prior to drilling will be a "supplement" to the original opinion. While practices vary, most companies rely on record checks by landmen at the leasing stage and do not secure formal title opinions at that time. Thus, the opinion prepared prior to drilling is typically the "original" opinion. If drilling results in production, a Division Order Title Opinion must be prepared to facilitate preparation of "division orders."¹⁷⁰ Division Order Title Opinions set forth the respective percentage ownership of all parties having interests in production from the well and the land covered by the opinion.

Original Drilling Opinions and Division Order Opinions are the two most common types of title opinions. Both Original Drilling Opinions and Division Order Opinions are frequently supplemented to reflect the status of title requirements, new information, curative matters, or changes in the size or composition of the unit. Original Drilling Opinions and Division Order Opinions differ in two fundamental ways. First, Original Drilling Opinions typically trace title back a relatively long way in time, often to sovereignty, while Division Order Opinions, covering the same land, trace title back only to the closing date of the Original Drilling Opinion or the most recent supplement. Second, Original Drilling Opinions typically cover all leased property, while Division Order Opinions cover only the property allocated to the actual spacing unit established for a particular well.¹⁷¹ Skeletal forms of an Original Drilling Opinion and a Division Order Title Opinion are attached as appendices to serve as examples and facilitate the discussion of the form and content of Title Opinions.

*1055 B. Malpractice Liability

Many people read, work with, and rely on title opinions. Consequently, material errors or omissions in a title opinion expose the title attorney to malpractice liability, as illustrated in *Gavenda v. Strata Energy, Inc.*¹⁷² In *Gavenda*, the operators, who had drilled a producing well on certain property, hired an attorney to prepare a Division Order Title Opinion.¹⁷³ Well production proceeds were paid to the operators, who distributed these proceeds to the various owners of well production, including the Gavendas, who owned a nonparticipating royalty interest.¹⁷⁴ The size of the *Gavenda* interest was later questioned. All parties to the suit signed division orders which reflected the interests set out in the Division Order Title Opinion.¹⁷⁵

The title attorney found a reservation of "a one-half (1/2) non-participating royalty" extremely high and concluded that the parties probably meant to reserve a one-half (1/2) royalty.¹⁷⁶ The attorney's Division Order Title Opinion and the division orders prepared and signed based on that opinion reflected that interpretation.¹⁷⁷ Payments were made pursuant to those division orders for several years. Subsequently, nonparticipating royalty owners revoked the division order and filed suit, claiming a full one-half royalty interest.¹⁷⁸ The court agreed with the royalty owners and rendered judgment against the operators for approximately \$2.4 million, the amount of the underpayment from date of first production.¹⁷⁹ The operators filed a malpractice cross action against the attorney who rendered the opinion.¹⁸⁰

C. Form and Structure of Title Opinions

Title opinions take the form of letters from the examining attorney to the operator or purchaser of production, expressing the attorney's conclusions as to the status of title. The form and structure of the title *1056 opinion may vary significantly, depending on the opinion's purposes and the preferences of the particular attorney and client. However, basic principles relative to organization, form, and structure should be followed in preparing all opinions.

All opinions should contain essential information and be written to advise the readers of the current status of title and how to bring title to marketability status. The opinion should be well organized and limited to relevant information. The examples of original and division order opinions, attached as appendices, contain the minimal information required in a title opinion. The attachments reflect the significant differences in structure, content, and organization between original opinions and Division Order Opinions.

The heart of the original opinion is the section captioned "Title," which sets forth the attorney's conclusions as to the status of the surface title, and the minerals and leasehold interests in the property under examination as of the opinion's closing date. Ideally, every other part of the opinion should implement, explain, complement, or qualify the information contained in that section. The following sections should be included in the title opinion:

1. The caption or "RE Clause" should briefly describe the property under examination with appropriate reference to the lease and land involved.
2. The "Material Examined" section sets forth the examined materials on which the attorney based his opinion.
3. The section captioned "Patent Information and Chain of Title" should contain a brief narrative description of the chain of title, which helps readers understand the basis for the attorney's conclusions and exceptions to title.
4. The section captioned "Validity and Maintenance of Lease" contains the attorney's conclusions regarding the current validity of the lease and how the lease was maintained. This section typically refers to an exhibit which summarizes the principal lease terms for easy reference by the client.
5. The sections on "Taxes" and "Easements and Rights of *1057 Way" should contain information on the status of payment of ad valorem taxes and the existence of any easements which might affect operations on the property.

6. In a series of numbered paragraphs under the caption "Comments and Requirements," the opinion should set forth exceptions to title and the requirements to make title marketable.

7. Under the caption "Limitations," the attorney should note matters that the opinion does not cover.

8. Special facts or circumstances might call for additional captions or other information.

The heart of the division order opinion is the "Division of Interest" referred to in the opinion section of the same name and set out in detail in Exhibit A. In this section, the attorney sets forth in decimal form the well production ownership among the persons owning royalty, overriding royalty, and working interests in such production. The sum of the decimals will always equal one (1). The formula used to derive the decimal interests is set out to inform the reader how the attorney reached his or her conclusions.

The other sections of the Division Order Opinion implement, explain, complement, or qualify the Division of Interest. No title history is typically necessary in a Division Order Opinion since the time period covered is usually short. A narrative description of well interest assignments may be necessary, depending on the scope and complexity of the assignments. A section detailing the current status of the comments and requirements contained in the earlier opinion is often included.

The attorney should emphasize accuracy and completeness when preparing a title opinion. Many people, such as company management, landmen, lease analysts, division order analysts, and others, including attorneys, work with the title opinion. In fact, parties often pass around and rely on title opinions well into the future. The examining attorney should strive to write and structure the opinion in a manner that makes it as readable and as easy to work with as possible, without sacrificing **1058* accuracy.¹⁸¹ In short, the examining attorney assumes a high degree of responsibility each time he signs a title opinion. He should strive to produce complete, accurate, and relevant results, while producing succinct and well-written opinions.¹⁸²

X. Curing Title Defects

Curing title defects discovered during the title examination is the final step in the process discussed in this Article. Title requirements and curative matters represent two sides of the same coin; thus, curative considerations are part and parcel of the examination process. Attorneys and landmen often work closely together in curing title defects.¹⁸³ Consequently, both the examining attorney and the landman should understand the available curative tools. Detailed considerations regarding curative procedures -- for example, the form and content of curative affidavits or procedures involved in judicial proceedings brought to cure title defects -- are beyond the scope of this Article. The Article merely provides an overview of the primary procedures available to cure title defects.

Generally, the major types of curative procedures are as follow: (1) voluntary curative action, (2) compliance with curative statutes, and (3) suits to clear title. In curing a particular title problem, one should select the least expensive and time consuming alternative. These curative alternatives are not mutually exclusive, and the available procedures are often combined.¹⁸⁴

A. Voluntary Curative Action

Voluntary curative action consists of preparing, executing, and recording instruments that address various title problems raised in the title opinion. If the necessary parties are alive, can be located, and are cooperative, curative conveyances such as assignments, releases, quitclaim deeds, and correction deeds usually represent the surest and least **1059* expensive method of curing many title problems. All claimants or affected parties must execute these curative conveyances. Disclaimers, stipulations of interest, and ratification are also widely used to cure title defects. All affected parties should sign both the instrument and the curative instrument, and the curative instrument should contain words of grant.¹⁸⁵

Various affidavit forms are frequently used to cure title irregularities. Affidavits usually will not be sufficient to render an otherwise defective title marketable. However, these affidavits often furnish evidence to satisfy business risk, which is the standard generally applied in approving title.¹⁸⁶ The five most common categories of curative affidavits are: affidavits of

possession, affidavits of adverse possession, affidavits of non production, affidavits of death and heirship, and affidavits of identity.¹⁸⁷ Nothing magical exists in the fact that curative evidence is furnished in affidavit form. An affidavit's weight and usefulness depends on the detail, reliability, and factual accuracy of the affidavit information and on the affiant's knowledge of the facts.¹⁸⁸

B. Curative Statutes

All states have statutes which can be utilized in varying degrees to cure title defects or eliminate title requirements. Curative statutes are generally grounded on the policy against unreasonably burdening the transfer of land and the policy favoring quieting titles. Curative statutes are also a practical necessity. For example, most chains of title, in their early years, reveal apparent gaps in title, conveyancing irregularities, or defective court proceedings. From a cost effective, practical standpoint, these defects are difficult to cure absent curative statutes.¹⁸⁹

Although curative statutes vary from state to state, they generally fall into three categories:

(1) Statutes of limitations, which all states recognize, **1060* although in varying forms.¹⁹⁰

(2) Specific curative statutes which cure specifically enumerated defects or create irrefutable presumptions. These statutes typically relate to defects such as defective acknowledgments or executions in instruments which have been recorded for a prescribed time period, name discrepancies, enumerated deficiencies in court proceedings, and presumptions that some affidavits, if recorded for a prescribed time period, are true. These types of statutes are typically narrow in scope and vary from jurisdiction to jurisdiction.¹⁹¹ The examining attorney should be familiar with the specific statutes available in the jurisdiction in which he is working, the types of defects those statutes will cure and the extent of protection afforded by such statutes.

(3) In recent years several states have adopted marketable title acts which essentially seek to bar ancient defects under certain circumstances. Texas does not have a marketable title act. In general, these acts bar title defects occurring before a specified time when an instrument, under which the record owner claims title, has been recorded for a given number of years, and no claims adverse to the record holder's title have been filed during the specified time period.¹⁹²

**1061* These marketable title statutes typically provide that the record owner holds marketable title free of all interest or claims which depend on transactions occurring before the record owner's "root of title," as long as the "root of title" instrument has been recorded for a specified time period.¹⁹³ All of the marketable title acts contain exclusions, limitations, and exceptions which vary from state to state. For example, the acts typically exclude interests reflected in subsequent title transactions or preserved by filing statutory notices. Furthermore, various types of interests are excluded from the operation of the marketable title acts in some states.

C. Suits to Clear Title

Sometimes judicial action is the only means of curing title. Generally, judicial action should be used as a last resort due to time and expense. The most common causes of action available in Texas for establishing or curing title are (1) suits to quiet title and (2) suits in trespass to try title.¹⁹⁴

A suit to quiet title is a suit in which a person in possession seeks relief against persons making claims against plaintiff's title. Plaintiff must allege his right, title, and ownership with sufficient certainty to enable the court to see that the plaintiff has an ownership right that warrants judicial interference.¹⁹⁵ The suit to quiet title is the principal procedural vehicle for interpreting ambiguous instruments in the chain of title, removing clouds on title, and setting the record straight.

While suits to quiet title are equitable actions, trespass to try title suits are statutory.¹⁹⁶ Section 22.001 of the Texas Property Code provides that "[a] trespass to try title action is the method of determining title to lands, **1062* tenements, or other real property," and that "[t]he action of ejectment is not available in this state."¹⁹⁷

A plaintiff in a trespass to try title action must recover on the strength of his own title, which he can establish by proof of: (1) a regular chain of title from the sovereign, (2) superior title from a common source, (3) limitation title or (4) prior possession. The plaintiff's petition can be in statutory form. The plaintiff is not required specifically to plead his title.¹⁹⁸ However, by the statutory plea of "not guilty," the defendant places the question of title in issue and places the burden on the plaintiff to prove his title.¹⁹⁹

Judicial proceedings may be the only available course of action where adverse claimants are uncooperative and defects in title are serious. Therefore, title attorneys should be aware of the types of judicial proceedings available to clear title and should not hesitate to use those proceedings when necessary.

*1063 XI. Appendices²⁰⁰

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE
TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

Under its agreement with Investors A, B, and C, Aggressive is entitled to an ORI equal to the difference between 20% of total production and the sum of all other royalty and overriding royalty interests. (.2000000 - .1916666 = .0083334).

Footnotes

- a1 Associate Professor of Law, Texas Wesleyan University School of Law. J.D., University of Texas, 1960. Practiced primarily in the areas of Coporate/S.E.C. and Oil and Gas prior to joining the faculty of Texas Wesleyan in 1990. Professor Shade gratefully acknowledges the contribution of his research assistant, Robert McCleskey.
- 1 The majority of citations are to Texas authority, although many of these citations support propositions of general application.
- 2 See, e.g., Tex. Bus. & Com. Code Ann. s 26.01 (Vernon 1987).
- 3 See, e.g., Tex. Prop. Code Ann. s 13.001(a) (Vernon Supp. 1994) ("A conveyance of real property or an interest in real property or a mortgage or deed of trust is void as to a creditor or to a subsequent purchaser for a valuable consideration without notice unless the instrument has been acknowledged, sworn to, or proved and filed for record as required by law."); see also Carroll v. Holliman, 336 F.2d 425, 429 (5th Cir. 1964), cert. denied, 380 U.S. 907 (1965).
- 4 See Tex. Prop. Code Ann. s 13.001 (Vernon 1984).
- 5 See Hawley v. Bullock, 29 Tex. 216, 222 (1867).
- 6 The buyer's mortgage lender, if any, wants similar assurances.
- 7 The following are the most significant Texas recording statutes:
Tex. Prop. Code Ann. s 11.001(a) (Vernon 1984 & Supp. 1994) ("To be effectively recorded, an instrument ... must be recorded in the county in which a part of the property is located."); id. s 12.002(a) (recording a subdivision plat or replat); id. s 13.001(a) ("A conveyance of real property or an interest in real property or a mortgage or deed of trust is void as to a creditor or to a subsequent purchaser for valuable consideration without notice unless the instrument has been acknowledged, sworn to, or proved and filed for record as required by law."); id. s 13.003 (Vernon 1984) ("Recording a previously recorded instrument in the proper county does not validate an invalid instrument.").
- 8 See, e.g., Hawley, 29 Tex. at 222.
- 9 See generally 3 Fred A. Lange and Aloysius A. Leopold, Texas Practice ss 251-268 (2d ed. 1992 & Supp. 1993) [hereinafter Lange & Leopold]. A full discussion of state recording statutes is beyond the scope of this Article. However, both title attorneys and landmen should have a good working knowledge of the recording statutes in the jurisdictions where they conduct title searches.

- 10 Tex. Ins. Code Ann. art. 9.02a (Vernon Supp. 1994) (“ ‘Title Insurance’ means insuring, guaranteeing or indemnifying owners of real property or others interested therein against loss or damage suffered by reason of liens, encumbrances upon, or defects in the title to said property, and the invalidity or impairment of liens thereon”).
- 11 See *id.* See also Paul E. Basye, *Clearing Land Titles*, ch. 1 (2 d ed. 1970) [hereinafter Basye]; Jesse Dukeminier & James E. Krier, *Property* 670 (2d ed. 1988) [hereinafter Dukeminier & Krier] (“Title insurance is the opinion of the insurer concerning the validity of the title, backed by an agreement to make that opinion good if it should prove to be mistaken and loss results as a consequence.”).
- 12 See *infra* part IV for a discussion of the standards followed in examining and approving petroleum land titles, which are similar to the insurability standard that title insurance companies follow with respect to surface titles.
- 13 One reason title insurance is not available in connection with oil and gas transactions is the variety of property interests that may be created in oil and gas. If mineral ownership is severed from surface ownership, two separate fee estates result -- the mineral estate and the surface estate. Further, the mineral estate consists of several component parts, each of which can be separately conveyed. Finally, not only can the owner divide the mineral estate into its component parts, he can further divide it, temporarily or permanently, in all of the ways developed since the feudal beginning of modern property law. Such fractionalization regularly takes place because of the demands of oil business economics. Because the oil industry is a capital-intensive and risky business, fractionalization helps raise capital and spread the risk. See *infra* part VIII(A). See generally Bruce M. Kramer, *Conveying Mineral Interests -- Mastering the Problem Areas*, 26 *Tulsa L.J.* 175 (1990). [[[hereinafter Kramer, *Conveying Mineral Interests*].
- 14 “Prospect” is a term often employed in the oil and gas industry which may be defined in various ways depending on context. In this Article, the term is used as it relates to the future -- lands having potential for producing oil and gas. In *Wurzlow v. Placid Oil*, the court defined “prospect” as follows:
 [I]n the oil and gas industry, a prospect commences with the determination of the existence of a certain geological structure conducive to the production of oil and gas underlying a certain area of land. The actual existence of such minerals must then be determined and confirmed by actual drilling and production of said minerals.
 279 So. 2d 749, 754 (La. Ct. App. 1973).
- 15 See, e.g., *Amoco Prod. Co. v. Alexander*, 622 S.W.2d 563, 571 (Tex. 1981); *Williamson v. Mobil Producing Texas & New Mexico, Inc.*, 737 S.W.2d 917, 921 (Tex. App. -- Beaumont 1987, writ denied).
- 16 See *infra* part IX(A) for a definition of an “Original Drilling Opinion” and a discussion of its use.
- 17 See *infra* parts IX(A) and (B) for definitions of and further discussion pertaining to “division orders” and “division order title opinions”.
- 18 See generally *Luckel v. White*, 792 S.W.2d 485, 489 (Tex. App. -- Houston [14th Dist.] 1990), *rev'd on other grounds*, 819 S.W.2d 459 (Tex. 1991).
- 19 Eugene O. Kuntz et al., *Cases and Materials on Oil and Gas Law*, 571-72 (2 d ed. 1993) [hereinafter Kuntz]. See *infra* part V for additional details on both “stand-up” and “sit-down” opinions.
- 20 See *infra* part IX. See generally Lewis G. Mosburg, Jr., *Landman's Handbook on Petroleum Land Titles* s 4.05 (1976) [hereinafter Mosburg]; Tevis Herd, *Title Opinions for Oil and Gas Purposes - Structure and Information Needed by a Client*, 33 *Inst. on Oil & Gas L. & Tax'n* 285, 298 (1982) [[[hereinafter Herd].
- 21 See *infra* part IX(B).
- 22 See *infra* part V(B).
- 23 See *infra* part V(A).
- 24 See *infra* part X.
- 25 See *infra* part VII. The opinion should also set forth the component elements of the mineral estate.

- 26 See *infra* part IX.
- 27 See *infra* part IV(A) for a definition of marketable title.
- 28 See *infra* part IV(B) & (C).
- 29 See generally J.E. Rehler, Proposed Title Examination Standards for Texas, Rev. of Oil & Gas Law VI, Oil, Gas, and Mineral Section of the Dallas Bar Ass'n (1991) [hereinafter Rehler]. See also 16 Okla. Stat. Ann. tit. 16, s 71 (West 1986 & Supp. 1992) (containing a similar but slightly more restrictive definition of marketable title); *First Am. Title Co. v. Prata*, 783 S.W.2d 697, 702-03 (Tex. App. -- El Paso 1989, writ denied) ("[M]arketable title means a title free and clear from reasonable doubt as to matters of law and fact and is one not clouded by any outstanding contract, covenant, interest, lien or mortgage sufficient to form a basis of litigation.") (citations omitted); *Lieb v. Roman Devel. Co.*, 716 S.W.2d 653, 655 (Tex. App. -- Corpus Christi 1986, writ ref'd n.r.e.); *Ryan Mortgage Investors v. Fleming-Wood*, 650 S.W.2d 928, 936 (Tex. App. -- Fort Worth 1983, writ ref'd n.r.e.) (" 'Marketable title' means a title free and clear from reasonable doubt as to matters of law and fact, such a title as a prudent man, advised of the facts and their legal significance, would willingly accept."); *Lund v. Emerson*, 204 S.W.2d 639, 641 (Tex. Civ. App. -- Amarillo 1947, no writ) (finding same general definition).
- 30 Proposed Texas Title Standard 2.10 provides: "All title examinations should be made on the basis of marketability of title" Rehler, *supra* note 29. See also Mosburg, *supra* note 20, s 4.05.
- 31 See *supra* note 29.
- 32 *Texas Auto Co. v. Arbetter*, 1 S.W.2d 334, 336-37 (Tex. Civ. App. -- San Antonio 1927, writ dismissed w.o.j.).
- 33 *Owens v. Jackson*, 35 S.W.2d 186, 188 (Tex. Civ. App. -- Austin 1931, writ dismissed); *Texas Auto Co.*, 1 S.W.2d at 336-37.
- 34 *Austin v. Carter*, 296 S.W. 649, 651 (Tex. Civ. App. -- Eastland 1927, writ dismissed w.o.j.). See also *Lund*, 204 S.W.2d at 641; *Texas Auto Co.*, 1 S.W.2d at 336-37.
- 35 See *Texas Auto Co.*, 1 S.W.2d at 336-37; *Alling v. Vander Stucken*, 194 S.W. 443, 444 (Tex. Civ. App. -- San Antonio 1917, writ ref'd).
- 36 Mosburg, *supra* note 20, s 1.05.
- 37 *Id.*
- 38 *Id.*
- 39 *Id.* Compare part II(D) with part IV to understand the similarity in standards and practices followed by title insurance companies with respect to general real estate titles with those followed by oil companies with respect to petroleum land titles.
- 40 See *Pearson v. 32 Oil Ass'n*, 1 S.W.2d 860, 860 (Tex. Comm'n. App. 1928, holding approved); *Lambert v. Taylor Tel. Coop.*, 276 S.W.2d 929, 932 (Tex. Civ. App. -- Eastland 1955, no writ); see also *Black's Law Dictionary* 10 (6th ed. 1990).
- 41 See Lange & Leopold, *supra* note 9, ss 291-299 for a general discussion of abstracts, the abstracting process, how abstracts are prepared, and what abstracts contain.
- 42 See Lange & Leopold, *supra* note 9, s 291.
- 43 *Id.* s 303.
- 44 Supplemental abstracts are abstracts which cover a period of time subsequent to the date covered by a previous abstract on the same land. *Id.* s 300.
- 45 Base abstracts are abstracts which cover a period from sovereignty, or such lessor period as is deemed appropriate, to the date shown in the abstractor's certificate. *Id.*

- 46 See *supra* note 19.
- 47 Engaging a landman to search the indices and prepare a run sheet is usually more economical. It saves the attorney time and allows him to focus on examining the instruments listed in the run sheet. Further, good landmen usually have more skill than attorneys at working the indices and constructing run sheets. On the other hand, although the attorney can delegate the work, he cannot delegate the responsibility. The title opinion is the attorney's opinion, and the attorney is responsible for any error that resulted because the landman omitted a key document from the run sheet.
- 48 For example, local procedures and customs vary not only from state to state but also from county to county within the same state. Procedures may also vary depending on the personal preferences of the examining attorney, landman, and client oil company; time and cost factors; the structure of the indices and records in the particular county; and the purpose of the opinion.
- 49 This scenario assumes that the tasks of running the records and preparing a run sheet are delegated to a landman.
- 50 Grantor-grantee is the index required by statute in Texas. See *infra* note 54. Sometimes, though not usually, a "tract" index will also be maintained as part of the public record. See *infra* note 56.
- 51 See *infra* part V(C). Today, in counties with computerized records, computer-generated chains of conveyances make this task significantly easier.
- 52 The attorney makes the decisions regarding relevancy and materiality. Unless an instrument is clearly irrelevant, it should be included in the run sheet. The attorney can later dismiss the instrument if it turns out to be irrelevant or immaterial.
- 53 An excerpt from a run sheet is attached as Appendix A.
- 54 Index to Real Property Records.
(a) The county clerk shall maintain a well-bound alphabetical index to all recorded deeds, powers of attorney, mortgages, and other instruments relating to real property. The index must state the specific location in the records at which the instruments are recorded.
(b) The index must be a cross-index that contains the names of the grantors and grantees in alphabetical order. If a deed is made by a sheriff, the index entry must contain the name of the sheriff and the defendant in execution. If a deed is made by an executor, administrator, or guardian, the index entry must contain the name of that person and the name of the person's testator, intestate, or ward. If a deed is made by an attorney, the index entry must contain the name of the attorney and the attorney's constituents. If a deed is made by a commissioner or trustee, the index entry must contain the name of the commissioner or trustee and the name of the person whose estate is conveyed.
Tex. Loc. Gov't Code Ann. s 193.003 (Vernon 1988).
- 55 The clerk recompiles the main indices periodically to incorporate the supplements in much the same way that publishers reprint statute books periodically to incorporate the pocket parts. Recompilation used to take place only every decade or so, but today many counties have computerized records that can be updated much more frequently.
- 56 A tract index is an index compiled according to the land affected by the transactions rather than by the parties to the transaction. This index is similar to the "plants" maintained by title insurance companies.
- 57 For general information regarding the structure of indices, see *Basye*, *supra* note 11, at 51-53.
- 58 See, e.g., *Smith v. Sorelle*, 87 S.W.2d 703, 705 (1935). See also *Lange & Leopold*, *supra* note 9, s 812.
- 59 In *Greer v. Greer*, the court succinctly stated the rule as follows:
The rule was long ago announced by this court that in all instruments for the conveyance of lands the description must be so definite and certain upon the face of the instrument itself, or in some other writing referred to, that the land can be identified with reasonable certainty; otherwise, the instrument is void under the Statute of Frauds.
191 S.W.2d 848, 849 (1946).
- 60 Urban land is usually identified by lot, block, and subdivision.
- 61 National Land Act, ch. 29, 1 Stat. 464 (1796) (current version at 43 U.S.C. s 52 (1986)).

- 62 Id. s 2. See also 43 U.S.C. ss 751-774 (1986).
- 63 For example, the original 13 states as well as Kentucky, Tennessee, Maine, Vermont, and West Virginia were surveyed prior to adoption of the National Land Act in 1796 and thus do not use the rectangular survey system. Dukeminier & Krier, *supra* note 11, at 660.
- 64 Fractions of leagues or labors were also granted in some cases.
- 65 Tex. Nat. Res. Code Ann. s 21.077 (Vernon 1978).
- 66 Mosburg, *supra* note 20, s 2.11; Lange & Leopold, *supra* note 9, s 820.
- 67 Id.
- 68 A conveyance is a presently operative instrument which transfers ownership to an interest in land from the transferor to the transferee. See, e.g., Leonard v. Benford Lumber Co., 216 S.W. 382, 383 (1919).
- 69 The oil & gas lease is also a conveyance. See *infra* note 94.
- 70 See, e.g., Tex. Prop. Code Ann. s 5.021 (Vernon 1984). Some state statutes impose additional requirements such as seals, witnesses, or acknowledgements.
- 71 See, e.g., Curry v. Curry, 270 S.W.2d 208 (1954); Koppelman v. Koppelman, 57 S.W. 570 (1900). See also Lange & Leopold, *supra* note 9, ss 691-693.
- 72 Agnew v. Brawner, 553 S.W.2d 688, 689 (Tex. Civ. App. -- Eastland 1977, writ ref'd n.r.e.); Sgitcovich v. Sgitcovich, 229 S.W.2d 183, 185 (Tex. Civ. App. -- Galveston 1950, writ ref'd n.r.e.) (holding that deeds executed but never delivered by grantor were ineffective to pass any title to realty).
- 73 See *infra* part VIII(F).
- 74 Ragland v. Kehner, 221 S.W.2d 357, 359 (1949) ("The test ... is whether or not the grantor parted with all dominion and control over the instrument at the time he delivered it to the third person, with intent at the very time of its delivery that it take effect as a conveyance."); Vannerberg v. Anderson, 206 S.W.2d 217, 219 (1948) (holding that delivery is essential but may be presumed from recordation). See also Lange & Leopold, *supra*, note 9 ss 691-693; Mosburg, *supra* note 20, s 2.12.
- 75 See Mosburg, *supra* note 20, s 2.12. See also *infra* part X.
- 76 See *infra* part X(C).
- 77 Tex. Prob. Code Ann. s 37 (Vernon 1980 & Supp. 1994). Texas Probate Code section 38 governs the transfer of property of persons dying intestate. Id. s 38. A title examiner needs to be familiar with the probate code and the law of wills, intestacy, and estate administration of the state in which the property examined is located.
- 78 Texas recognizes limitations periods of 3, 5, 10, and 25 years. See Tex. Civ. Prac. & Rem. Code Ann. ss 16.021-16.037, subch. B, Limitations of Real Property Actions (Vernon 1986 & Supp. 1994). See id. s 16.024 (the 3 year statute); id. s 16.025 (the 5 year statute); id. s 16.026 (the 10 year statute); id. ss 16.027 & 16.028 (the two 25 year statutes). See also Richard W. Hemingway, The Law of Oil and Gas ss 3.4-3.5 (3d ed. 1991) (limitations title to oil and gas properties) [hereinafter Hemingway]; Thomas K. McElroy, Adverse Possession of Mineral Estates, 11 Baylor L. Rev. 253 (1959).
- 79 See *infra* part IX(A) for definition of "original" or "initial" opinions.
- 80 See, e.g., Okla. Stat. Ann. tit. 16 s s 71-80 (West 1986) (A marketable record title might exist when a person holds under an unbroken chain of title extending back at least 30 years, and nothing appears of record which divests such person of title). Texas does not have such a statute. See *infra* part X(B).

- 81 See Mosburg, *supra* note 20, app. at 150.
- 82 Resolution Trust Company.
- 83 All patents to Texas land emanate from Spanish or Mexican land grants or from grants by the Republic or State of Texas. See generally Lange & Leopold, *supra* note 9, ss 158-159.
- 84 Kuntz, *supra* note 19, at 855, describes "public lands" as follows:
Federal public lands comprise ... about 30 percent of the total land area of the 50 states. Most of this acreage is classified as "public domain." lands that have never left federal ownership The balance is generally classified as "acquired land." land obtained by the federal government by purchase, condemnation, gift or exchange.
- 85 Texas expressly provides that limitations provisions do not bar the rights of the state, all counties, and all school districts. Tex. Civ. Prac. & Rem. Code Ann. s 16.061 (Vernon 1986 & Supp. 1994). Thus, in the event of litigation involving title, one must show that the state parted with title through an appropriate grant of patent prior to commencement of the alleged adverse possession. See, e.g., *Houston Oil Co. v. Gore*, 159 S.W. 924, 927 (Tex. Civ. App. -- Galveston 1913, writ ref'd). See generally *Dallas County Levee Improvement Dist. No. 6 v. Curtis*, 287 S.W. 301 (Tex. Civ. App. -- Dallas 1926, no writ).
- 86 Persons examining title to Texas lands granted by patent from the State of Texas after September 1, 1919, should be aware of the Relinquishment Act of 1919. Tex. Rev. Civ. Stat. Ann. arts. 5367-5379 (Vernon 1919) (repealed but reenacted verbatim in 1977 as Tex. Nat. Res. Code Ann. ss 52.171-52.189 (Vernon 1977 & Supp. 1994)). The definitive article on the Texas Relinquishment Act is A.W. Walker, *The Texas Relinquishment Act*, 1 *Oil & Gas Inst.* 245 (S.W. Legal Found. -- Matthew Bender 1949). See also Herd, *Title Opinions*, *supra* note 20, at 291-97; Lange & Leopold, *supra* note 9, s 234.
- 87 See Lange & Leopold, *supra* note 9, ss 233 & 236 (discussing vacancies and vacancy litigation).
- 88 For general information regarding patents, see Mosburg, *supra* note 20, ss 2.02 & 2.04. For further general information regarding patents to Texas land, see Lange & Leopold, *supra* note 9, ss 155-159.
- 89 See *infra* note 190. See also Lewis G. Mosburg, Jr., *Statutes of Limitation and Title Examination*, 13 *Okl. L. Rev.* 125, 166-67 (1960).
- 90 See Mosburg, *supra* note 20, s 5.03. See also *infra* part X(A).
- 91 The attached appendix contains examples of chain of title diagrams. One diagram tracks surface ownership and mineral ownership, while the other diagram tracks leasehold ownership. For other suggested methods of tracking chains of title, see Lange & Leopold, *supra* note 9, ss 311-314.
- 92 When the configuration of the land being examined changes (i.e., parts of the tract are sold or adjoining tracts are acquired) during the period covered by the examination, a set of plats showing these configuration changes, used in conjunction with the chain of title diagram, can be very helpful.
- 93 These rights flow from the well-settled rule that when the mineral estate is severed from the surface estate, the mineral estate is dominant. The surface estate is burdened with a servitude in favor of the mineral estate. See *Texaco, Inc. v. Paris*, 413 S.W.2d 147, 149 (Tex. Civ. App. -- El Paso 1967, writ ref'd n.r.e.); *Hunt Oil Co. v. Kerbaugh*, 283 N.W.2d 131, 135 (N.D. 1979).
- 94 Eugene Kuntz describes the oil and gas lease as follows:
[The oil and gas lease is] both [a] conveyance and [a] contract.... [A] conveyance, because it is the instrument by which the mineral owner conveys a right to an oil company to explore for and produce oil and gas.... [A] contract because the oil company accepts the right to explore and produce, burdened by certain express and implied promises.
....
The key to understanding [the] oil and gas lease ... is to remember that the lease is a business transaction. A mineral owner, who generally lacks the capital or expertise to explore or develop, transfers those rights to an oil company [while reserving a royalty interest in production].... Both parties expect to make a profit from the transaction, and the lease ... sets out their bargain.
Kuntz, *supra* note 19, at 138-39.

- 95 Altman v. Blake, 712 S.W.2d 117, 118 (Tex. 1936).
- 96 This is the full bundle of rights that comprises "ownership" of the mineral estate. See Altman, 712 S.W.2d at 118; Schlittler v. Smith, 101 S.W.2d 543, 544 (Tex. 1937). See also Kramer, Conveying Mineral Interests, supra note 13; Mosburg, supra note 20, s 3.01.
- 97 In economic terms, a royalty interest is a form of compensation used when value is speculative. It is a hedge against uncertainty. See Hemingway, supra note 78, s 2.5.
- 98 Id.
- 99 A preliminary, and often critical, question in the interpretation process is the question of what evidence is admissible in construing the instrument. This inquiry involves application of the parol evidence rule and is beyond the scope of this Article. Generally, if a court finds the instrument to be ambiguous, it will consider extrinsic evidence. Conversely, if a court finds the instrument to be unambiguous, it will look only to the four corners of the instrument and use rules of construction to interpret the ambiguous language. In the overwhelming majority of cases involving interpretation of oil and gas conveyances, courts tend to find the instruments unambiguous and refuse to hear extrinsic evidence. See infra part VIII (C).
- 100 See Hemingway, supra note 78, s 2.7(A).
- 101 Howard R. Williams & Charles J. Meyers, Oil & Gas Law s 304 (Student Ed. 1985); Hemingway, supra note 78, s 2.7.
- 102 712 S.W.2d 117 (Tex. 1986).
- 103 Id. at 117-18.
- 104 Id. at 120. Although the deed seems ambiguous, the parties stipulated that the deed was unambiguous and the court looked only to the four corners of the instrument in construing it. By applying a rule of construction called the "greatest estate rule", see infra part VIII(D), the court found that 1/16 of the development rights passed under the deed and therefore concluded that the grantee received a 1/16 mineral interest rather than a 1/16 royalty interest.
- 105 See supra note 96 and accompanying text.
- 106 See Altman, 712 S.W.2d at 118-19. See also Kramer, Conveying Mineral Interests, supra note 13; Luckel v. White, 819 S.W.2d 459, 463 (Tex. 1991); Day & Co., Inc. v. Texland Petroleum, Inc., 786 S.W.2d 667, 669 (Tex. 1990).
- 107 See Hemingway, supra note 78, s 2.7(G).
- 108 717 S.W.2d 891 (Tex. 1986).
- 109 Id. at 895.
- 110 See Will G. Barber, Duhig to Date: Problems in Conveyancing of Fractional Mineral Interests, 13 Sw. L.J. 320, 322-23 (1959).
- 111 671 S.W.2d 870 (Tex. 1984), overruled in part, Luckel v. White, 819 S.W.2d 459 (Tex. 1991).
- 112 Id. at 871-72.
- 113 Id. at 872-74.
- 114 See e.g. Tevis Herd, Deed Construction and the "Repugnant to the Grant" Doctrine, 21 Tex. Tech L. Rev. 635 (1990) ; Robert Bledsoe & John Scott, The Ten Most Regrettable Oil and Gas Decisions Ever Issued by the Texas Supreme Court -- and the "Winner" -- Based on a Survey, Eighth Annual Advanced Oil, Gas and Mineral Law Course, State Bar of Texas (1990) .
- 115 819 S.W.2d 459 (Tex. 1991).

- 116 *Id.* at 460-61. The granting clause conveyed a 1/32 royalty interest, while the "subject to" and "future lease" clauses referred to 1/4 of lease royalties. At the time of the deed, the property was subject to an oil and gas lease with a 1/8 royalty. Leases in effect at the time of suit provided for 1/6 royalties. *Id.*
- 117 *Alford, Luckel, and Jupiter Oil Co. v. Snow*, 819 S.W.2d 466 (Tex. 1991), a companion case to *Luckel*, as well as numerous other deed construction cases, are exhaustively treated in Bruce M. Kramer, *The Sisyphean Task of Interpreting Mineral Deeds and Leases: An Encyclopedia of Canons of Construction*, 24 *Tex. Tech L. Rev.* 1 (1993) [hereinafter *Kramer, The Sisyphean Task*].
- 118 See Karl Llewellyn, *The Common Law Tradition, Deciding Appeals* (1960); Edwin W. Patterson, *The Interpretation and Construction of Contracts*, 64 *Colum. L. Rev.* 833 (1964).
- 119 Courts are reluctant to admit extrinsic evidence in cases involving interpretation of written instruments. In Texas, admissibility depends on whether the court finds the deed ambiguous or unambiguous. In an overwhelming majority of cases, courts have found the language to be unambiguous. See, e.g., *Black v. Shell Oil Co.*, 397 S.W.2d 877, 887 (Tex. Civ. App. -- Texarkana 1965, writ ref'd n.r.e.); *Chandler v. Hartt*, 467 S.W.2d 629, 634 (Tex. Civ. App. -- Tyler 1971, writ ref'd n.r.e.).
- 120 This Article only scratches the surface regarding the interpretation process and the use of rules of construction. See *Kramer, The Sisyphean Task*, *supra* note 20; *Mosburg*, *supra* note 20, s 3.06.
- 121 See *Kramer, The Sisyphean Task*, *supra* note 20, at 124.
- 122 See 6A *Richard R. Powell, The Law of Real Property* P 899[3] (1994).
- 123 *Kramer, The Sisyphean Task*, *supra* note 20, at 6; see *supra* note 119.
- 124 See generally *Kramer, The Sisyphean Task*, *supra* note 20.
- 125 717 S.W.2d 891 (Tex. 1986).
- 126 *Alford v. Krum* may be characterized as an extreme application of the "in sequence rule."
- 127 712 S.W.2d 117 (Tex. 1986).
- 128 See *Kramer, The Sisyphean Task*, *supra* note 20, at 84-100, 103-05. Professor Kramer lists and attempts to define a number of additional canons of construction in his article.
- 129 *Southland Royalty Co. v. Pan Am. Petroleum Corp.*, 378 S.W.2d 50, 58 (Tex. 1964) (Calvert, J., concurring).
- 130 *Kramer, The Sisyphean Task*, *supra* note 20, at 129. Early in his article, Professor Kramer analogizes his task of rationalizing Texas jurisprudence in the area of judicial interpretation to the task of Sisyphus, a character from Homer's *Odyssey*, who was condemned in Hell to roll a large boulder to the top of a steep hill. Each time Sisyphus got the boulder to the top of the hill, it rolled over the crest and down the other side. Professor Kramer summarized the results of his attempt to "rationalize the myriad canons of construction that have been used and abused in Texas case law" as follows:
To continue the Sisyphean analogy, the boulder has been pushed to the top of the hill several times, only to become dislodged and roll back over me on its headlong journey back down the hillside. I hope, that by exposing the difficulties encountered in the jurisprudence of deed interpretation, to have others join me in the task of pushing the boulder until it comes to rest at the top of the hill. *Id.* at 128, n.591.
- 131 *Id.* at 128.
- 132 See *Mosburg*, *supra* note 20, s 3.06; *supra* part IV(A) & IV(B); *infra* part X.
- 133 135 *Tex.* 503, 144 S.W.2d 878 (Tex. 1940).
- 134 In contrast to rules of construction, which courts may apply in their discretion, rules of law are mandatory if applicable. The court clearly intended the *Duhig* rule to be a rule of law. *Id.* at 880.

- 135 Hemingway, *supra* note 78, s 3.2 at 128.
- 136 See *Acoma Oil Corp. v. Wilson*, 471 N.W.2d 476 (N.D. 1991). *Acoma* contains a good statement of the Duhig Rule. The *Acoma* court applied the rule even though the deed did not contain a reservation.
- 137 See *Hill v. Gilliam*, 682 S.W.2d 737, 739 (Ark. 1985). In a warranty deed, the grantor warrants that he has title, while in a quitclaim deed the grantor does not warrant anything. He merely conveys whatever interest, if any, that he has. While Duhig does not apply to conveyances by quitclaim deed, it apparently does apply to conveyances by special warranty deed -- a deed under which the grantor makes only limited warranties. See *Blanton v. Bruce*, 688 S.W.2d 908, 911-14 (Tex. Civ. App. -- Eastland 1985, writ ref'd n.r.e.).
- 138 157 Tex. 403, 410, 303 S.W.2d 341, 346 (1957).
- 139 See Hemingway, *supra* note 78, s 7.8 at 407-08.
- 140 *Lange & Leopold*, *supra* note 9, the four volume work frequently cited in this Article, is the most comprehensive attempt within a single work to deal with potential title problems that might arise in Texas. Even this massive treatise falls far short of answering all potential title questions arising during the course of a title examination.
- 141 See, e.g., *Grossman v. Jones*, 157 S.W.2d 448, 451 (Tex. Civ. App. -- San Antonio 1941, writ ref'd w.o.m.).
- 142 See, e.g., *Best Inv. Co. v. Parkhill*, 429 S.W.2d 531, 534 (Tex. Civ. App. -- Corpus Christi 1968, writ dismissed w.o.j.). Any deed, contract, judgment, or other instrument which purports to convey an interest in or make any charge upon land, the invalidity of which would require proof, clouds the owner's title. See also *Angus E. McSwain, Westland Oil Development Corp. v. Gulf Oil: New Uncertainties as to Scope of Title Search*, 35 Baylor L. Rev. 629 (1983).
- 143 A primary term is "the period of time during which a lease may be kept alive by a lessee even though there is no production in paying quantities by virtue of drilling operations on the leased land or the payment of rentals," and a secondary term is the period after the primary term expires where the lease is continued by operation of the "thereafter" clause. *Howard R. Williams & Charles J. Meyers, Manual of Oil and Gas Terms Annotated* 189, 225 (1957).
- 144 If the lease is in its primary term, the cloud can be removed by evidence of expiration of the lease, such as by non-production and non-payment of delay rentals. After the primary term of the unleased lease expires, the cloud can possibly be removed through physical inspection of the property and a recordable "Affidavit of Non-Production." Someone familiar with operations on the property should execute the affidavit, and if the lease has a pooling clause, the affidavit should cover all lands which might conceivably have been pooled with lands covered by the unleased lease. See *Mosburg*, *supra* note 20, ss 5.03 & 5.07(b).
- 145 See *id.* s 5.07(d).
- 146 See *id.* s 5.07(a).
- 147 See *Tex. Prob. Code Ann. s 3* (Vernon 1980 & Supp. 1994). "Probate" is sometimes narrowly defined as the judicial process of proving a will. Modern usage gives the term broader meaning to include all judicial activity related to winding up a decedent's affairs, whether the decedent died testate or intestate. For example, Chapter II of the Texas Probate Code covers intestate succession. This Article uses the term "probate" in the broader sense.
- 148 See, e.g., *Tex. Prob. Code Ann. s 48(a)* (Vernon 1980) (Proceedings to Declare Heirship). If a person dies intestate, the court, pursuant to statute, may determine who the decedent's heirs are as well as their respective shares and interests under Texas law.
- 149 See *Tex. Prob. Code Ann. ss 37-38* (Vernon 1980 & Supp. 1994). See also *Mosburg*, *supra* note 20, s 5.06(d); *Lange & Leopold*, *supra* note 9, ss 1021-1025. At the other extreme, an action to quiet title may be required to set the record straight. See *infra* note 194 and accompanying text.
- 150 Numerous Probate Code provisions may impact these determinations. Thus, a title examiner must have broad knowledge of probate matters.

- 151 For example, the title examiner may have to determine that the principal was alive at the time the agent executed the instrument. Notably, the power to sell does not include the power to execute oil and gas leases. See *Bean v. Bean*, 79 S.W.2d 652, 654 (Tex. Civ. App. -- Texarkana 1935, writ ref'd).
- 152 See *infra* part VIII(F). Title standards such as those currently in effect in Oklahoma and those proposed in Texas, as well as local statutes, establish certain presumptions regarding capacity.
- 153 *Id.* The title standards referred to in note 166, *infra*, also create certain presumptions regarding identity. See also *Mosburg*, *supra* note 20, s 5.03(d).
- 154 The Title Standards referred to in note 166, *infra*, also create presumptions regarding spouses.
- 155 See, e.g., *Prairie Oil & Gas Co. v. Allen*, 2 F.2d 566, 573 (8th Cir. 1924); *Hemingway*, *supra* note 78, s 5.2 (A-D). Section 5.2(C) of *Hemingway* discusses the "Open Mine Doctrine," which is an exception to the general rule regarding allocation of interests between the life tenant and remaindermen.
- 156 See, e.g., *Rio Bravo Oil Co. v. Weed*, 50 S.W.2d 1080, 1084 (1932), cert. denied, 288 U.S. 603 (1933); *Cox v. Campbell*, 143 S.W.2d 361, 362 (1940). See also *Lange & Leopold*, *supra* note 9, ss 371-387.
- 157 Many states, including Texas, now have statutes making the public record *prima facie* evidence of execution and delivery. Tex. Prop. Code Ann. s 5.021 (Vernon 1984). See also *Hunter v. Meshack*, 471 S.W.2d 155, 157 (Tex. Civ. App. -- Tyler 1971, writ ref'd n.r.e.) (filing of deed for recordation establishes a rebuttable presumption of delivery); *Austin Lake Estates Recreation Club, Inc. v. Gilliam*, 493 S.W.2d 343, 347-48 (Tex. Civ. App. -- Austin 1973, writ ref'd n.r.e.) (recording a deed results in a presumption that the grantor intended to effect a conveyance, and no further act of delivery is required); *Sorsby v. State*, 624 S.W.2d 227, 234 (Tex.Civ.App -- Houston [1st Dist.] 1981, no writ) (recording a deed is *prima facie* evidence of grantee's acceptance). See also *Mosburg*, *supra* note 20, s 5.05.
- 158 Interim results of a survey dated October 19, 1989, conducted by the Joint American Bar Association/Oklahoma Bar Association/Oklahoma City University Title Examination Standards Resource Center Project, show that the following 26 states have adopted title examination standards: Colorado, Connecticut, Florida, Georgia, Idaho, Illinois, Iowa, Kansas, Maine, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Mexico, New York, North Dakota, Ohio, Oklahoma, Rhode Island, South Dakota, Utah, Washington, Wisconsin, and Wyoming.
- 159 Lewis M. Simes & Clarence B. Taylor , *Model Title Standards* , 1 (1960) [hereinafter Simes & Taylor] .
- 160 *Id.* at 6.
- 161 *Id.* at 3. See also *Rehler*, *supra* note 29.
- 162 Compare the Proposed Texas Title Standards, *infra* note 166, with the Oklahoma Title Standards, *infra* note 164.
- 163 *Simes & Taylor* , *supra* note 159, at 3-4.
- 164 16 Okla. Stat. Ann . tit. 16, ch. 1 (West 1986 & Supp. 1994). In addition to publication in the Oklahoma Statutes, the real property section of the Oklahoma Bar Association publishes the Oklahoma Title Standards annually. These standards are widely disseminated and extensively used by Oklahoma practitioners.
- 165 *Knowles v. Freeman*, 649 P.2d 532, 535 (Okla. 1982).
- 166 The Proposed Texas Title Standards have not been officially published. The latest draft furnished this writer was a discussion draft dated April 6, 1994. All references in this Article to the "Proposed Texas Title Standards" or to specific Texas title standards are to the standards set forth in the the April 6, 1994, discussion draft. To trace the evolution of the proposed Texas Title Standards compare the standards set forth in the discussion draft dated April 6, 1994, with those set forth in the concept draft dated March 1, 1991, appended to *Rehler*, *Proposed Title Examination Standards for Texas*, *supra* note 161.
- 167 The following excerpts from *Simes & Taylor* , *supra* note 159, at 1-3, illustrate the desirability of title standards:

Perhaps there is no greater delusion current among inexperienced conveyancers than that land titles are either wholly good or wholly bad, and that the determination of the person who has the title is merely a mathematical process of applying unambiguous rules of law to the abstract of the record. Yet the experienced conveyancer knows that the process of determining the marketability of a title is much more like determining whether, under all the facts, a man has a cause of action for negligence, than it is like the calculation of the amount of income tax a person owes on a given date.

No record, or abstract of the record, gives all the facts from which marketability must be determined.... If the practice of conveyancers is not uniform, the tendency always is for the standards of the overmeticulous conveyancer to determine the standards of all conveyancers.... Thus, uniform title standards have great remedial value because they crystallize the practices of conveyancers; and instead of being merely the recognized practices of individuals in a profession, they become also the recognized conclusions of the organized profession itself.

- 168 See Herd, Title Opinions, *supra* note 20, at 298.
- 169 These are title opinions of general application. There are numerous other types of title opinions which are more limited in scope and application and are beyond the scope of this Article. The most commonly encountered of these other title opinions include: (1) purchase opinions -- rendered when one or more production owners sell their interests and (2) mortgage opinions -- rendered when lenders loan money secured by production. Title opinions can be either broad or quite limited. See John L. Beckham & Charlotte Parker, Title Examination/Opinions, Oil, Gas and Mineral Law for Lawyers and Legal Assistants, Professional Development Program, State Bar of Texas (1990) [hereinafter Beckham]. See also Mosburg, *supra* note 20, s 4.05.
- 170 "Division order means an agreement signed by the payee directing the distribution of proceeds from the sale of oil, gas, casinghead gas, or other related hydrocarbons. The order directs and authorizes the payor to make payment for the products taken in accordance with the division order." Tex. Nat. Res. Code Ann. s 91.401(3) (Vernon 1991) (defining "Division Order"). In other words, a division order is a special type of contract which is revocable at will by either party. As a general rule, division orders, even if erroneous, are binding on the parties until revoked or terminated. See *Exxon Corp. v. Middleton*, 613 S.W.2d 240, 250 (Tex. 1981). However, when an operator benefits from the underpayment of royalty, the underpaid owners can recover for underpayments prior to revocation. See *Gavenda v. Strata Energy, Inc.*, 705 S.W.2d 690, 691-92 (Tex. 1986). See also Hemingway, *supra* note 78, s 7.5. For information relating to title attorneys' potential liability for errors or omissions in division order title opinions, see *infra* notes 172-180 and accompanying text.
- 171 See appendices; Mosburg, *supra* note 20, s 4.05.
- 172 705 S.W.2d 690 (Tex. 1986).
- 173 *Id.* at 690-91.
- 174 *Id.*
- 175 *Id.*
- 176 *Id.* The opinion erroneously concluded that the Gavendas were entitled to a 1/16 royalty interest rather than a 1/2 royalty interest.
- 177 *Id.*
- 178 *Id.*
- 179 *Id.*
- 180 *Id.* at 693.
- 181 In view of the attorney's exposure to malpractice liability, the attorney should never sacrifice accuracy for readability. However, the two are not mutually exclusive, and a well-crafted title opinion can accomplish both objectives.
- 182 See Mosburg, *supra* note 20, s 4.05; Herd, Title Opinions, *supra* note 20, at 314-15; Beckham, *supra* note 169, at 20.

- 183 The curative process and stand-up title examinations are the two areas which usually call for the greatest degree of teamwork and interaction between the attorney and the landman. See *supra* section V(b).
- 184 See Mosburg, *supra* note 20, s 5.01.
- 185 See Mosburg, *supra* note 20, s 5.02, including Appendix Five, Sample Curative Instruments.
- 186 See *supra*, parts IV(A) & IV(B).
- 187 See Mosburg, *supra* note 20, s 5.03.
- 188 *Id.* s 5.03; including Appendix Five, Sample Curative Instruments, containing a number of curative affidavit forms. See also J.E. Rehler, Improving Marketability of Real Property in Texas: Affidavits, Recitals and the Evidentiary Effect of Recording, 49 Tex. L. Rev. 747, 749 (1971); Moses, The AAPL Guide for Landmen at 64 (Revised Ed. 1980).
- 189 See Mosburg, *supra* note 20, s 5.04(a).
- 190 Texas has a 3 year, a 5 year, a 10 year, and two 25 year statutes of limitations. See *supra*, note 78; Harold F. Thurow, Trespass to Try Title, (Butterworth Legal Publishers 1988), Chs. 13-18 (discussing elements that must be pleaded and proved to obtain title under the Texas limitations statutes).
- 191 See generally Mosburg, *supra* note 20, s 5.04(b) Some writers have criticized marketable title acts. See, e.g., Shirley N. Jones, Constitutional and Practical Problems in Legislation to Terminate Non-Productive Mineral Interests, 3 Miss. C. L. Rev. 175, 191 (1983) (Marketable title acts do not relieve mineral interest problems. In fact, they have the potential to create additional problems.).
- 192 See J.E. Rehler, Proposed Marketable Act and Title Examination Standards for Texas, Advanced Oil, Gas and Minerals Course, Professional Development Program, State Bar of Texas (September 1990). Texas does not have a marketable title act, but such an act was proposed in the early 1990s. Oklahoma, Kansas and several other states have such acts. See 16 Okla. Stat. Ann. tit. 16, 71-86 (West 1986); Kan. Stat. Ann. ss 58-3401 to 58-3411 (1983).
- 193 The "root of title" is the conveyance or other title transaction under which the record title owner claims title. The specified time period varies from 25 to 40 years under most marketable title acts.
- 194 See Lange & Leopold, *supra* note 9, s 1091 (recognizing other Texas actions that may be brought to resolve title disputes including trespass, slander of title, and declaratory judgment).
- 195 See *Ellison v. Butler*, 443 S.W.2d 886 (Tex. Civ. App. -- Corpus Christi 1969, no writ). This court concluded that the appellants failed to prove title or show possession which made this a trespass to try title case rather than an equitable proceeding to remove a cloud from title. *Id.* at 889. See also *Bibby v. Preston*, 555 S.W.2d 898, 901 (Tex. Civ. App. -- Tyler 1977, no writ) ("The primary requisite in a suit to quiet title is that the plaintiff must prove, and thereby recover on, the strength of his title and not on the weakness or invalidity of his adversary's title").
- 196 Tex. Prop. Code Ann. ss 22.001 and 22.002 (Vernon 1984). Trespass to try title is a formal action which emanates from the laws of the Republic of Texas and has its origins in Spanish Law.
- 197 *Id.* s 22.001. See also *Hill v. Preston*, 34 S.W.2d 780, 787 (Tex. 1931) (The remedy of trespass to try title is given in all cases where right to title or interest and possession of land may be involved.); *City of El Paso v. Long*, 209 S.W.2d 950, 954 (Tex. Civ. App. -- El Paso 1947, writ *ref'd n.r.e.*). See generally *Lodino v. Crawford Packing Co.*, 169 S.W.2d 235 (Tex. Civ. App. -- Galveston 1943), *aff'd*, 175 S.W.2d 410 (Trespass to try title is the only formal action known to Texas civil law.).
- 198 Tex. R. Civ. P. 783.
- 199 See Lange & Leopold, *supra* note 9, s 1093 and cases cited therein.
- 200 In a real opinion, addresses of all interest-owners would be included. As a matter of industry practice, interests are carried out to seven decimal places.

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