

**PREPARING TITLE OPINIONS, COMMENTS AND REQUIREMENTS:
DECIDING WHAT’S IMPORTANT
(IS THIS THE BABY OR THE BATHWATER?)**

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I. INTRODUCTION

When you have finished examining all the documents and chaining the title, it's time to prepare the opinion. Your title chain and notes from the examination will have all the information you need to prepare the title opinion.

This paper will describe how to prepare the title opinion, including how important the ownership schedules are, and how to prepare comments and requirements. The goal is to provide a practical summary of how to prepare a title opinion.

II. OVERVIEW OF CONTENTS OF A TITLE OPINION

The title opinion includes the following information:

- (a) surface, mineral and leasehold ownership of the property;
- (b) encumbrances which may affect title to the property, including taxes, mortgages and liens, easements and rights-of-way, and unreleased mineral leases;
- (c) the status of surface, mineral and leasehold title to the property, including specifically any title defects;
- (d) required actions to cure title defects and to enable the company to meet its objectives;
- (e) title comments giving helpful information for company personnel.¹

III. THE OPINION IS A SNAPSHOT OF OWNERSHIP AT A CERTAIN TIME

The title opinion necessarily will show ownership and the status of title as of a particular time. This date is the certification date of the opinion, and it will be the same as the certification date of the abstract, status report, or other title materials provided to the title examiner, or the date the records are certified to for a stand-up examination. It is important to state these certification dates in the title opinion. You will need to know the certification date if the title opinion is updated in the future.

¹ Thomas C. McKee, "Guidelines for Landmen in Conducting Records Searches and Preparing Reports for Attorneys (or What Does the Client Want?)," *Land and Permitting*, Paper 10A, page 10A-4 (Rocky Mt. Min. L. Fdn. 1994.)

There are other dates on which the examiner will focus while analyzing the title. For example, the examiner will ask, who owned the minerals on the date the lease was executed? You have to focus on how title was owned at certain points in the chain of title, to be sure the leases or other documents were taken from the correct owner at that time. But the title opinion will show title as of the certification date of the title materials provided to the examiner.

IV. OWNERSHIP SCHEDULES

A. Preparing the Ownership Schedules

The ownership schedules are the key part of the opinion, because they state the title examiner's main conclusions. I like to calculate the ownership schedules before I start drafting the opinion, soon after finishing the title examination and chaining the title. As you review the chain of title and make your conclusions regarding ownership, you will find points to note that may become comments and requirements in the opinion. It is helpful to keep a separate list of these issues as you work on the ownership schedules.

The title opinion will usually cover surface, mineral, and oil and gas leasehold ownership. There may be variations from these categories, in an acquisition title opinion or other specialized opinion. A drilling title opinion or a division order title opinion (and these are often combined into one opinion in current practice) will include surface, mineral and oil and gas leasehold ownership schedules.

If mineral ownership breaks down into different parcels within the lands covered by the opinion, it is customary to define tracts in the opinion, with a description of all of the tracts at the beginning of the opinion. I was taught by a client that it is also customary to number or letter the tracts beginning with the NE/4, then to the NW/4, then SW/4 and SE/4 of the section, similar to how the sections are arranged in a township.

The surface owners and mineral owners will be listed in the ownership schedules. If there are several tracts, the mineral ownership is listed for each tract separately.

The oil and gas leasehold ownership schedule shows the owners of the right to drill for and develop oil and gas on the lands covered by the opinion. It also shows owners of non-cost bearing interests in the leases and lands, such as royalty and overriding royalty interests. Title examiners have different methods of showing leasehold ownership. I prefer to show all of the working and net revenue interests in the lands or tract on one schedule, which totals 100%. An example is as follows:

OIL AND GAS LEASEHOLD OWNERSHIP

<u>Owner</u>	<u>Working Interest</u>	<u>Net Revenue Interest</u>	<u>Lease</u>
ABC Oil Company (50% WI x 87.5% NRI OGL)	50.000000%	43.750000% WI	1
XYZ Resources Company (25% WI x 87.5% NRI OGL) – (25% x 7.5% ORR)	25.000000%	20.000000% WI	1
NOP Development Company (25% WI x 87.5% NRI OGL) – (25% x 7.5% ORR)	25.000000%	20.000000% WI	1
John Doe (7.5% ORR x 50% WI)		3.750000% ORR	1
United States of America (100% MI x 12.5% R)		12.500000% R	1
Totals:	<u>100.000000%</u>	<u>100.000000%</u>	

It is helpful to include the arithmetic for the calculations relating to each interest, and to identify the lease applicable to each interest. This information makes it easier to understand the ownership schedule, and, if questions arise later this information helps the examiner and the client more quickly understand the ownership.

The oil and gas leasehold ownership schedules may be limited by depth or formation, they may be divided into a schedule for before payout and one for after payout of a well, or they may be limited to production from a particular wellbore. If any of these limitations apply, the ownership schedules need to be clearly labeled to show the limitations, and usually in such cases there will be several oil and gas leasehold ownership schedules. Unless the client has asked you to do otherwise, the oil and gas leasehold ownership schedules together, as a whole, should cover all depths, before and after payout, and all interests in the lands covered by the opinion.

Occasionally a client will request that you not cover ownership below a certain depth, or that you exclude an existing well from the opinion, in which case these limitations need to be clearly noted in the ownership schedules. The problem with these limitations is that if later the client decides to drill to a deeper depth, or wants to know who owns those rights, the abstract or other title materials need to be reexamined if the complete ownership picture was not reported in the original opinion.

The format set out above is one way to show the oil and gas leasehold ownership. Other title examiners show leasehold or working interest ownership, royalty ownership and overriding royalty ownership in separate subsections of the oil and gas leasehold ownership schedules.

Whatever format is used to show oil and gas leasehold ownership, it is important to include enough information regarding overriding royalty interests. Overriding royalty interests sometimes burden only one lease of several leases in a tract, or the overriding royalty burdens the working interest owners disproportionately. This needs to be shown in some way in the ownership schedules. In the format example set out above, the deductions from each working interest owner are shown in the calculations. If a different format is used that does not show the working interest owners' final net revenue interests, if an overriding royalty burdens the working interests disproportionately, this should be noted. For example, a note stating "The overriding royalty owned by John Doe burdens the working interests in the following proportions: XYZ (50%), NOP (50%)" or "the overriding royalty owned by John Doe burdens only the working interests of XYZ and NOP," provides the explanation of how the overriding royalty is borne by the working interests.

B. Footnotes in the Ownership Schedules

Because the ownership schedules are the core of the opinion, any major title issues or assumptions relating to the ownership schedule should be noted with a footnote or other note on the ownership schedule. For example, some federal oil and gas leases have sliding scale royalty clauses that provide for varying royalty depending on the amount of production. On the leasehold ownership schedule, you may show 12.5% royalty, but then you should footnote that interest to mention the royalty may be higher under the sliding scale royalty clause, and refer to a comment or requirement where that clause is further described. Another example of a time to include a footnote is where there is significant uncertainty as to who owns a particular interest. This could arise where there is an ambiguous conveyance in the chain of title and the examiner has required curative steps to determine the correct owner of the interest. Deciding whether to footnote an interest is a matter of evaluating the uncertainty as to ownership; I use a footnote if there is significant uncertainty and I want to be sure the client reads the comment and requirement relating to the interest in question.

V. TITLE COMMENTS AND REQUIREMENTS

A. The Purpose of Comments and Requirements

The Comments and Requirements in a title opinion state the title defects, the curative actions required to establish or confirm ownership is the same as is shown in the ownership schedules of the opinion, and the qualifications to the opinion. Some title examiners use a section called Exceptions or Qualifications for some of these types of issues, but the purpose is the same, which is to identify any title defects or matters not covered by the opinion.

The comments and requirements also state the assumptions the title examiner has made. Assumptions often cover factual matters, such as an assumption that an oil and gas lease has been extended beyond its primary term to a current date. The comments or the exceptions section will further state matters that are not covered by the opinion, which are often matters related to title that cannot be determined from examining the records, such as forgery of documents, or a mechanic's lien that has accrued but has not yet been filed in the county records.

B. Format of Comments and Requirements

Some title examiners use Comments only to provide information on title matters that do not require any curative action.² Examples of comments are to describe how the opinion is organized, to describe the pooling agreements affecting the lands, or other informational matters. These examiners use a separate Requirements section of the opinion to address any matters that require curative action.

Other examiners use one section of the opinion called Comments and Requirements, which may include advisory comments that do not require any curative action. In this format, the comment discusses the problem and the requirement states what needs to be done to resolve or cure the problem.

In either format, the requirement will include a separate portion that states what needs to be done to resolve the problem. An example is as follows:

1. The title materials show that John Doe died April 1, 2007, and estate proceedings have been opened for him in the District Court, Weld County, Colorado, Case No. 07-0000. There is no other information as to who will succeed to this interest. We have scheduled the mineral interest owned by him in "the heirs or devisees of John Doe." This interest is covered by Lease No. 1, from John Doe, so ownership will need to be determined for division order purposes.

REQUIREMENT: In the event of production, a personal representative's deed from the personal representative of the estate of John Doe to his heirs or devisees, covering the mineral interest in the subject lands, should be obtained and recorded in Weld County, Colorado. A certified copy of the letters appointing the personal representative should also be recorded in Weld County, Colorado.

C. Deciding What Comments and Requirements Need to be Included in the Opinion

It is helpful to keep a list of title defects or questions, as you chain the title and prepare the ownership schedules. Some of the issues on this list will get resolved, either by later documents in the chain of title, or by research you do on curative statutes or other legal rules. On this list of issues and possible comments and requirements, I write down a very short description of the problem. For example, if a mineral deed is unclear because there is

² George G. Morgenthaler, *Oil and Gas Title Examination* 6, (1982), p. 79.

a Duhig type problem, where you are not sure whether a reservation of one-half of the minerals is effective to reserve one-half the minerals or a lesser interest, because someone else earlier in the chain of title already reserved a one-half mineral interest, I will jot down something like “1. Did Jones mineral deed reserve ½ or no minerals – Duhig.” This issue could be resolved by a later stipulation among the mineral owners in the county records, but I keep a list of the issues I see as I am chaining the title and preparing the ownership schedules.

A title examiner needs to be familiar with all of the curative statutes of the state where the lands lie. These curative statutes may resolve problems that appeared in the chain of title. The title examiner should use these curative statutes to resolve any title issues covered by the curative statutes, and then no comment or requirement is needed in the opinion on that point.

Examples of curative statutes in Colorado are the statutes providing a deed of trust or mortgage more than 15 years past its due date is deemed released of record;³ if a deed names as grantee a corporation that is not yet incorporated but later is properly incorporated, the title shall vest in the grantee as soon as the grantee is incorporated;⁴ an unacknowledged or defectively acknowledged instrument that has been of record in the county for ten or more years shall be deemed to have been properly acknowledged;⁵ if it is apparent from the body of an instrument that a person is conveying or acting in an official or representative capacity, but the signature omits the statement of the official or representative capacity, it shall be presumed that the official or representative capacity is a part of the signature;⁶ and that certain name variances, such as using a full first name in one document and only the initial in the next document, shall not impair the presumption that the person is the same person in both instruments.⁷ These types of statutes may be found in the sections regarding real property, deeds, acknowledgements, and mortgages and deeds of trust, or treatises may list such statutes.⁸ The title examiner should be familiar with all such statutes for the state where the opinion lands are located. Legal research on case law on a particular issue also may resolve a title problem that appears in the chain of title.

You do not need to include comments that recite the chain of title, when no curative action is needed or the information is not needed to understand some other aspect of the opinion. The client wants to know how the title is held as of the certification date of the opinion, and what problems exist and actions need to be taken. Additional information about the history of the title is often not important to the client’s purposes.

On the topic of what to include in the comments and requirements, a prior author advised that the title examiner should be picky and skeptical while examining the title, but should also try to avoid requirements and “when you are preparing your opinion, try to find

³ § 38-39-201, C.R.S.

⁴ § 38-34-105, C.R.S.

⁵ § 38-35-106, C.R.S.

⁶ § 38-34-102, C.R.S.

⁷ § 38-35-116, C.R.S.

⁸ See, e.g., Paul E. Basye, *Curing Land Titles*, Second Edition, West Publishing Co. (1970).

a way out. Search for a reason why every title defect can be considered cured. . . . When all else fails, make the requirement, but only when you are convinced that you cannot prudently avoid the issue. Balance your attempts to avoid requirements against the consideration that you are not an insurer and cannot waive a requirement just because it is unlikely to cause any real difficulty. Cure it, do not just ignore it.”⁹

This process of deciding what comments and requirements need to be included in the opinion is one of the times the title examiner exercises his or her judgment to decide what’s important, and whether a particular matter is the baby or the bathwater.¹⁰ To determine what’s important, focus on any title defects, encumbrances and assumptions that would cause or could cause ownership to be different from how you have shown it in the ownership schedules of the opinion.

Once your initial list of possible comments and requirements is pared down to remove those that have been resolved, it’s time to organize how the comments and requirements will be presented in the opinion.

D. Organizing Comments and Requirements

One way to organize the comments and requirements is by covering defects regarding mineral ownership first, then defects affecting leasehold coverage and ownership, then those affecting royalty or overriding royalty interests. This often also follows the amount of risk arising from the various title defects. The defects affecting mineral ownership also often affect leasehold coverage and could result in an unleased mineral interest. The defects affecting leasehold interests are important to the client, because they want to have full leasehold coverage and the right to drill before moving on to a property. The defects affecting royalty and overriding royalty interests will affect payment of proceeds of production in the event the well is successful, but they do not affect the right to drill on the lands.

I once had a client request that we list the comments and requirements in the order of those that could result in the greatest dollar risk first, and then list the rest of the comments and requirements in descending order, based on the amount of damages that could result from the title defect. I told him we could not do that based on the information we generally have, in part because we don’t know how much the well will produce in order to put a dollar value on each comment and requirement. Nevertheless, it was a good lesson to be reminded that the client is looking at the title issues from a financial risk perspective. Thus, you can organize the comments and requirements so issues affecting larger mineral interests come before those affecting a smaller mineral interest.

⁹ Morgenthaler, Note 2 *supra* at p. 87, 93.

¹⁰ The old adage “don’t throw out the baby with the bathwater” could be rephrased for title opinions as don’t include extraneous information, but do include all crucial information and requirements.

E. Drafting the Comments

If you are using the format where comments describe the problem and the requirement states the steps to be taken to cure it, the comment should describe the problem. The comment should be succinct, but with enough detail or information so the client understands why the curative action is needed. The comment will include both a description of the relevant facts, deeds and other instruments, and a discussion of why there is a title defect or ambiguity, and perhaps how the examiner believes the issue would mostly likely be resolved in a court or what the examiner believes the parties most likely intended the document to mean. At times a discussion of relevant case law or statutes will be included in the comment.

The goal is to communicate clearly the problem. It can be helpful to include a sentence at the beginning of the comment that tells where you are going with this discussion. For example, a “topic sentence” that “there are estate proceedings for John Doe in the title materials examined, but no ancillary probate documents for him in Wyoming” tells the client up front why you are going into the details of what the recorded estate documents say (because ancillary probate needs to confirm them in the state where the property is located). Using a topic sentence is especially helpful if the comment is complex and therefore long.

The title examiner should limit using “legalese” in the comments. The people who will be reading the opinion and using it for years to come usually are not lawyers, and are not used to some of the terminology lawyers use among themselves. In order to write clearly it is usually better to use common English rather than legal terms.

The comment should clearly state the details such as the percent of mineral interest affected by the issue, which lease covers the interest, and which current owner’s interest is affected by the title defect being discussed. These facts help you to communicate clearly, and they help the client in assessing the relative importance of the problem covered by the comment.

F. Drafting the Requirements

The requirement states the action that needs to be taken to resolve the problem described in the comment. It should be concise and detailed at the same time: the person reading the opinion should be able to tell from the requirement exactly what needs to be done. It is helpful to be specific in the requirement. This may include stating what document needs to be obtained, who needs to sign the document, and where it needs to be filed or recorded. A requirement may also relate to factual matters and require the client to investigate the facts and confirm facts, such as whether a person died or when he died.

If the title examiner takes care to be sure the requirement states exactly what needs to be done, this can help keep the comment and requirement focused. In some cases, writing the requirement will make the examiner see that the comment or discussion part of the comment and requirement has additional information in it that is not needed to understand the problem at issue. Title examiners should avoid mixing into the comment the curative

actions that are needed, and then stating in the requirement “as stated above.” The “as stated above” requirement is not concise because it refers to the entire comment and does not serve the purpose of telling the reader just what the solution is to the problem.

The requirement should state alternative methods of curing the problem, if there are alternatives.

The requirement may also state that the requirement is one that the client may consider waiving on a business risk basis, if the title examiner feels this is appropriate. This type of suggestion can also be used in conjunction with offering alternative methods of resolving a title defect: the requirement may offer alternatives, and note that one alternative is a complete cure to the problem and the other alternative involves a business risk.

G. The Client Makes the Decisions About Waiving Requirements

The title attorney normally includes comments and requirements in the opinion for all the title defects (after eliminating any that have been resolved by relying on curative statutes or otherwise). The attorney does not waive title defects, and does not make the decision whether or not to assume the business risk of a title defect. The comments and requirements may, however, advise the client as to the severity of the title problem, the likelihood of the title defect turning into a title failure, and other judgments by the attorney, to help the client assess the risk and decide whether to waive a requirement.

At an earlier Special Institute on Mineral Title Examination, the concept of business risk was described as follows:

It is the responsibility of the landman or division order analyst working with other company employees and industry participants to determine to what lengths they are willing to go to bring title from where it is at the point in time the opinion was rendered to where it will be before they proceed with further capital investments on the property. This standard is often referred to as the “business risk” standard and differs from company to company and from deal to deal.¹¹

This author also addressed some of the matters that the landman or division order analyst will weigh in assessing the business risk of a particular title defect:

The factors used in determining to what extent pure marketable title is sought often include the cost of the proposed operation, whether or not the proposed well is a wildcat or a development well, the number of different ownership tracts involved in the anticipated spaced or pooled unit, the length of time it will take to secure certain curative documents, how practical it is to satisfy certain requirements, etc. The client must take each of these issues into account when

¹¹ Nicola L. Maddox, “Curing Title Defects Pursuant To Title Opinions,” Paper 10B, page 10B-2, Mineral Title Examination III, (Rocky Mt. Min. L. Fdn. 1992).

determining the extent to which title defects set forth in the opinion can and will be resolved.¹²

H. Summarizing Comments and Requirements from Prior Opinions

A supplemental title opinion should address the status of comments and requirements from the prior opinion that is being supplemented. This makes the supplemental opinion a “stand alone” document that includes all the title requirements that apply, so the client does not have to review several opinions and try to determine which title requirements from the prior opinion have been resolved. The status of prior comments and requirements usually can be done in a summary fashion, and if a prior requirement is satisfied the supplemental opinion should either state that the prior requirement has been satisfied or set out a brief description of how the requirement was satisfied. A prior author on this topic suggests that in addition to describing the curative action that was taken, if the curative resulted in a change to the calculations, the summary of the prior requirement should state how the interests were revised.¹³ Another alternative is to state that all requirements from the prior opinion have been satisfied, except those that are restated in the prior opinion. The goal is that the client needs to read only the supplemental opinion and that the client knows that all the pertinent requirements from the prior opinion are included in the supplemental opinion.

VI. CALL THE CLIENT REGARDING MAJOR TITLE DEFECTS

As you are preparing the title opinion, if you have a major title defect, you should call the client and alert them to the situation. It is possible the client will have additional information on the matter, in which case the defect may be at least partially resolved. The client also may want to start right away on obtaining curative on a major title defect, or may need to readjust its drilling schedule because of the problem.

VII. CONCLUSION

Preparing the title opinion, including drafting the ownership schedules, comments and requirements, is a key part of title examination. Reading all the documents, chaining the title, analyzing the ownership and analyzing any legal issues all occur before you sit down to write the opinion. All of these preliminary processes are interesting for the title examiner, but it is the written product, the title opinion, that the client is most interested in. Writing the opinion is your communication to the client of your work. You should strive to write the opinion well, organize it well, and be clear and concise.

¹² *Id.* at 10B-7, 8.

¹³ *Id.* at 10B-11.