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IDENTIFYING THE MINERAL FEE OR LEASEHOLD ESTATE HOLDER – TACTICS, RESOURCES AND OFF-RECORD COMPLEXITIES

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I. Introduction

Colorado has significant amounts of oil, gas and other minerals under the surface of lands within the state. Exploration and production of oil and gas has been very active in recent years in portions of the state, particularly Weld County. Oil, gas and mining companies obtain mineral title opinions from title attorneys to determine oil, gas and mineral ownership under the lands. Title insurance typically does not insure title to oil, gas and minerals. This paper will outline sources of information available to identify the mineral fee or leasehold estate holder.

II. Identifying the Mineral Fee Owner

A. Did the United States of America Reserve Any Minerals in the Patent?

Whether the United States reserved any minerals in a particular tract of land depends on when that land was settled and patented. In Colorado, in some lands the United States reserved no minerals, in other lands patented later the United States reserved coal, oil and gas, and eventually later patents contained a reservation of all minerals.

1. Bureau of Land Management ("BLM") Records

The first conveyance in which oil, gas or minerals are reserved is often in the patent from the United States of America.

The statutes regarding patents by the United States of America, prior to 1909, did not provide for reservation of any mineral interests by the United States. Under Acts in 1909 and 1910, the United States was authorized to reserve coal in its patents. The first authorization to reserve oil and gas in U.S. patents was under the Act of July 17, 1914. The Act of December 29, 1916, the Stock Raising Homestead Act, allowed the United States to reserve all coal and other minerals.

The date of the patent is not always controlling as to whether the United States reserves coal, oil, gas, and other minerals. Thus, a patent dated July 30, 1914, which is after the date the United

States was authorized to reserve oil and gas, may not include an oil and gas reservation, because the patent rights were initiated under an earlier Act.

The best source to determine whether the United States reserved oil, gas or other minerals in a patent is to examine a copy of the original patent. These patents are available on the website of the U.S. Department of the Interior-Bureau of Land Management, General Land Office Records ("GLO website"), http://www.glorecords.blm.gov. This page has a link titled Land Patents, where you can search by legal description, which will yield a list of patents and in most cases an image of the patent is included on the results list.

Patents are often recorded in the county records. Many times the county records contain a conformed copy of the patent that was prepared using form books available at that time (before copy machines). In some instances, a conformed copy may have been prepared using the wrong form and the mineral reservation in the conformed copy in the county records will vary from the actual mineral reservation in the original patent. In all the time I have been examining oil and gas titles, I have seen only one instance of this happening, where there was a variance between what a conformed copy in the county records showed as to a mineral reservation by the United States, and what the official patent records showed.

Another resource available on the BLM's GLO website are land status records. These records include the BLM's "Master Title Plat" and "Oil and Gas Plat." The Master Title Plat shows patents on a plat. The BLM designation "D/C" means the United States reserved only ditches and canals; "OG" indicates the United States reserved oil and gas and "All Min" indicates the United States reserved all minerals. See the copies of the MT (Master Title) Plat in the PowerPoint presentation that accompanies this paper, for an example of a BLM MT plat.

2. Title Insurance Policy

You may be able to tell whether the United States of America reserved minerals from a title policy on the lands. Generally, Exhibit B to a title policy lists any exceptions and reservations. This would include any mineral reservation by the United States of America. The title insurance policy is probably based on the county records, so the caveat regarding conformed copies, discussed in the preceding section, would also apply to what is shown in Exhibit B to a title insurance policy.

B. If the United States of America Did not Reserve Oil, Gas and Minerals

If the United States did not reserve the oil, gas and minerals in the patent, those minerals pass to the patentee. Any subsequent reservations of oil, gas and minerals generally would be shown in Exhibit B to a title insurance policy. For example, the following is an example of an exception listed on Exhibit B to a title insurance policy:

> 11. An undivided one-half interest in and to all of the oil, gas and other minerals, as granted to _____ by Mineral Deed recorded _____ in Book _____ at Page _____, and any interest therein or rights thereunder.

Exhibit B to a title insurance policy may or may not list subsequent conveyances of a mineral interest which has been reserved. Thus, if you are trying to determine who currently owns an interest in oil, gas or minerals, you would need to do a title examination; current ownership of a severed oil, gas and mineral interest can not be determined by reviewing Exhibit B to a title insurance policy.

In order to determine current ownership of the severed mineral interests, you would need to do a title examination yourself, hire another lawyer to do a title examination or hire a landman. Landmen are professionals that work in the oil and gas industry and many of them work in the county records to determine ownership of interests for purposes of obtaining oil and gas leases. Landmen often prepare reports showing current ownership of mineral interests in a particular tract of land. These reports also often list whether the mineral interest is subject to a current oil and gas lease and the reports identify major title defects. Landmen's reports typically include language stating that the landman's liability is limited to the amount paid for the report. Landmen also often prepare "landman's abstracts" in which the landmen will prepare an index of documents affecting a particular tract of land and compile copies of all those relevant documents, for a title attorney to use in his or her title examination.

III. Identifying the Mineral Leasehold Estate Owner

A. If the Oil, Gas or Minerals are Owned by the United States of America

The BLM maintains records regarding coal, oil shale and oil and gas leases issued by the United States of America covering minerals it owns. These BLM records (as well as the county records) need to be examined to determine current ownership of a federal coal, oil and gas or other mineral lease. The BLM also maintains an OG plat, similar to the MT plat discussed above, which shows the lease number of an oil and gas lease or other mineral lease currently in effect. See the sample OG plat in the PowerPoint presentation that accompanies this paper. The dotted line on the plat shows a parcel that is subject to an oil and gas lease. The language "COC 67090 OG Lse" refers to a federal oil and gas lease, serial number COC-67090. In order to determine who is the lessee or working interest owner (working interest owner refers to the party owning the lessee's interest in the oil and gas lease and the right to drill and produce the oil and gas) can only be determined by examining the BLM's lease file for this lease and other BLM records, as well as the county records.

B. If the Minerals are Privately Owned

If the United States did not reserve the oil, gas or other minerals, and they passed into private ownership, those owners have the right to grant leases covering their mineral interest. The leases should be recorded in the county records and any assignments of the leases should also be recorded. Thus, determining the current owner of the leasehold estate requires an examination of the county records, either by an attorney, or through a landman's report as discussed in Section II.B. above.

In Colorado, the grantor-grantee index maintained by the Clerk and Recorder is the official index. However, title companies maintain tract indices that identify the documents affecting a

particular tract of land. In the olden days, these tract indices were in large paper books with handwritten entries. More recently, many of the indices are computerized. Landmen who prepare abstracts, as well as abstract companies, can usually obtain access to these tract indices in order to prepare an index of documents affecting a particular tract of land. This is generally how mineral title examinations are conducted, based on the title company tract indices, because of the expense and difficulties inherent in a grantor-grantee title examination.

C. Determining Whether an Oil and Gas Lease is Still in Effect

Oil and gas leases are typically for a primary term of a stated number of years and so long thereafter as oil, gas or other hydrocarbons are produced. Thus, in order to determine whether a particular oil and gas lease is still in effect, you need to determine whether oil, gas or other hydrocarbons were produced pursuant to the lease and whether that production continues.

Oil and gas leases also often include a pooling clause, which allows the lessee to pool the leased lands with other lands in the area in order to form a pooled unit. This is done because an oil and gas well usually drains oil and gas from lands beyond just the lands where the wellbore is located. The Colorado Oil and Gas Conservation Commission ("COGCC") has the authority to establish a drilling unit (often referred to as a "spacing unit") as to certain lands, and for a particular zone or zones under the lands. The statute provides that "no drilling unit shall be smaller than the maximum area that can be efficiently and economically drained by one well." C.R.S. § 34-60-116(2). Thus, the COGCC might adopt a spacing order providing that wells drilled to a particular formation (for example the Niobrara formation or the Dakota formation) will be 320 acres. In that instance, an oil and gas company will most likely pool all of the leases within that drilling or spacing unit to be operated as one unit. In those instances, under the pooling provision of the lease, a well located on lands not within the lease lands, but in a pooled area, will extend all of the leases in the pooled area, because production from the well within the pooled area is allocated to all of the lands in the pooled area. The lessor will also receive a proportionate share of the royalties in that situation. Generally, a declaration of pooling is recorded in the county records to pool the leases and lands in the drilling unit.

Oil and gas leases can also be extended beyond their primary terms by being committed to a federal exploratory unit, which is a tool available under the federal statutes allowing a large area, including federal oil and gas leases, to be developed as a unit. A federal exploratory unit is approved by the Bureau of Land Management and the agreement is sometimes, but not always, recorded in the county records. Another type of agreement that can lead to an oil and gas lease being extended by production from neighboring lands is a communitzation agreement, which is very similar to the pooling agreements described above, but which is approved by the Bureau of Land Management and involves at least one federal oil and gas lease.

§ 38-42-106, C.R.S, is a statute requiring an affidavit to be recorded in the county records if a lessee claims that an oil and gas lease has been extended beyond its primary or definite term. If the affidavit is not recorded within six months after the expiration of the primary or definite term of such lease, the "record thereof, if any, shall cease to be notice and shall have no more effect than an unrecorded instrument." This statute has a slightly different provision for oil, gas or

other mineral leases dated before March 28, 1967, in which case the affidavit needed to be recorded within six years after March 28, 1967.

Despite the affidavit of extension statute, it is possible that if a surface inspection of the lands would give notice that oil and gas was being produced from the lands, a subsequent purchaser would still be on notice that the oil and gas lease had been extended beyond its primary term by production, even if an affidavit had not been recorded.

In some instances, if a title insurance policy contains an Exhibit B exception for an oil and gas lease, and no affidavit of extension was recorded as required by the statute, the title insurance company may agree to remove that exception for the oil and gas lease from exceptions in the title insurance policy.

Information regarding oil and gas wells in Colorado can be obtained from the Colorado Oil and Gas Conservation Commission website: http://cogcc.state.co.us. On the home page, along the left side is a heading Database, which leads to a page entitled Inquiry, and you can click on the Facilities heading there to get a form used to search for oil and gas wells on a particular section, township and range. I always click at least 100 records under the Limit Records portion of this form, because the 25 records that is the default will sometimes yield only a partial list of the relevant oil and gas wells and other facilities. You should be aware, however, that the information in the Database/Facilities portion of the COGCC records shows the surface location of a particular well. With the new horizontal wells, a well may actually pass under additional lands other than those shown on the list using this COGIS Facility Inquiry form. The Maps section that you can click on the left side of the COGCC home page leads to GIS maps, which also show directional well bottomhole locations and these maps could be used to determine the path of a horizontal wellbore. See the examples of information from the COGCC website in the PowerPoint presentation that accompanies this paper.

3. Decedent's Interests

In many instances, people have died owning a severed mineral interest and an estate proceeding was not done to pass title to their heirs or devisees. Many estate proceedings or similar proceedings are now being done, as the value of the mineral estate has increased in recent years. Thus, in those instances where estate proceedings have not been done and recorded, you also will need to do additional investigation to determine a current owner, if the record owner is deceased. Landmen can conduct searches to attempt to locate heirs or devisees of deceased mineral owners.

IV. Conclusion

Determining the ownership of a mineral fee or leasehold estate requires examination of the county records and sometimes also the federal Bureau of Land Management records. Some information often can be gleaned from a title insurance policy, but the policy does not show current ownership of severed mineral interests or current ownership of oil and gas leasehold estates. In order to determine whether an oil and gas lease is still in effect, you can check to see whether an affidavit of extension has been recorded and you also need to determine whether there has been any oil and gas produced under the terms of a particular oil and gas lease from

lands covered by the lease or lands pooled or unitized with the leased lands. Title examinations to determine mineral or leasehold ownership can be conducted by attorneys. Landmen who work in the oil and gas industry also prepare ownership reports addressing these matters.