# Advanced Mineral Title Examination (Jan 2014)

CHAPTER 1
ADVANCED MINERAL CONVEYANCING AND TITLE ISSUES - PART 1

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## I. Overview on How to Report Complicated Title Issues

The first step in addressing tricky title issues is to recognize any complex or advanced issues in the chain of title. Often, these arise from documents where you read the document and wonder "what were they trying to do here?" or "how can they do that, they don't have that much mineral interest left?" Then, assuming that these issues are not resolved in the later chain of title, you need to analyze the issue, decide your interpretation for purposes of scheduling the ownership and then make a comment and requirement.

The keys to drafting comments and requirements are to make them clear and concise. Those two words sometimes are at odds; in a complex issue, the facts and discussion are necessarily going to be longer than they would be for a simple issue. Nevertheless, it is important to continue to work to keep the comment and requirement clear and concise. This is not new advice. A 1977 paper states "[t]he discussion on title exceptions should be concise and to the point. The requirement should be specific. The title opinion is not the appropriate place for the attorney to expound his 'learning'. A long legal dissertation relative to the problem or problems encountered in the chain of title may be beneficial to the attorney in reaching his conclusion, but the proper place for it is in the title opinion file as a memo and not in the opinion itself."[1] As noted in the 1977 paper, the discussion should be practical and you should try to keep it readable.

While keeping in mind that the comment and requirement should be clear and concise, in the comment you need to include the relevant facts, such as the language in the pertinent documents, which caused the problem. Then, you need to discuss the law; there is no need to brief the issue, but it is often helpful to cite the most relevant cases. At times the landman will be taking the comment and requirement to the legal department and the case citations may be particularly helpful to those reviewing lawyers.

Different title examiners have different styles, but we generally discuss the issue in the comment and state the way to resolve the problem in the requirement. Thus, the requirement should not include any new facts or discussion. Often, the requirement will state alternative ways to resolve the issue.

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[1] Lewis C. Cox, Jr., "Scope, Content, and Form of Title Opinions" *Mineral Title Examination Institute,* Paper 2, page 2-13 (Rocky Mnt. Min. L. Fdn. 1977).

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## II. Categorizing Conveyances of Oil and Gas Interests

A. *Determining the Type of Interest Conveyed*

Title examiners often face difficult issues determining whether a conveyance is of a non-participating royalty or a mineral interest. Typically, an instrument that grants or reserves "the oil, gas and other minerals *in, on and under"* or *"in and under and that may be produced from"* the subject lands without further description creates a mineral interest.[2] The conveyance of a fractional interest in minerals *"produced"* or *"produced and saved"* from lands, with a reservation of bonus, rental and executive rights creates a royalty interest.[3] A "royalty interest" in a mineral estate is nonparticipating in nature, and does not entitle the owner to any share of ordinary cash or other bonuses, or of delay rentals.[4] A non-participating royalty interest is "perpetual" when a habendum clause granting to the "assignee, his heirs, successors or assigns" is included in the conveyance.[5] The title examiner must be careful in categorizing interests as royalties or mineral interests in order to properly allocate production and costs of production.

However, when grantors have used variations of the phrases above, used them together or added additional provisions, courts have found both mineral interests and royalty interests to be created, basing their decisions on the intent of the parties and other facts and circumstances surrounding the conveyance. Courts agree that an instrument's title is not determinative as to the interest conveyed, holding that a "Mineral Deed" has created a royalty interest and a "Royalty Conveyance" has created a mineral interest.[6] The form of the creation of the interest is also indeterminate, as a mineral interest or royalty can be created by grant or reservation or a royalty can be created by reservation to a lessor under an oil and gas lease.[7] The difficulty that courts have had classifying an oil and gas interest is well illustrated by court interpretations of "non-participating royalties" in Wyoming and Colorado.

B. *Non-Participating Royalties in Wyoming*

Unlike in Colorado, Wyoming courts have clearly defined the requirements necessary for creating a non-participating royalty interest. A non-participating royalty interest is created through instruments that purport to convey "oil and gas produced and saved" from the subject lands.[8] The non-participating royalty becomes perpetual upon the inclusion of a habendum clause conveying the interest to the "assignee and his heirs, successors and assigns."[9] The reservation or grant of a royalty interest prior to the lease of the mineral interest "is generally termed a non-participating royalty, if no right is granted or reserved to participate in the making of future leases."[10] Distinguishing characteristics of a non-participating royalty interest in

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[2] I Williams & Meyers, Oil and Gas Law (hereinafter "Williams & Meyers") § 304.4 (2010).

[3] *See* Brian R. Bjella, "Advanced Mineral Conveyancing and Title Issues (Tough Titles Top Twelve)," *Mineral Title Examination, Fundamentals for Practice in the 21st Century,* Paper 9, page 9-1 (Rocky Mnt. Min. L. Fdn. 2007).

[4] 38 Am. Jur. 2d *Gas and Oil* § 196 (2013).

[5] *See* Bjella, *supra* note 3, at 9-2.

[6] I Williams & Meyers § 304.1 (2010).

[7] 3A Summers Oil and Gas § 32:5 (3d ed., 2013).

[8] *See* Boley v. Greenough, 22 P.3d 854 (Wyo. 2001).

[9] *Id.*

[10] *Id*.

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Wyoming include (1) that the interest is not subject to costs of discovery or production; (2) that the assignee has no exploration or production rights; (3) that the owner has no right to grant leases; and (4) that the owner has no right to bonuses and delay rentals.[11] These characteristics are evidence of a non-participating royalty interest, even when the interest may be mislabeled as an "overriding royalty interest."[12] If the conveyance creating the interest is ambiguous, the Wyoming courts allow extrinsic evidence to show the intent of the parties. Because Wyoming has clearly defined rules regarding the classification of non-participating royalty interests, the title examiner has excellent guidelines to follow to assist her in properly identifying the mineral interest conveyed.

C. *Non-Participating Royalties in Colorado*

In Colorado, however, the courts have struggled to classify a non-participating royalty. Colorado courts have held that, at common law, the right to a share of profits from a mineral fee estate equals an ownership share in the mineral fee estate.[13] The application of this rule has surprising results. For example, assume O was the owner of a 100% mineral interest in the subject lands.[14] O desires to convey to his child ("C") an undivided 1/2 non-participating royalty interest from any oil and gas lease entered into upon these lands. To this end, O conveys C "a 6¼% royalty interest in oil and gas" together with the statement that "it is the intent to convey hereby one-half of the normal 12½% landowner's royalty in the subject lands." L then obtains a lease from O on the lands, and, out of an abundance of caution, a secondary lease from C, both of which contain proportionate reduction clauses. Under the early Colorado rule set forth in *Corlette* and *Simson,* the courts would hold that C has a 6¼% share of the mineral interest because C has a share in the mineral profits. When this interpretation is coupled with the proportionate reduction clause in the lease, C would only receive 6¼% of the royalty interest of 12½% (or 0.78125%), and not a 6¼% royalty as O intended.

In an attempt to clarify the rule, the Colorado legislature expressly allowed for the creation of a non-participating perpetual royalty by statute in 1991, and now they can be created using express language of the same.[15] The statute, however, does not expressly state that it has a retroactive effect. The Colorado Court of Appeals has more recently held that an interest described in a 1972 deed was a non-participating royalty, and that such royalties were legally permissible prior to enactment of the 1991 statute.[16] While the *Keller Cattle Co*. case criticizes and distinguishes the earlier cases that essentially convert non-participating royalty interests into mineral fee estates, Colorado has not expressly abandoned the old rule as applied retroactively and does not explain when and how a non-participating royalty would have been created prior to 1991. As a result, the *Corlett* and *Simson* rules may apply to older attempts to convey non-participating perpetual royalties in Colorado. Title examiners in Colorado should be aware of the pitfalls related to this rule.

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[11] *Id*.

[12] *Id*.

[13] *See* Corlett v. Cox, 333 P.2d 619 (Colo. 1958) and Simson v. Langholf, 293 P.2d 302 (Colo. 1956).

[14] This hypothetical is based upon *Corlett,* 333 P.2d. 619. See 1B Colo. Prac., Methods of Practice § 10:2 (6th ed., 2013) for a much more detailed example.

[15] Colo. Rev. Stat. Ann. § 38-30-107.5 (West 2013) (effective July 1, 1991).

[16] *See* Keller Cattle Co. v. Allison, 55 P.3d 257 (Colo. App. 2002).

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D. *Comment and Requirement Drafting Tips*

As illustrated by the Wyoming and Colorado examples above, the title examiner should first familiarize herself with the relevant case law and statutes of her state. The title examiner should then always look to the language of the conveyance to determine the grantor's intent to convey a mineral interest or royalty interest. In her comment, she should describe the relevant language used in the conveyance and whether it is ambiguous. If it is ambiguous, the title examiner should set forth all relevant facts and circumstances that support her finding of the conveyance to be either a mineral or royalty interest. The title examiner should then conclude as to what type of interest was most likely intended to be conveyed and prepare her ownership schedules based upon that conclusion. She should recommend that the client suspend payment on the interest pending the receipt of a properly executed and recorded amendment of the deed or assignment or a stipulation of interests signed by all parties to the original conveyance which created the interest or the current owners of those interests. The title examiner should also inform the client that, if the parties intended to convey a different type of interest than what she concluded it to be, she should be advised and will update the ownership schedules and make additional requirements as necessary.

In Colorado, if a pre-1991 conveyance is unclear as to whether a mineral interest or a non-participating royalty interest was intended to be conveyed, a protective oil and gas lease or a ratification of the existing oil and gas lease should be obtained from the current owner of the uncertain interest.

E. *A Note on Fractional Royalties and Fractions of Royalties*

Title examiners, when analyzing royalty interests, should always closely examine the language creating the royalty to determine if it is a “fractional royalty” or a “fraction of royalty.” A “fractional royalty” is a share of the gross production from the lands, while a “fraction of royalty” is a fraction of a fractional royalty, or share of gross production multiplied by a fractional interest.[17] For example, a fractional royalty might be created as “an undivided 1/8 royalty interest” or a “5% royalty of all of the oil and gas produced and saved.” A fraction of royalty might be created as “1/8 of all royalty” or “an undivided one-half interest in and to all of the royalty.” While the difference in language is subtle, the result of misinterpreting the language can be major. For example, a fractional royalty of 1/8 is much different than a fraction of royalty of 1/8, as the fraction of royalty would equal 1/8 times whatever royalty rate is in effect.

This is very important because a misinterpretation of this distinction may expose the title attorney to malpractice liability, as illustrated in *Gavenda v. Strata Energy, Inc*.[18] There, an attorney was hired by the operators to draft a title opinion. By a conveyance, the Gavendas reserved “an undivided one-half (1/2) non-participating royalty” in the subject lands.[19] Finding that amount to be remarkably high, the title attorney assumed that the Gavendas meant to reserve

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[17] 2 Williams & Meyers, §§ 327.1, 327.2 (2012).

[18] 705 S.W. 690 (Tex. 1986).

[19] *Id*. at 690-691.

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one-half (1/2) of the one-eighth (1/8) royalty.[20] The title opinion was issued, the division orders were prepared and signed, and payments were made based upon that incorrect assumption.[21] Subsequently, the Gavendas revoked the division order and filed suit, claiming a full one-half (1/2) royalty interest.[22] Because the operators prepared the erroneous division orders and retained the benefits, the court held that the division orders were not binding and rendered judgment against the operators for the amount of the underpayment from date of first production (approximately $2.4 million).[23] The court also noted that the operators had filed a malpractice third-party cross-action against the attorney who rendered the opinion.[24] To avoid similar liability, a title examiner should always carefully read royalty conveyances closely and, if any ambiguity exists, should comment on the ambiguity and require that the conveyance is corrected by a properly executed and recorded corrective deed or assignment.

## III. Concurrent Ownership of Oil and Gas Interests

During the preparation of a title opinion, complicated issues can arise based upon joint ownership of mineral interests. Under common law, the grant of an estate to more than one person with concurrent rights of possession can take one of three forms: tenancy in common, joint tenancy or tenancy by the entirety. The primary distinction between tenancy in common and other forms of tenancy is that joint tenants and tenants by the entirety both have rights of survivorship. A joint tenant may sever or eliminate the right of survivorship unilaterally, effectively converting that person's relationship with the other tenant(s) into a tenancy in common. Tenants by the entirety must be husband and wife, and an act of both parties is required to eliminate the right of survivorship.

The common law presumption that a concurrent estate was intended to be a joint tenancy absent evidence to the contrary has been abolished by statute in many jurisdictions, but they continue to recognize a joint tenancy with right of survivorship if the instrument creating the estate expresses a specific intent to grant a right of survivorship. At common law a joint tenancy required unities of time, title, interest and possession, and a tenancy by the entirety required those plus the additional unity of marriage.[25] A tenancy by the entirety is recognized in the Rocky Mountain region by only Wyoming today.[26] Title issues arising from these concurrent ownership forms are typically related to their creation, oil and gas use and waste, and ownership severance. Several complicated issues arising from concurrent ownership are set forth as follows.

### A. *Creation of Concurrent Ownership Interests*

In most states today, a conveyance to multiple grantees results in a tenancy in common, and whenever a class of heirs receives mineral interests by inheritance under laws of intestacy,

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[20] *Id*. at 690 - 691.

[21] *Id*.

[22] *Id*.

[23] *Id*. at 693.

[24] *Id*. at 693.

[25] *See* 1 Patton and Palomar on Land Titles §§ 222 - 224 (3d ed., 2003).

[26] *See* Maria E. Mansfield, *A Tale of Two Owners: Real Property Co-Ownership and Mineral Development,* 43 Rocky Mnt. Min. L. Inst. 20 (1997).

they take their property as tenants in common.[27] A joint tenancy, on the other hand, requires express language of survivorship to be created. This can be done using the phrase “as joint tenants with rights of survivorship” or using the abbreviation for the same, “JTWROS.”[28] As noted above, the common law requires that a joint tenancy has the four unities of title: time, title, interest and possession. However, many states have abolished the unities of time and title so as to avoid the need to use a straw man to create a joint tenancy.[29] For example, the Colorado joint tenancy statute, enacted in 2008, allows that the interests of joint tenants no longer need to be equal, requiring only that their interests total 100%.[30] Ultimately, the grantor's clearly expressed intent is required to create a joint tenancy. When the grantor's intent is unclear, various title issues may arise.

Often times, a simple drafting variation may result in a difficult title issue. For example, a conveyance of record purports to create concurrent ownership in a mineral interest, describing the grantees as “John Smith or Mary Smith” or “John Smith and/or Mary Smith.” Based upon the plain language of the conveyance, most jurisdictions would view this as a tenancy in common and not a joint tenancy because words of grant of the right of survivorship are not included. In states that do not have this language requirement, an argument could be made that a joint tenancy exists because the conveyance has all four unities of title. A similar issue may arise when a conveyance is made to “John Smith and Mary Smith, jointly” or to “John Smith and Mary Smith, as joint tenants” in a jurisdiction where express language regarding the right of survivorship is required.[31] Even though the intent was to create a joint tenancy, a court may adhere to the strict letter of the law and deny its creation because words of survivorship were not clearly demonstrated.[32] However, at least one court has gone so far to allow for the creation of joint tenancy even though the required statutory form was not followed based upon the intent of the parties.[33]

1. Comment and Requirement Drafting Tips

When a conveyance is ambiguous as to the intended concurrent ownership status, a title examiner should first familiarize herself with relevant state statutes, case law and title standards applicable to concurrent ownership, and apply them to the ambiguity. If this authority does not resolve the issue, the title examiner should then look to subsequent conveyances by one or more of the concurrent owners. The ensuing actions of the concurrent owners may help to resolve the issue. For example, in the conveyance to “John Smith or Mary Smith” described above, the title examiner could pass title if the Smiths joined in a subsequent conveyance, or, perhaps, if one of

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[27] 1 Patton and Palomar on Land Titles § 222 (3d ed., 2003).

[28] *Id*.

[29] *See, e.g.*, Kan. Stat. Ann. § 58-501 (West 2013); N.M. Stat. Ann. §§ 47-1-36, 47-1-35 (2013); Utah Code Ann. § 57-1-5 (2013) (joint tenancy presumed if conveyance to husband and wife); Wyo. Stat. Ann. § 34-1-140 (2013).

[30] Colo. Rev. Stat. Ann. § 38-31-101 (West 2013).

[31] 48A C.J.S. Joint Tenancy § 10 (2013).

[32] *Id.* § 9.

[33] *Id., citing In re* Kas' Estate, 303 N.E.2d 201 (Ill. App. 1st Dist. 1973).

the grantees were deceased and the usual instruments are recorded to perfect title in the surviving joint tenant.[34]

If subsequent conveyances do not resolve the issue, the title examiner should examine any other relevant documentation that may shed light on the intent of the parties. She should describe the ambiguity and any evidence of intent that weighs towards defining what concurrent ownership exists and make a conclusion based upon the documents reviewed. If the necessary parties are available to resolve the issue, the title examiner should require that a stipulation and cross-conveyance with words of grant clearly defining the form of concurrent ownership is properly executed and recorded. If the parties are not available, the title examiner should advise the client to weigh the risk the ambiguity places on its interest against the cost of a quiet title action, and to determine a course of action based upon that analysis.

B. *Tenancies by the Entirety in Wyoming*

Wyo. Stat. Ann. § 34-1-140 provides that real persons may own real or personal property, including mineral interests, in the form of tenancy by the entirety. In order to create a tenancy by the entirety, there must exist either the four unities of interest, time, title and possession, plus the unity of person (*i.e.*, marriage), or, in the absence of one or more of the first four unities, it must be evident from the language of the instrument itself that the parties intended to create a right of survivorship.[35] Wyoming courts have held that a conveyance to named persons recited to be husband and wife is presumed to create a tenancy by the entirety.[36] Unlike joint tenants, neither spouse can unilaterally sever the right of survivorship without the consent of the other; thus, the right of survivorship continues until there is a divorce, a death of one of the spouses, a joint conveyance, or an agreement to sever.[37] Most importantly, the conveyance or encumbrance of any mineral interest owned in tenancy by the entirety must be signed by both spouses to be effective.[38]

Consequently, title issues arise when (1) a tenancy by the entirety is intended but is not created correctly, or (2) one tenant by the entirety purports to unilaterally convey or devise his or her interest without the consent of his or her spouse. If a tenancy by the entirety is intended but fails, it can have complicated unintended consequences. For example, A and B are conveyed a mineral interest by deed that does not identify them as husband and wife or otherwise purport to create an estate of joint tenancy or tenancy by the entirety. A and B enter into a subsequent lease as husband and wife. A then dies. B files an affidavit reciting the death of A that attempts to terminate the tenancy by the entirety and vest title in B. Even if A and B have the same last name and the lease lists them as husband and wife, Wyoming law would not create a tenancy by the entirety absent specific designation of a tenancy by the entirety in the original deed. Consequently, the affidavit would be insufficient to vest title in B. Similarly, if a link in the title

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[34] *See* Colorado Real Estate Title Standards, §§ 7.1.2, 7.2 (Rev. and eff. July 1, 2013). Some title examiners, including your authors, question whether this second portion of the Colorado Title Standard is an accurate and reliable statement of the law.

[35] Wambeke v. Hopkin, 372 P.2d 470, 475-76 (Wyo. 1962).

[36] *See In re* Anselmi, 52 Bankr. 479 (Bankr. D. Wyo. 1985); Witzel v. Witzel, 386 P.2d 103 (Wyo. 1963).

[37] 1 Patton and Palomar on Land Titles § 224 (3d ed., 2003).

[38] *Id*.

chain is based upon a unilateral conveyance by only one spouse, the conveyance fails, and the title chain can be changed significantly.

1. Comment and Requirement Drafting Tips

When the title examiner prepares an opinion in Wyoming, she should be acutely aware of the issues that arise from concurrent ownership by tenancy by the entirety. In addition to the steps described above, the title examiner should describe any instances where a tenancy by the entirety appears to have been intended but was not properly created. If the parties are deceased, she should recommend that appropriate probate or determination of heirship proceedings should be conducted and proper orders should be recorded. If a tenancy by the entirety is created and the chain of title relies upon a unilateral conveyance by one tenant by the entirety, the title examiner should recommend that the conveyance is amended to reflect the consent of both tenants to convey, and that such amendment is properly executed and recorded. If the conveyance is void and the tenants by the entirety are dead, the title examiner should comment on the same and schedule the interest in the heirs or devisees of the surviving tenant. Additionally, all oil and gas leases and division orders should be jointly executed by tenants by the entirety, and, if they are not, should be ratified by the non-executing spouse.

C. *Reservations to Strangers to Title*

Another complicated issue linked with joint ownership arises when a reservation is made in a third party. For example, assume A is granted an undivided 1/2 mineral interest and all of the surface rights in a tract of land. A is married to B, but B is not named in the conveyance to A. A and B then jointly execute a conveyance transferring all of the surface rights to C, excepting and reserving “unto Grantors, their heirs, personal representatives and assigns, all of the oil, gas, and other minerals” in the lands conveyed. Because B was never conveyed an interest in the undivided 1/2 mineral interest, the question remains whether that interest can be reserved to B in a subsequent conveyance.

Under the common law, the “stranger to title” doctrine declared that no interest or estate in land could be created in favor of a stranger to title by reservation or exception in a conveyance or assignment.[39] As a result, B would hold no interest. Many states today, however, would allow B to reserve an interest. In North Dakota, for example, a reservation in a spouse is permitted when it is the grantor's intent.[40] In *Malloy v. Boettcher,*[41] the grantor and his wife conveyed an interest to their daughter, which “reserved to the parties of the first part a life estate.” The Court held that the wife was not a stranger to title and was allowed to acquire an interest through a third party reservation as it was the intent of the parties. Wyoming has also rejected the stranger to title doctrine in the context of a conveyance by a partnership, with the Wyoming courts calling the stranger to title doctrine “an archaic and inappropriate feudalistic

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[39] Paul Upsons, *The Erosion of the Stranger to Title Doctrine,* The Rocky Mnt. Landman, December 2004, at 3.

[40] North Dakota Mineral Title Standards, § 3-06 (2002), states that “[a]n exception or reservation can be effective to convey a property interest to a spouse, who does not own an interest in the land prior to the deed, but joins in the execution of the deed, where it is determined to have been the grantor's intent.”

[41] 334 N.W.2d 8 (N.D. 1983).



principle.”[42] Similarly, Colorado and Montana courts have rejected the stranger to title doctrine in

the context of an easement, holding that a deed conveying land to one person may validly reserve or except an easement in a third-party stranger to title.[43] While it is likely that the Wyoming, Colorado and Montana courts would extend this analysis to a reservation in a mineral deed or an oil and gas lease, there are no published opinions applying this analysis in the oil and gas context. In eschewing this doctrine, these courts agreed that the intent of the parties, and not the form of conveyance, was to be emphasized.[44]

Thus, the crux of the analysis turns on whether A intended for B to obtain a mineral interest. If this intent is apparent from the plain language of the conveyance, then the title examiner does not need to look further. However, often times the deed is ambiguous as to the parties' intent. For example, the deed may be a pre-printed form where the husband and wife are collectively defined as “Grantor,” and the reservation of a life estate in the mineral interest is to the “Grantor.” While the intent of the husband and wife was probably to reserve an interest together, the grantee may argue that intent is ambiguous. If an ambiguity exists, the title examiner may look outside of the deed for evidence of the parties' intent at documents executed by both or either of the parties, including subsequent conveyances by either or both spouses, agreements entered into by both spouses, statements of claim, leases, or other relevant documentation.

1. Comment and Requirement Drafting Tips

When drafting a comment regarding a reservation to a spouse or stranger to title, the title examiner should first confirm whether the stranger to title doctrine has been replaced by an intent-based analysis in the state where the lands lie. If so, and the reservation to the third party is ambiguous, the title examiner should lay out each ambiguity clearly and concisely. She should then advise the client to obtain and record a stipulation of interest including present words of grant between the spouses to establish ownership. If a lease is of record from one of the spouses, the title examiner should require that the lease is ratified by the second spouse, regardless of ownership. If the mineral interests in the stipulation are different than as set forth in the opinion, the title examiner should request that the client provide the stipulation and any other relevant documentation to her so that she can adjust the ownership schedules accordingly.

If one or both of the spouses are deceased, the issue often times is resolved by subsequent probate or intestacy proceedings where the surviving spouse inherits all right, title and interest of decedent, thereby rendering the issue moot. In addition, any subsequent conveyance from both spouses to a third party would eliminate the issue. An adverse possession claim or resolution through marketable title statutes may be other options to clear title, but only if the minerals have not been severed from the land. In the absence of any other solutions, the title examiner may require that an ambiguous reservation between spouses must be resolved by a quiet title action. However, if the ambiguity is ancient and the business risk of a stranger to title making a claim on

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[42] *See* Simpson v. Kistler Investment Company, 713 P.2d 751 (Wyo. 1986).

[43] *See* Michael J. Uhes, Ph.D., P.C., PROFIT SHARING PLAN & TRUST v. Blake, 892 P.2d 439 (Colo. App. 1995); Kelly v. Wallace, 972 P.2d 1117 (Mont. 1998).

[44] *See* Simpson v. Kistler Investment Company, 713 P.2d 751 (Wyo. 1986); Michael J. Uhes, Ph.D., P.C., PROFIT SHARING PLAN & TRUST v. Blake, 892 P.2d 439 (Colo. App. 1995).



the property is outweighed by the cost of a quiet title action, then the client may choose to do nothing.

D. *A Note on Oil and Gas Leases Executed by Both Spouses*

In some instances, oil and gas leases are signed not only by the individual owner of the mineral interest but also by his or her spouse. Thus, if an owner spouse and non-owner spouse execute a lease together, the owner spouse might inadvertently create an ownership interest in the non-owner spouse. However, it is customary in the industry for a lessee to obtain the signature of a non-owner spouse on the lease in order to protect against possible homestead or other inchoate interests. In most cases, it cannot be assumed that naming of a non-owner spouse as co-lessor was intended to reserve a royalty interest in favor of the non-owner. If this is the case, the title examiner should advise the client to distribute the proceeds of production only in accordance with a written agreement or a division order signed by both spouses.

## IV. Future Rights and Successive Interests

### A. *The Rule Against Perpetuities*

As most title examiners know, the traditional Rule Against Perpetuities is usually stated as follows (hereinafter, the "Rule"): "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest."[45] The Rule traditionally voids executory interests and contingent remainders that may not vest within "twenty-one years after some life in being at the creation of the interest." The intended purpose of the rule is to balance land owner interests with the free alienability of land. Historically, the application of the Rule by courts was inflexible, holding the letter of the law to be paramount over the intent of the parties conveying the interest. However, courts have always been hesitant to apply the rule to mineral interest conveyances, and it has fallen out of favor in many states.

For example, most courts have held that the Rule does not apply to "no-term" oil and gas leases,[46] perpetual non-participating royalty interests,[47] overriding royalty interests,[48] reservations or grants of the executive power to lease the minerals and distribute royalties to the lessor,[49] net profits interests,[50] and defeasible (or term) mineral or royalty interests.[51] In

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[45] Bruce M. Kramer, *Modern Applications of the Rule Against Perpetuities to Oil and Gas Transactions: What the Duke of Norfolk Didn't Tell You,* 37 Nat'l Resources J. 281, 281 (1997), *quoting* John Chapman Gray, The Rule Against Perpetuities 2001 (4th 3d. 1942).

[46] *Id.*, at 286.

[47] *See, e.g.*, Luecke v. Wallace, 951 S.W.2d 267, 274 (Tex. App. 1997); Price v. Atlantic Refining Co., 447 P.2d 509 (N.M. 1968); J. M. Huber Corp. v. Square Enterprises, Inc., 645 S.W.2d 410 (Tenn. App. 1982); and McGinnis v. McGinnis, 391 P.2d 927 (Wyo. 1964). Kansas was the only state to hold that a perpetual non-participating royalty may violate the Rule, but appears to have recently rejected that proposition. *See* Rucker v. DeLay, 295 Kan. 826 (2012).

[48] J. Hovey Kemp and J. Forbes Newman, *Hidden Rule Against Perpetuities Problems in Oil and Gas Transactions,* 32 Rocky Mnt. Min. L. Inst. 16, 9 (1986).

[49] *See* C. J. Meyers, *The Effect of the Rule Against Perpetuities on Perpetual Non-Participating Royalty and Kindred Interests,* 32 Tex. L. Rev. 369, 408-25 (1954); Elick v. Champlin Petroleum Co., 697 S.W.2d 1, 4-5 (Tex. App. 1985).

[50] *See* Grynberg v. Amerada Hess Corp., 342 F. Supp. 1314 (D. Colo. 1972).

[51] *See* Williams v. Watt, 668 P.2d 620 (Wyo. 1983); Kramer, *supra* note 45, at 294-295.

addition, the Rule has been statutorily abolished in some states,[52] and most Rocky Mountain states have adopted a version of the Uniform Statutory Rule Against Perpetuities ("USRAP").[53] The USRAP provides a "wait-and-see" approach, which allows for the validity of a suspect future interest to be determined based on the facts as they exist at the end of the measuring life or lives, and not at the time the interest is created.[54] As adopted in some states, the USRAP is not automatically retroactive, and the common law rule applies to older conveyances.[55] However, the USRAP as adopted in most states directs the court to reform instruments that contain a violation of the common law rule by inserting a savings clause that most closely preserves the grantor's original intent in certain instances.[56] Although it has been limited statutorily and by case law, the Rule often applies to executory interests and contingent remainders, as well as to top leases that do not have a defined term.

Accordingly, a title examiner must be mindful of any conveyance that purports to convey an executory interest or contingent remainder. For example, assume O conveys land to A, reserving to himself all right, title and interest to oil, gas and other minerals under the land, so long as a specific oil and gas lease is in effect. If the oil and gas lease lapses, then all oil, gas and other mineral interests would be transferred to a third-party, B. In this scenario, assume the oil and gas lease habendum clause is for "five (5) years and so long thereafter oil and gas is produced therefrom." Under the common law rule, the executory interest in B would be void *ab initio* because production under the lease could extend beyond twenty-one years after some life in being. A court would strike the clause that violates the Rule, which in this case would be the clause that transfers the mineral interests to B. O would remain the owner of the mineral interest, even if the lease lapsed at the end of its five year term. Under the "wait and see" doctrine, B's interest would not be void unless the lease was held by production for the length of the statutory period, which is up to 1,000 years in some jurisdictions.[57] Thus, the mineral interest would be transferred to B if production was not obtained at the end of the five year lease term, or at the end of the extended lease term if it is less than the statutory wait and see period.

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[52] Alaska (Alaska. Stat. Ann. §§ 34.27.051, 34.27.075 (West 2013)), Idaho (I.C. § 55-111(2008)), South Dakota (S.D. Codified Laws § 43-5-8 (2013)) and Pennsylvania (20 Pa. Cons. Stat. Ann. § 6104 (2013)).

[53] Arizona (Are. Rev. Stat. Ann. § 33-261; 14-2901 (2013)), California (Cal. Prob. Code §§ 21200 , 21205, 21206, 21207 (West 2013)), Colorado (Colo. Rev. Stat. Ann. § 15-11-1102.5 (West 2013)), Kansas (Kans. Stat. Ann. § 59-3401 (West 2013)), Montana (Mont. Code Ann. 72-2-1002 (West 2012)), Nebraska (Neb. Rev. Stat. Ann. § 76-2002 (West 2013), New Mexico (N.M. Stat. Ann. § 45-2-901 (West 2013)), North Dakota (N.D. Cent. Code Ann. § 47-02-27.1 (West 2013)), and Utah (Utah Code Ann. § 75-2-1203 (West 2013)) have all adopted the USRAP in some form.

[54] 2A Colo. Prac., Methods Of Practice § 72:30 (6th ed., West 2013)

[55] For example, the Utah statute applies the "wait and see" doctrine only to interests created after December 31, 2003, subject to exclusions and exceptions from the rule. Utah Code Ann. § 75-2-107 (West 2013).

[56] Colo. Rev. Stat. Ann. § 15-11-1106 (West 2013), Utah Code Ann. § § 75-2-1207 (West 2013). The Colorado Supreme Court will soon address the issue of whether the Statutory Rule against Perpetuities Act's reformation provision, Colo. Rev. Stat. § 15-11-1106(2) (2009), authorizes a court to reform a non-donative, commercial option created prior to the effective date of the Act in order to bring it into compliance with the common law rule against perpetuities. *See* Whiting Oil & Gas Corp. v. AU. Richfield Co., No. 09CA1081, 2010 WL 3432211, --- P.3d ---, (Colo. Ct. App., Sept. 2, 2010), *cert, granted,* No. 10SC688, 2011 WL 3276261 (Colo., Aug. 1, 2011).

[57] Colorado and Utah each have a statutory “wait and see” period of 1,000 years. Colo. Rev. Stat. Ann. § 15-11-1102.5 (West 2013), Utah Code Ann. § 75-2-1203 (West 2013).

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In states that have adopted the USRAP, the date of the conveyance could be important to the title examiner. Under Utah law, for example, B would need to petition a court to reform the instrument if the interest was created before December 31, 2003 because the common law still applies to certain conveyances preceding that date.[58] However, if the interest was created after that date, B would not need to petition the court to reform the instrument and the “wait and see” rule would apply.

1. Comment and Requirement Drafting Tips

Because the Rule is inherently complex and has been modified statutorily and by case law in most states, the title examiner should be deliberate in commenting on the same. The title examiner should confirm that the executory interest or contingent remainder is of the type that is subject to the Rule. As noted above, many oil and gas interests (perpetual royalties, overriding royalties, net profits interests) do not violate the Rule in most jurisdictions. If the conveyance is a violation of the common law rule, the title examiner should determine if the “wait and see” doctrine was in effect at the time the interest was created, and, if so, whether the interest has vested, rendering the violation moot.

If the title examiner is certain a violation exists, she should quote the clause that violates the Rule, and explain what effect the violation would have upon the ownership schedule. If the subject lands of the opinion are in a “wait and see” jurisdiction, the examiner may wish to comment on any grants or reservations that would violate the common law rule but for the newly adopted statute. If the parties are available, the title examiner should suggest a revision to the conveyance that would have the same effect without violating the rule, and request the client obtain a properly executed and recorded amendment to the conveyance. If the wait and see period is for an extended period ( *e.g*. 1,000 years), the title examiner may wish to comment on the issue, but not require that the client take any action, as the well likely would not produce for such a long time period. In the absence of viable alternatives, the title examiner may require that the client resolve the title issue through a quiet title action, if it is necessary and cost efficient to do so.

B. *Life Estates and Future Interests*

A title examiner will often see conveyances creating successive interests, such as those of a life tenant and future interest holder, or remainderman. Title issues most commonly arise from this type of ownership (1) where the owner of the life estate or the remainderman attempts to enter into an oil and gas lease without the consent of the other, and (2) when proceeds from an oil and gas lease are to be divided between the life tenant and the remainderman without a binding agreement.

1. Leasing Successive Interests

Under the common law, the life tenant typically does not have the right to enter into an oil and gas lease to develop the minerals, as this constitutes waste of the estate of the

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[58] Utah Code Ann. §§ 75-2-1207 (West 2013). This default rule is subject to a petition for court reformation under Utah Code Ann. §§ 75-2-1205 .

**[Page 1-13]**

remainderman.[59] Likewise, the owner of a future interest also does not have the right to develop the land because he does not have a right to possession or present use of the mineral interest.[60] However, the parties may jointly lease the land and have the right to enter into an agreement allocating the right to lease to either party.[61] In addition, if the conveyance specifically grants the life tenant the right to lease or dispose of the property, then the life tenant will have the right to lease the property even though it may extend beyond his life.[62] If the life tenancy is granted "without impeachment for waste," the life tenant has no duty to protect the minerals from waste, but courts have not ruled on whether this language grants the life tenant the right to lease beyond his lifetime.[63] Most states follow these common law rules, with the exception of Louisiana.[64]

Because they require the consent of the life tenant and remainderman, oil and gas leases are obtained in a variety of ways. Both the life tenant and remainderman may sign the same lease, or enter into two separate leases. The life tenant may execute a lease, and the remainderman may ratify the same. Oil companies tend to prefer the lease and ratification method because the life tenant is clearly identified as the payee under the lease, and the ratification by the remainderman may set forth which party is paid the payments under the lease, including bonuses or shut-in royalties. However, this is not always the case, as some ratifications act as if the remainderman was a party and signatory to the original lease.

Any of these leasing scenarios can cause problems. If the life tenant and remainderman enter into a joint lease that is silent regarding payment, the lessee (and the title examiner) will not know how to allocate bonuses, rentals and royalties. If the life tenant and remainderman execute separate leases, the lessee may have trouble reconciling royalty payments or resolving conflicting provisions across the leases. Even when a lease is ratified, the lessee must ensure that the remainderman is aware of all of the terms of the lease to avoid any future fraud or misrepresentation claims, and it is best if the ratification specifies to whom the various types of payments should be made.

### 2. Allocation of Proceeds

Life tenants and remaindermen frequently enter into oil and gas leases without specifying how bonuses, delay rentals and (most importantly for the title examiner) royalties will be allocated. When this happens, courts typically have held that the life tenant is not entitled to any part of the royalty itself, but is only entitled to income or interest earned from the same.[65] The royalty is viewed as corpus that must be preserved for the benefit of the remainderman.[66] Generally, the life tenant is paid delay rentals, but Arkansas and Oklahoma allocate the life

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[59] *See* Welborn v. Tidewater Associated Oil Co., 217 F.2d 509 (10th Cir. 1954). 2 Williams & Meyers, § 512.1, at 638 - 639, fnt. 1 (2012) contains an extensive list of relevant cases.

[60] 2 Williams & Meyers, § 512.1, at 638 (2012).

[61] *Id*. at 638 -639.

[62] *Id*. § 512.1, at 638 - 639.

[63] *Id*. § 512.1, at 639.

[64] *See id*. § 512.3, at 645. Louisiana uses *usufruct* and *naked owner* instead of life tenant and remainderman, and the usufruct generally only has a right to use the surface.

[65] Ernest R. Fleck, *Selected Leasing Problems - Protection Leases, Life Estate and Remainder Interest, Interest in a Particular Stratum,* 15 Rocky Mnt. Min. Law Inst. 9, 5 (1969).

[66] *Id*. (Fleck at 5)

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tenant bonus as well.[67] The common law, however, has been modified by the Uniform Principal and Income Act (the "UPIA"), which has been adopted in all of the Rocky Mountain States.[68] The UPIA provides for a default method of dividing the royalty interest more equitably between the life tenant and the remainderman when no agreement is in place. For example, if parties in North Dakota cannot come to a mutual agreement as to how the royalties will allocated, the UPIA statute requires that 90% of royalties be allocated to principal for the benefit of the remaindermen and that 10% be allocated to income for the benefit of the life tenant.[69]

An exception to this rule, however, arises through the "open mine doctrine." When there is production prior to and at the time the life estate begins, this doctrine reverses the common law rule and the life tenant, and not the remainderman, is entitled to the royalties from the subject lands or well during his life time.[70] Texas and Oklahoma have limited this to the term of the lease in existence when the life tenancy was created.[71] Courts have held that the execution of the lease alone is enough to effect the open mine doctrine, and actual production is not required.[72]

### 3. Comment and Requirement Drafting Tips

Because the application of these rules is very mechanical, the title examiner must pay close attention to the circumstances surrounding the life estate. First, the title examiner should simply determine whether the life tenant is still alive. If not, she should recommend that the client obtain and record a death certificate or other official documentation of the life tenant's death in order to pass title. If the life tenant is alive, the title examiner should then determine if the document creating the life estate describes how funds are to be allocated between the parties. She should also examine any relevant wills, as life estates are often created pursuant to a will. If any of these documents unambiguously describe how the royalties are to be allocated, the title examiner should draft a comment and allocate the royalties pursuant to the clear intent of the parties.

If these documents are silent as to how the funds are to be allocated, the title examiner should determine whether the open mine doctrine applies in the subject jurisdiction, and, if so, draft a comment and schedule the royalty interests in the life tenant based upon the doctrine. The title examiner should also recommend that the remainderman is included as a signatory of the division order out of an abundance of caution in order to avoid future disputes. If the open mine doctrine does not apply, the title examiner should draft a comment stating that the parties have not agreed upon the distribution of royalties and schedule the royalty interest subject to the common law or the state's UIPA, depending on state law. The title examiner should then advise the client to obtain a stipulation of interests or similar document confirming who is entitled to receive lease bonuses, rentals, royalties and other distributions attributable to the interest, and to provide the properly executed and recorded document to the title examiner so that she may update the opinion accordingly.

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[67] 2 Williams & Meyers, § 512.2, at 644 (2012).

[68] The Act has been adopted in some form in California, Colorado, Kansas, Montana, Nebraska, Nevada, North Dakota, Oklahoma, Texas, Utah and Wyoming. *See* 76 Am. Jur. 2d *Trusts* § 476 (2013).

[69] N.D. Cent Code § 59-04.2-19 (West 2013).

[70] Fleck, *supra* note 65, at 5; *see, e.g.*, Wyoming Bank, N.A. Cheyenne v. Hewlett, 628 P.2d 1355 (Wyo. 1981).

[71] 2 Williams & Meyers, § 513, at 648 (2012).

[72] Fleck, *supra* note 65, at 5.

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## V. Complicated Conveyances

The interplay between conveyances of mineral interests results in many complicated title issues. This section discusses several problematic issues that arise from multiple or concurrent conveyances and reservations, and how the title examiner should address them.

### A. *The* Duhig *Rule: Fulfilling the Grant and Reservation*

A common title issue arises when a grantor who owns less than the full mineral estate purports to both convey and reserve a mineral interest. The traditional *Duhig* hypothetical is as follows: A owns title to an undivided 50% mineral interest and the entire surface of a tract. A conveys the tract to B by warranty deed, reserving 50% of the minerals with no exceptions. The result under *Duhig* is that B is the owner of the 50% mineral interest, because A, as grantor, did not own a sufficient mineral interest to make both B, as grantee, and herself whole. A must make B whole at the expense of A's reservation.[73] The *Duhig* case involved a warranty deed, and the result is in part based upon the grantor's breach of her warranty. However, subsequent courts have interpreted *Duhig* more on an estoppel by deed theory and less on a breach of warranty theory. Some states apply the *Duhig* rule in the absence of a warranty as long as the grantor purports to convey a "definite estate."[74] No court, however, has extended the rule to quitclaim deeds.[75]

The *Duhig* rule typically does not apply to deeds that except from the grant any previously reserved interest. Using the example above, if A had included the following clause in the deed to B, she would have retained her interest:

A excepts and reserves for all purposes for the exclusive benefit of A, his heirs and assigns, all previous reservations to A, including the undivided 50% mineral interest reserved in the warranty deed dated January 1, 2013, recorded January 12, 2013, Reception No. 123456XX, Garfield County, Colorado.[76]

Thus, the title examiner should always look for a previously conveyed or reserved interest that is expressly excepted from the conveyance. If the language is unambiguous in removing the interest from the conveyance, the *Duhig* analysis will not apply.

The title examiner should also closely analyze any "subject to" clauses included in a deed. Texas courts have held that a "subject to" clause which addresses the mineral interest at

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[73] *See* 1 Williams & Meyers, § 311 (2012), *explaining Duhig, et al v. Peavy-Moore Lumber Co.*, 135 Tex. 503, 144 S.W.2d 878 (1940). The rule has been adopted throughout the Rocky Mountain region. George A. Snell, "Title Examination of Fee Lands," *Mineral Title Examination III,* 31B Rocky Mnt. Min. L. Inst. 3, fnt. 118 (1992) cites cases from Colorado, Montana, North Dakota, New Mexico, Oklahoma and Wyoming that adopt the *Duhig* rule. Utah, on the other hand, has rejected it without referring to the case by name. *See* Hartman v. Potter, 596 P.2d 653 (Utah 1979).

[74] *See* 1 Williams & Meyers, § 311.1 (2012); M. Steve Smith, *The Duhig Rule in 'Real Life',* Landman, 30 (Jan/Feb 2013); *see also* Enerlex Inc. v. Ameralda Hess Inc., 302 S.W.3d 351 (Tex. App. - Eastland 2009, no pet.).

[75] M. Steve Smith, *supra* note 74, at 30.

[76] Snell, *supra* note 73, at 19.

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issue may also protect the grantor's interest from the application of the *Duhig* rule.[77] For example, if the deed includes a clause that makes the grant subject to a clearly-defined prior conveyance ( *e.g*. "subject to the 1/2 mineral interests reserved by O in the certain deed dated January 1, 2013, recorded January 13, 2013, Reception No. 1234567, Weld County, Colorado"), then *Duhig* would not apply. However, if the "subject to" clause is more general (*e.g*. "subject to all restrictions, reservations, covenants, conditions, and rights-of-way now outstanding and of record, if any in Weld County, Colorado"), a court might be hesitant to protect the grantor's reservation.

The Texas Supreme Court also has held that the *Duhig* rule does not apply to oil and gas leases. In *McMahon v*. *Christmann*[78] the lessee argued that an overriding royalty was to be reduced on the basis of the lessors' ownership of less than all of the mineral interests in the subject lands. The court rejected this argument, stating that because deeds are usually prepared by the grantor, *Duhig* properly places the risk of loss on the grantor. The court reasoned that leases are usually prepared by the lessee, so the risk of loss in a lease should be placed on the lessee as drafter. Further, the court noted that a lessee usually requires the lessor to lease full fee title in the subject lands, even if the lessor owns less, "in order to make certain that no fractional interest is left outstanding the lessor."[79] If the lessor owned less than all of the subject lands, the strict application of *Duhig* would result in the lessor losing all or a portion of her reserved royalty in order to fulfill the grant of the leasehold in full fee title in the subject lands.[80]

Analysis under the *Duhig* rule is further complicated because courts have extended and limited its application to different perpetual interests in a variety of scenarios. For example, the North Dakota Supreme Court has occasionally used the *Duhig* rule as an equitable tool. In *Acoma Oil Corporation v. Wilson*[81] the North Dakota Supreme Court has held that a grantee is "not burdened by prior assignments of [royalty interests] where the grantor retained ownership of enough minerals in the tract of land when conveying mineral acres to grantee to satisfy the prior [royalty assignment] without burdening the interest conveyed to grantee."[82] In this case, the original mineral owner made three royalty conveyances, cumulatively transferring a 6.5% royalty of all oil and gas produced from a 160 acre parcel of land to third parties. The original mineral owner then conveyed the 160 acre parcel, including all of the minerals, to the Wilsons. The Wilsons then conveyed by warranty deed to the grantee a 1/8 mineral interest, retaining a 7/8 mineral interest, with no mention of the outstanding 6.5% royalty. The court held that because the Wilsons conveyed the 1/8 mineral interest to the grantee by warranty deed without mentioning the outstanding 6.5% royalty (even though the royalty conveyance was properly recorded), and because the entire 6.5% royalty interest could be satisfied out of the Wilsons' remaining 7/8 interest, the 6.5% royalty only burdened the Wilsons' interest, and not that of the grantee. The North Dakota courts have applied the *Duhig* rule to the conveyance of non-

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[77] M. Steve Smith, *supra* note 74, at 40.

[78] 303 S.W.2d 341 (Tex. 1957).

[79] McMahon, 303 S.W.2d at 346.

[80] *Id*.

[81] 471 N.W.2d 476 (N.E. 1991).

[82] *Id*. at 481.

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participating royalty interests,[83] and declined to apply the rule in a case where a co-tenant grantee had constructive or actual notice of the outstanding mineral interests.[84]

Wyoming courts defer to the intent of the parties whenever possible, holding that the subsequent conduct of the grantor and grantee can be used to confirm their intent and circumvent the strict application of *Duhig*.[85] Similarly, courts in Colorado and Texas have held that expressions of intent in subsequent deeds may prevent application of the rule.[86] Because the states vary in how far their courts choose to extend the rule, it is of utmost importance that the title examiner familiarizes herself with her state's application of *Duhig* principles.

1. Comment and Requirement Drafting Tips

The application of the *Duhig* rule can be confusing and complicated, and no two states follow the rule in the same manner. When reviewing abstracts, the title examiner should look for the following conditions where the application of the rule may apply:

(1) The conveyance is by warranty or mineral deed and is of a mineral or non-leasehold interest;

(2) Interests are both transferred and reserved;

(3) The grantor owns less than the entire mineral estate at the time of conveyance; and

(4) The grantor does not except any prior reservations or conveyances of record.

If a *Duhig* issue arises, the title examiner should clearly and concisely comment on the state law, apply it to the facts of the case, and make a conclusion as to the ownership of the interests. If the parties or their successors-in-interest are available, the title examiner should advise the client to contact the parties involved to determine their intent, and if necessary, have them execute a correction deed or stipulation and cross-conveyance with words of grant. She should require that the client provide her with the correction or stipulation so that she may, if necessary, update her ownership schedules. If the parties are unavailable or do not agree as to their intent, the title examiner may recommend the client suspend the payment of proceeds on the interest in dispute pending the completion of a settlement agreement or a quiet title or declaratory judgment action.

B. *Simultaneous Conveyances*

Title examiners frequently discover issues based upon simultaneous conveyances of mineral or leasehold interests. As a general rule, separate instruments executed contemporaneously as part of the same transaction and relating to the same subject matter will be construed together as a single instrument.[87] This rule applies to deeds that do not expressly refer to one another.[88] Further, when two deeds involve the same party or parties and relate to the

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[83] *See, e.g.*, Wenco v. EOG Resources, Inc., 822 N.W.2d 701 (N.D. 2012).

[84] Gilbertson v. Charlson, 301 N.W.2d 144 (N.D. 1981).

[85] Whitney Holding Corp. v. Terry, 2012 WY 21, 270 P.3d 662.

[86] *See* Dixon v. Abrams, 357 P.2d 917 (1960); Pich v. Lankford, 295 S.W.2d 749 (Tex. Civ. App. 1956), *rev'd on other grounds*.

[87] 4 Tiffany Real Prop. § 981 (3d ed., West 2013).

[88] *Id*.

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same transaction, courts will read the deeds together to establish their intent.[89] In the oil and gas context, these same rules of construction apply.[90]

As a result, a title examiner can safely assume that deeds executed and acknowledged on the same date by the same grantor covering the same lands would be construed by a court together. For example, if O conveyed “an undivided 1/2 of grantor's mineral interests” in certain lands to A on January 1, 2013, and also conveyed “an undivided 1/2 of grantor's mineral interests” in the same lands to B on the same date, the title examiner could assume that A received an undivided 1/2 mineral interest, B received an undivided 1/2 mineral interest, and O retained no interest. Because they were properly executed and acknowledged on the same date, a court would read them together, and the order in which they were recorded would not affect the interests of A and B.

This rule is important because the result would be entirely different if O did not execute the deeds to A and B on the same date. In the example above, if the deed to A was executed on January 1, 2013, and the deed to B was executed on January 2, 2013, A would still own an undivided 1/2 mineral interest in the subject lands. However, B would only receive an undivided 1/4 mineral interest, as “an undivided 1/2 of grantor's mineral interest” would equal 1/2 of an undivided 1/2 mineral interest. This diminishing interest effect only becomes more pronounced with additional conveyances and more complicated fractional interests.

1. Comment and Requirement Drafting Tips

When analyzing conveyances from the same grantor of the type described above, the title examiner should first focus on the language describing the interest conveyed. If the conveyance is of “an undivided 1/2 mineral interest *in the subject lands,”* and not “an undivided 1/2 of *grantor's mineral interest in the subject lands”* than the conveyances are not reduced based upon the grantor's interest. If the conveyances are fractions of the “grantor's interest” and are conveyed on the same date, the title examiner should probably include an advisory comment explaining that a court would read the conveyances together, and neither parties' interest would be reduced due to a reduction in the grantor's interest by the conveyance to the other party. If the conveyances are fractions of the “grantor's interest” and take place over several days, the title examiner should see if there are any other documents of record that clarify the grantor's intent to convey the interest simultaneously or separately. If not, she should schedule the interests based upon the separate conveyances.

C. *Effective Dates*

Title examiners should always take note when effective dates are used in the conveyance of leasehold interests. Assignors sometimes use effective dates in an attempt to simulate a simultaneous conveyance after the fact, often with disastrous results. For example, assume A receives a 3% overriding royalty interest on an oil and gas lease by assignment dated August 1.

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[89] 16A C.J.S. Deeds § 217 (2013).

[90] 38 Am. Jur. 2d *Gas and Oil* § 29 (2013).

**[Page 1-19]**

By assignment executed August 20, A conveys 50% of his overriding royalty interest to B, but the assignment is “made effective for all purposes as of August 15.” Then, by assignment executed August 30, A conveys 50% of his overriding royalty interest to C, but the assignment is “made effective for all purposes as of August 1.” Without any information apart from these assignments, the title examiner could interpret A's intent in several ways. First, A may have intended to convey his 3% override in equal 50% shares of 1.5% to each of B and C, and used effective dates to backdate the conveyances. Alternatively, A may have intended to convey a 50% interest in his 3% override (or 1.5%) to C, as evidenced by the earlier effective date, and a 50% interest in his remaining 1.5% override (or 0.75%) to B, thereby retaining a 0.75% interest for himself. However, if the effective dates are disregarded and the fractional interests are calculated based upon what A actually owned on the dates of conveyance, the results would be reversed. A and C would each own a 0.75% interest and B would own a 1.5% interest. These issues are compounded when, as described above, the interests assigned are calculated based upon the “assignor's interest” in the lands and/or leasehold, are calculated based upon the “existing burdens” on the lease, or a combination of both.

1. Comment and Requirement Drafting Tips

If the scenario is easy to track as set forth in the example above and the documents were recorded in the order they were executed, the title examiner can schedule 1.5% overriding royalty in B and 0.75% in each of A and C. However, if many more documents, fractions and effective dates are used, the intent of the assignor may become so unclear that the title examiner should request that all of the owners or claimants of interests execute and record a stipulation of interest, with words of grant and cross-conveyance, which states the parties' interests based upon these back-dated assignments.

D. *After-Acquired Title*

When a grantee receives a mineral interest guaranteed by warranty, the grantee will receive any after-acquired title in that interest received by the grantor (*i.e*. an interest not greater than the interest conveyed).[91] This rule is based on an estoppel by deed theory, as the grantor is estopped from claiming that he did not own what he conveyed when he conveyed it.[92] Thus, the after-acquired title doctrine is not strictly limited by the warranty in most states, and likely applies to all conveyances apart from a quitclaim.[93] The after-acquired title doctrine is limited in several ways, however. The doctrine does not protect the grantee if the grantor receives the after-acquired interest through the grantee or his successors in interest. In addition, it may not usually apply to leases for the same reason as the *Duhig* rule: the lessee typically controls the terms of the lease, and lessors are usually protected by the inclusion of a proportionate reduction clause.[94] However, the title examiner may schedule leasehold interests as if the after-acquired title doctrine applies, subject to a ratification by the lessor.

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[91] Robert L. Theriot and Jana Grauberger, “Assignments and Conveyances,” *Oil and Gas Agreements: The Exploration Phase,* Paper 11, page 10-13 (Rocky Mnt. Min. L. Fdn., March 3-4, 2010).

[92] *Id*.

[93] *Id*.

[94] McMahon v. Christmann, 303 S.W.2d 341 (Tex. 1957).

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A typical after-acquired title problem arises when a conveyance describes the land but is not

clear as to what fraction of the mineral interest is being conveyed. This can happen when the grantor attempts to clarify a property description by reference to a prior deed, and the prior deed lists an interest greater or less than the interests cited on the conveyance. For example, a conveyance from A to B conveys “all right, title and interest in oil, gas and other minerals in Section 10” by specific reference to a prior deed. The prior deed, however, purports to convey “an undivided 50% interest” in the oil, gas and other minerals in the same lands. If A subsequently acquires the additional 50% interest in Section 10, courts have held that the after-acquired interest rule would apply in some states and would not apply in others.[95]

1. Comment and Requirement Drafting Tips

As with the other issues described above, after-acquired title issues generally turn on the intent of the grantor. The title examiner should first review other documents and conveyances related to the mineral interest at issue to attempt to determine the intent of the grantor, and comment on the same if applicable. She may then schedule the interests based upon the apparent intent, subject to the fulfillment of the stipulation requirement below. If the intent of the parties cannot be determined, the title examiner should schedule the interests based upon the application of the after-acquired title doctrine, and request that all of the owners or claimants of interests execute and record a stipulation of interests, with words of grant and cross-conveyance, which states the parties' interests based upon their shared intent. The title examiner should require the client to provide her with the properly executed and recorded documents so that she can update her ownership schedule and make any further requirements as necessary.

E. A *Note on Multiple Recorded Counterparts*

Occasionally, parties to an assignment of an oil and gas lease interest will execute the assignment in counterparts as a convenience or to comply with BLM filing requirements, and multiple counterparts signed by both parties will be recorded in the county records. This causes a problem for the title examiner because she may not be able to determine whether the recorded assignment is a subsequent conveyance of the same interest or just a counterpart. When this happens, the title examiner should contact the client upon discovering the issue to see if the intent of the assignor can be determined. If not, the title examiner should require that the client have the parties execute and properly record a stipulation of interests or ownership affidavit describing whether the recorded documents are counterparts or separate conveyances.

## VI. Anti-Washout Provisions, a.k.a. Extension and Renewal Clauses

A. *Overview*

Ordinarily, an overriding royalty or other non-operating interest is extinguished when the underlying oil and gas lease expires.[96] Some case law protects an overriding royalty owner against “washout” of an overriding royalty interest. A typical washout occurs when an operator

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[95] Donald G. Sinex and Susan A. Stanton, *After Acquired Title Revisited,* Landman, 16, (Mar/Apr 2005).

[96] 2 Williams & Meyers, § 420.2 (2012).



allows a lease to expire and acquires a new lease on the same lands from the same lessor with the intent of taking the new lease burden-free.[97]

While a few cases have proposed that an operator has an implied duty of good faith and fair

dealing to the non-operating interest holder and may not washout the non-operating interest in bad faith,[98] most jurisdictions do not recognize any duty from the operator to the non-operating interest holder in the absence of an extension and renewal provision or other express contractual duty.[99] Oklahoma case law grants the non-operator greater protection, and links the contract rules and fiduciary duty concepts, holding that an extension and renewal clause places a fiduciary duty on the operator to protect the non-operating interest holder's interest.[100] On the other hand, a federal court applying Wyoming law has rejected that any heightened duty to the non-operator arises from an extension and renewal clause.[101] A very recent Texas case found that intentionally terminating a set of leases to extinguish the overriding royalties and acquiring new leases from the lessors did not amount to an actionable wrong under Texas law.[102]

In the case law regarding washout or finding that an override extends to a new lease even in the absence of an extension and renewal clause, the claims are based on legal theories such as constructive trust, breach of fiduciary duty, negligence (in allowing the lease to expire), bad faith and estoppel. Court analysis of these factors has been inconsistent at best, favoring equity over standardized judicial rules. In these types of cases, the factors considered by the court include the consideration paid by the operator for the working interest burdened by the non-operating interest. The higher the consideration paid to the non-operating interest owner, the better the argument that the override should not extend to the new lease.[103] However, if the cash consideration is minimal and the primary obligation of the operator is to develop and drill, it is more likely that the new lease is burdened by the original non-operating interest, as it would be inequitable for the operator to washout the overriding royalty interest holder after providing minimal consideration.[104] In addition, the relationship between the operator and the non-operating interest holder may evidence their intent for the non-operating interest to extend or not extend to a new lease. To assess these facts, you should consider "(1) whether there is a long standing relationship between the parties; (2) whether the parties have equal bargaining position; (3) whether there were any oral or written agreements or representations to drill wells; and (4) whether there is evidence of collusion or bad faith dealings."[105]

Non-operating interest holders often protect their interests with provisions in the assignment creating their interests, the most common of which is an extension and renewal

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[97] *Id*.

[98] *See, e.g.*, Rees v. Briscoe, 315 P.2d 758 (Okla. 1957).

[99] 2 Williams & Meyers, § 420.2 (2012); Sawyer v. Gurthrie, et al., 215 F.Supp.2d 1254 (D.Wyo. 2002).

[100] See John K. H. Akers, *Overriding Royalty Interests: Pitfalls, Precedent and, Protection,* 50 Rocky Mtn. Min. L. Inst 21-1 (2004), describing the "Oklahoma Rule," which provides for the existence of an extension and renewal clause, by itself, gives rise to a fiduciary duty between parties to the assignment and their successors, *citing* Independent Gas & Oil Producers, Inc. v. Union Oil Co., 669 F.2d 624 (10th Cir. 1982).

[101] Sawyer v. Gurthrie, et al., 215 F.Supp.2d 1254 (D.Wyo. 2002).

[102] Stroud Production, L.L.C. v. Hosford, 405 S.W.3d 794, 811 (Tex. App. 2013). This case includes an good review of the Texas law regarding duty to overriding royalty owners. A petition for review was filed April 18, 2013.

[103] Gregory R. Danielson, *Will This Overriding Royalty Ever* Die?, The Rocky Mnt. Landman, 5 (1993).

[104] *Id*.

[105] *Id*.

**[Page 1-22]**

clause. An extension and renewal clause generally causes a non-operating interest attached to a working interest to apply to any subsequent renewal, extension or substitution of the lease when the renewal, extension or substitution is entered into on the same lands by the same working interest holder.[106] Courts have consistently upheld the validity of extension and renewal clauses. Most cases apply the extension and renewal clause based on contract interpretation laws. However, in a few cases interpreting express extension and renewal clauses, the court uses language more relevant to the fiduciary duty basis for a claim, emphasizing bad faith or intent to washout an override.

Because extension and renewal clauses vary significantly from assignment to assignment, complicated title issues often arise from their usage. The next sections examine two of the most common title issues involving. express extension and renewal clauses.

B. *Specific Issues regarding Extension and Renewal Clauses*

1. Is the New Lease an "Extension or Renewal"?

When a title examiner considers the application of an extension and renewal clause, her first concerns should be the language of the extension and renewal clause and whether a new lease is considered an extension, renewal or substitution of the original lease and, therefore, is burdened by the non-operating interest attached to the prior lease.[107]

Most Rocky Mountain states have no strict rules in place that differentiate a lease that is an extension, renewal or substitution from a "new" lease. Courts typically resolve this question on a lease-by-lease basis by examining the facts and circumstances surrounding the conveyance. Thus, the title examiner should do the same and consider factors such as timing, similarities in the terms of the leases, the relationship of the parties, and what consideration, if any, is paid for the new lease.[108]

The title examiner should first compare the terms of the original lease and the new lease. Courts usually consider factors such as the lands and formations covered, the execution and effective dates, the addition, modification or removal of special provisions such as a Pugh clause, the royalty rate in the leases, and the length of the primary term.[109] Courts are more likely to find a new lease to be an extension and renewal if its terms are closely aligned with those of the prior lease.[110] Another critical factor is whether the same lessee held the old lease and took the new lease. "Extension and renewal clauses extend the overriding royalty interest 'to new leases obtained on the same property by the same lessee.'"[111]

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[106] For examples of common extension and renewals clauses, see 2 Williams & Meyers, § 428.1 (2009).

[107] The issues discussed in this section can also apply to other non-operating interests such as production payments, but overriding royalty interests are the most common interest covered by an extension and renewal clause, so we will refer to overriding royalties in this discussion.

[108] Danielson, *supra* note 103, at 5.

[109] L. Victoria Shape and Craig Rowland, *March Field Landman Question of the Month,* The

Rocky Mnt. Landman, 12 (March 2013).

[110] *Id*.

[111] Randall J. Bakke, P.C. v. Murex Petroleum Corporation, not reported in F. Supp.2d, 2008 WL 4937553, D.N.D (2008), *citing* Avatar Exploration, Inc. v. Chevron USA, Inc., 933 F2d 314, 319 (5th Cir. 1991).

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The Kansas Supreme Court found that an overriding royalty could attach under an extension and renewal clause to a lease that covered more lands than the original lease, had a different term than the prior lease (1 year vs. 3 years), and was taken more than thirteen months after the prior lease expired.[112] This case involved a geologist who brought a prospect to the defendant, an allegation that there was a confidential relationship between the parties, steps by the plaintiff to work with the defendant to acquire the new lease after the original lease expired, and ongoing negotiations with the lessor regarding the new lease during the thirteen months that elapsed from expiration of the original lease until the new lease was taken. This case was the appeal of a ruling on a demurrer (a precursor to the modern day summary judgment motion) so the court's decision essentially means that the new lease could be found to be a renewal of the original lease and the trial court was correct not to dismiss the case at the preliminary demurrer stage.

Both a Texas court and a federal court applying Wyoming law have held that new leases with many variances from the prior leases, such as different formations, acreage, landowner royalties, primary terms, and pooling clauses, are not extensions and renewals of the prior leases.[113] The Texas court was interpreting a clause regarding an overriding royalty that provided “Said Interest is to apply to all amendments, extensions, renewals or new leases taken on all or a part of the lease premises within one year after termination of the present lease.” The original lease was dated in 1966 and covered approximately 40,000 acres. In 2000 a lessee released about 22,000 of the acres covered by the lease. The subsequent lease was taken more than a year later. The plaintiffs argued that “termination of the present lease” had not occurred because the 1966 lease was in effect as to part of the original lease lands. The court disagreed, and stated that in Texas, an overriding royalty interest does not survive the termination of the leasehold it burdens absent an express provision to the contrary.[114] The court found that “termination of the lease” in the extension and renewal clause included a partial termination. One fact relied upon by the court is that the lease provided the lessee could release all or part of the leasehold and thereby be relieved of all obligations as to the released acreage or interest.[115]

In the federal case applying Wyoming law, the assignment provided the overriding royalty would apply to “all extension, renewal and substitute leases obtained by [AOG], its successors or assigns on the land described herein.”[116] The court stated that “[r]enewal and extension are concepts closely allied to one another, normally involving a continuation of the

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[112] Howell v. Cooperative Refinery Ass'n, 271 P.2d 271 (Kan. 1954).

[113] *See Sawyer,* 215 F.Supp.2d at 1264; SM Energy Co. v. Sutton, 376 S.W.3d 787 (Tex. App. 2012), review denied (Feb. 15, 2013).

[114] *SM Energy Co.*, 376 S.W.3d at 791.

[115] A second case in Texas between the same parties, *Sutton v. SM Energy Co.*, 2013 WL 5989445 (2013), pertained to the 18,000 acres that had remained in the original lease. The original lease expired insofar as it covered these 18,000 acres due to failure to conduct continuous drilling operations. An additional well would have needed to be drilled by February 5, 2009, but SM

did not drill due to low gas prices in late 2008. Later in 2009, SM drilled a successful Eagle Ford well on land not covered by the original lease, and based on this new find and changed economics, went back to the lessor of the original lease and obtained a new lease dated May 1, 2010. This second case addresses the question of when the original lease terminated and found that more than a year had passed since the original lease terminated and the new lease was taken as to certain lands. The plaintiffs therefore did not have an overriding royalty in the new lease.

[116] *See Sawyer,* 215 F.Supp.2d at 1264.

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relationship on essentially the same terms and conditions as the original contract."[117] The court found that the subsequent leases were not extensions or renewals, because they lacked significant similarity to the original leases, aside from the fact that they involved a portion of the same lands and the lessee of the subsequent leases was a former lessee of the original leases. The other differences between the two sets of leases were that the new leases pertained only to shallow gas, while the original leases included all oil and gas; the subsequent leases covered about 1,000 fewer acres; the primary term was reduced from five years to three years; the shut-in clause was limited to one year instead of three years; the original leases included a one year extension if any part of the land was held by production, whereas the subsequent leases contained no extension; a 180-day continuous drilling clause vs. a 60-day continuous drilling clause; a minimum well requirement in the subsequent leases; and "normal pooling consents" in the original leases and rigid requirements in the subsequent leases including the duty to drill out unitized lands. The court stated it was significant that the original leases expired according to their own terms over two and a half months before the subsequent leases were executed.

An earlier Texas case found that a new lease was not an extension or renewal of an old lease, so the overriding royalty in question did not apply to the new lease.[118] The court states, "[a]n extension, as used in this context, generally means the prolongation or continuation of the term of the existing lease (citations omitted). It might also encompass the enlarging of the territory or strata to be covered by the lease."[119] The court also found the new lease was not a renewal of the old lease because the new lease was executed under different circumstances, for a new consideration, upon different terms, and over a year after the expiration of the old lease. The different terms included that the original lease had a 10-year primary term and provided for delay rentals; the new lease had no primary term and no provision for delay rentals; and the new lease had a drilling commitment with different time periods for the continuous operations clause.

The North Dakota Supreme Court has held that top leases, nearly identical in all respects to the original leases, between the same parties, covering the same lands for the same duration of time as the prior oil and gas lease, were extensions of the prior leases. This North Dakota case involved a claim under a joint venture, rather than under an extension and renewal clause.[120] In a case applying Kansas law, the United States Court of Appeals for the Tenth Circuit held that five top leases (leases that began the same day as the expiration date of the prior lease) were new leases and were not extensions or renewals of the prior lease. Thus, the new leases were not burdened by the disputed override, which the assignment provided would apply to any extensions and renewals of the prior lease.[121] The original lease covered 800 acres, and the new leases were five separate leases of 160 acres each (for a total of the same 800 acres); the original lease had a 1/8 royalty and the new leases had a 3/16 royalty; the original lease had a ten year primary term and the new leases were for three year primary terms; and the lessee paid a $130,200 bonus for the five new leases. The trial court had found there were material differences between the original lease and the five subsequent leases and therefore the five leases were new leases and not extensions or renewals. The court distinguished the prior Kansas

[117] *Id*. at 1264, *citations omitted*.

[118] Sunac Petroleum Corp. v. Parkes, 416 S.W. 2d 798 (1967).

[119] *Id*. at 802.

[120] *See* Sandvick v. LaCrosse, 2008 ND 77, 747 N.W.2d 519, 524.

[121] Lillibridge v. Mesa Petroleum Co., 907 F.2d 1031 (10th Cir. 1990).

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authority of *Howell v. Cooperative Refinery Ass'n.*, mentioning the fact that the *Howell* case was procedurally different because it was an appeal from overruling a demurrer, there was a confidential relationship between the parties in *Howell* but not in *Lillibridge* and other factors.

These cases show that there are differences among courts in interpreting whether a new lease is an extension and renewal, when interpreting extension and renewal clauses. However, the cases we found where a new lease was found to be subject to the overriding royalty under an extension and renewal clause involved leases that were taken as top leases during the term of the original lease, or became effective the day after the first lease expired. One exception is the *Howell* case, but as noted above, that case was from Kansas (the Kansas case law, while not as favorable to the override owner as Oklahoma law, seems to be slightly more favorable to the override owner than some of the other states) and also involved a finding of a confidential relationship between the parties and ongoing efforts by the parties to renew the leases for the thirteen months between when the original lease expired and the new leases were executed.

The existing cases also show that, in addition to timing of the leases, the terms of the original lease and subsequent lease, and how many similarities or dissimilarities there are between the two, are an important part of the analysis to determine whether the overriding royalty will attach to the new lease.

### 2. Effect of Royalty Increases on “Inclusive” Overriding Royalties

Another common issue created by extension and renewal provisions arises when an overriding royalty is calculated as a percentage interest less burdens and there is a subsequent increase in the land owner's royalty. For example, O enters into an oil and gas lease (Lease 1) with A for a five-year term, reserving a 1/6 (16.667%) royalty interest. Shortly thereafter, A assigns all of its working interest to B, reserving an overriding royalty equal to “20% less all existing burdens,” or 3.333%. The assignment also includes an extension and renewal provision stating that the overriding royalty interest shall apply to all extensions, renewals, and substitute oil and gas leases taken by B, its successors or assigns, within one year of the expiration of the primary term of Lease 1. B then acquires a second oil and gas lease (Lease 2) from O covering the same lands dated within a year of the expiration of Lease 1 with a royalty rate of 20%; under these facts, if A's interest is recalculated, A would receive no interest in Lease 2. This scenario presents several questions for the title examiner to consider. First, the title examiner would need to determine whether, under the extension and renewal clause, Lease 2 is an extension, renewal or substitute of Lease 1 or a new lease as described in the previous section. Assuming that Lease 2 is an extension, renewal or substitute of Lease 1, the title examiner would then need to determine whether A's interest is eliminated by the royalty increase to 20%, or if it remains static at 3.333%.

If the assignment is unambiguous, the title examiner should determine the outcome of this issue based upon its plain language. An overriding royalty interest is created from a contract between the assignor and the assignee, and the language of the contract determines what, if any, interest is conveyed.[122] If possible, the title examiner should follow the guidance of her state's

rules of contract construction to determine the intent of the parties from the “four corners” of the

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[122] Akers, *supra* note 100, § 21.03.

**[Page 1-26]**

document.[123] The plain meanings of the words used by the parties are controlling. However, if the extension and renewal clause is ambiguous, then the court may examine extrinsic evidence and other factors to determine the intent of the parties at the time the conveyance was executed.

The only reported case we have found addressing calculation of an “inclusive” overriding royalty when the extension or renewal lease has a higher royalty is a Texas appellate court decision which addressed a similar fact pattern, *EOG Resources, Inc. v. Hanson Production Co*.[124] There, Hanson reserved an overriding royalty calculated as “the difference between the aggregate of the basic royalties, overriding royalties and similar burdens chargeable to Assignor's leases existing on the effective date of this Assignment,” or a 16.67% royalty, and 25%. The assignment provided the overriding royalty shall burden any extensions or renewals taken within one year of termination of the subject leases. EOG, the lessee, obtained a renewal of two of the subject leases and negotiated a new landowner royalty of 25%. The trial court found that Hanson's overriding royalty was fixed and determined on the date of the assignment. The court held that Hanson's override was to be calculated as of the date of the assignment, using the plain language of the assignment and the 1/6 royalty interest burden effective on the date of the assignment.[125] In our example, the extension and renewals clause may function in the same way, and the overriding royalty interest would remain at 3.333%, as calculated based on the royalty in the original lease. However, if the calculation of our overriding royalty interest was not based on an assignment that specifically provided the existing burdens would be calculated “as of the effective date of the assignment,” the amount of A's override would remain in question.

One interesting issue regarding the *EOG Resources, Inc. v. Hanson Production Co*. case is that the arguments on appeal focused on whether a letter agreement between the parties changed the terms of the assignment. The letter agreement was silent as to whether the overriding royalty applied to extensions and renewals of the lease. It seems the lessee could also have argued that the higher royalty rate meant that the new leases were not extensions or renewals, because of the different terms of the new leases. From the appellate decision, we cannot determine whether the court would have found such an argument persuasive.

### 3. Comment and Requirement Drafting Tips

Because courts are inconsistent in determining what constitutes a new lease and what constitutes an extension and renewal, the title examiner should first familiarize herself the relevant case law and statutes of her state. The title examiner should then always look for any extension and renewal provisions coupled with assignments and reservations of non-operating interests, and comment on any that are found. In her comment, she should specifically and concisely describe the language in the extension and renewal provision and whether it is ambiguous. If it is ambiguous, the title examiner should set forth all relevant facts and circumstances that weigh towards or against a finding of an extension, renewal or substitution of the prior lease. In the situation where the assignment appears to be ambiguous, then a court would allow extrinsic evidence regarding the parties' intent, and a title examiner probably will

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[123] *Id*.

[124] 94 S.W.3d 697 (Tex. App. 2002).

[125] *Id*. at 703.

**[Page 1-27]**

not know what that extrinsic evidence would show. The title examiner should then conclude as to whether the overriding royalty interest most likely survives due to the extension and renewal provision and prepare her ownership schedules based upon that conclusion. The title examiner should recommend that the client suspend payment on the overriding royalty interest pending the receipt of a properly executed and recorded amendment of the assignment or a stipulation of interests signed by all parties to the original conveyance which created the overriding royalty interest or the current owners of those interests. The title examiner should also inform the client that, if the parties' interpretation of the extension and renewal clause is different than hers, she should be advised and will update the ownership schedules and make additional requirements as necessary.

If the extension and renewal clause appears to be unambiguous as applied to the facts, the comment should still be made, to explain the pertinent provisions and the title examiner's conclusions, and because many of the cases regarding these clauses show that the trial court may rule one way, and the appellate court a different way. Thus, there is a risk of litigation and there may be lawsuits to interpret the application of extension and renewal clauses to the particular fact pattern. In order to avoid litigation, an operator may want to obtain a stipulation of interests or disclaimer even if the application of the clause appears to be unambiguous.

Another key factor to consider is the relationship between the parties. Often times, the title examiner is completing the opinion for an operator with a controlling interest in the lease, who may have been a party to the assignment and knows the intentions of the assignor and assignee. In addition, many assignments and reservations of non-participating royalty interests today take place between associated companies. If the affected parties are subsidiaries or amicable parties, their intent in the assignment could be quickly determined through several phone calls. However, if the affected parties have a contentious relationship, the title examiner may need to require a more severe resolution, such as a quiet title or declaratory judgment action. Thus, the title examiner should be aware of the relationships between the parties when drafting her comments and requirements and likely will want to contact the client once the issue is identified to see whether the client has any additional information regarding the intent of the parties that would help in analyzing the issue.

## VII. Community Leasing and Community Title

Because they are used infrequently in the Rocky Mountain West today, many title examiners may be unfamiliar with community leases. A community lease is generally defined as “a single lease covering two or more tracts executed by separate owners as if they were joint owners” and is usually identified by the inclusion of multiple lessors in the granting clause.[126] The effect of a community lease is similar to that of an entireties clause in a standard oil and gas lease, in that royalties are apportioned in proportion to the interests owned in the entire leased premises barring the contrary intent of the parties.[127] Due to the customization of lease forms and the often conflicting interests of joint lessors, many complicated title issues arise when multiple fee owners of separate tracts enter into community leases or “communitize” their

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[126] 6 Williams & Meyers, § 904 (2012).

[127] *Id*.

**[Page 1-28]**

mineral acreage. This section will analyze several title issues that may arise within the context of community leasing between fee mineral interest owners.[128]

A. *When Is a Lease a Community Lease?*

One of the most obvious and most difficult tasks for a title examiner is determining whether an oil and gas lease with multiple lessors is a community lease. The first and most common characteristic of a community lease is that multiple lessors who own separate property interests are included in the granting clause.[129] The lessors typically own mineral interests in segregated portions of a tract and then lease the entire tract as a unit to a single lessee.[130] Additionally, the lessors are bound by the same terms and have the same rights and obligations as if they were joint owners of a single tract of land.[131] Other indicators of a community lease include a clause calling for the apportionment of royalties (as described below), a clause appointing a common agent or executive to act on behalf of the lessors, a unified property description of the entire unified tract, and, simply, the identification of the lease as a "Community Oil and Gas Lease."[132] In at least one jurisdiction, the existence of an express pooling clause in a lease from multiple lessors is "the functional equivalent of a community lease in which apportionment among the interest owners is conclusive."[133] Further, the Oklahoma Supreme Court has held that if the several owners of minerals in separate parcels combined into one tract by separate leases purport to lease the entire tract to a single lessee, by the same terms, then a community lease and the apportionment of royalties results.[134] While courts typically do not find any of these factors alone to be dispositive, collectively they may indicate the lessors' intent to enter into a community lease.

Conversely, any indicators that point away from joint ownership of a unified tract weigh against the creation of a community lease. For example, courts have held that factors such as the inclusion of noncontiguous tracts in a lease, inconsistent application of lease terms to the various lessors, and the existence of multiple units for operation and development purposes across the combined tract are inconsistent with the creation of a community lease.[135] Other clauses that treat lessors inconsistently by reducing the size of the communitized tract, such as a Pugh clause or retained acreage clause, also weigh against finding a community lease. Moreover, statutory considerations, such as restrictions on unit size and pooling, that would eliminate some of the lessors' lands from an agreed-upon unified tract would also be inconsistent with a community lease.

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[128] This section will analyze community title in the context of the community lease between fee owners. For an in depth analysis of title issues that may arise in the context of voluntary pooling, unitization, or federal leasing, please see Richard B. Johns, *Title Examinations on Unitized Lands,* 26A Rocky Mm Min. L. Inst. 17 (1990).

[129] 4 Summers Oil and Gas § 52:13 (2012).

[130] 2 Williams & Meyers, § 521.2 (2012), *quoting* Robert E. Hardwicke & Robert E. Hardwicke, Jr., *Apportionment of Royalty to Separate Tracts: The Entirety Clause and the Community Lease,* 32 Texas L. Rev 660 at 676 (1954).

[131] 4 Summers Oil and Gas § 52:13 (2012).

[132] 28A West's Legal Forms, Specialized Forms, § 22:54 (4th ed., updated 2012)

[133] 4 Summers Oil and Gas § 52:13 (2012), *citing* Brown v. Smith, 141 Tex. 425, 174 S.W.2d 43 (1943).

[134] *See* Magnolia Petroleum Co. v. Ovart, 200 Okla. 258, 192 P.2d 698 (1947) (court held that the lessee may not claim that a lease is held by production yet refuse to pay the royalty owner

based on the same).

[135] 2 Williams & Meyers, § 521.2 (2012).

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Whether a lease is a community lease is important for several reasons. Most significantly, the status of the lease will likely affect how the apportionment of royalties occurs between lessors, as detailed in the next section. In some jurisdictions, the execution of a community lease, a pooling agreement, or unitization agreement may result in a cross-conveyance of interests, which can affect mineral ownership schedules.[136] Additionally, the lands that need to be examined for the title opinion may be greater than the lands originally examined because of their inclusion in the community lease.

1. Comment and Requirement Drafting Tips

In examining what may be a community lease, a title examiner should include a comment concisely describing the relevant legal requirements for the creation of a community lease in the subject state. The title examiner should set forth the factors and indicators that weigh for or against the creation of a community lease, and make a determination as to how she will categorize the lease in order to schedule ownership in the opinion. Regardless of her categorization, she should specifically describe how and where the ownership schedules are affected.

The title examiner should then, at a minimum, require that her client contact the lessors (or the agent or the holder of executive rights as set forth in the lease) to inquire as to the lessors' intent to create a community lease. She should request that the lessors provide a written and signed lease amendment clarifying their intent to create or not create a community lease, and that the lessors then record the amendment in the county or counties where the subject lands are located. If the lessors' categorization of the lease is different from that of the title examiner, the title examiner should request that the client advise her so that she can update her ownership schedules as necessary. Additionally, if the lessors' categorization of the lease results in the inclusion of more acreage that needs to be covered in the opinion, the title examiner should inform the client that the examination of these additional lands will be required to accurately determine the leasehold interests.

If a community lease is found, the title examiner must make certain that all necessary parties have committed their mineral acreage to the lease. If necessary, the title examiner should require a wrongly excluded party, such as a spouse or life tenant, to ratify the lease. Ratification may be done by execution of a separate document clearly identifying the lease to be ratified.[137] If these necessary parties cannot be found, the examiner should recommend that the interests of a necessary party who was excluded from the community lease be held in suspense pending ratification.

B. *How Are Royalties Apportioned in a Community Lease?*

Categorization of an oil and gas lease as a community lease is important because it determines the apportionment of royalties to lessors. In a standard oil and gas lease, the

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[136] Richard B. Johns, *Title Examinations on Unitized Lands,* 26A Rocky Mm Min. L. Inst. 17 (1990).

[137] Acceptance of royalty payments with knowledge of the lease and the basis for the apportionment of the payments may constitute ratification in some states, but an executed and recorded ratification is preferable. *See* Leopard v. Stanolind Oil and Gas Co., 220 S.W. 2d 259

(Tex. Civ. App. 1949).

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“apportionment rule” allocates to the lessors in proportion to their mineral acreage interests in the entire tract leased.[138] The non-apportionment rule, however, holds that lease royalties are not apportioned among lessors, and the owner of the tract where the producing well rests is entitled to all royalties under the lease.[139]

The execution of a community lease, however, typically raises the presumption that the apportionment rule applies to the lessors' royalties absent evidence of intent otherwise.[140] Of course, if the community lease clearly sets forth whether apportionment or non-apportionment is to occur, the language of the lease controls.[141] If the lease language is ambiguous, the majority of jurisdictions that have answered this question allow evidence of contrary intent to some extent to rebut the presumption of apportionment. The rules of states which have answered this question are as follows:

• California and West Virginia follow the rule that the execution of a community lease gives rise to an irrebuttable presumption of apportionment.[142]

• Texas law favors a strong presumption in favor of apportionment that may only be overcome where there is clear evidence to the contrary set forth in the community lease.[143]

• Oklahoma law holds that the execution of a community lease gives rise to a presumption of apportionment, but that presumption is rebuttable by parol evidence.[144]

• Louisiana and New Mexico hold that no presumption for or against apportionment arises when a community lease is executed.[145]

Courts have found that evidence of intent supporting non-apportionment of royalties includes noncontiguous tracts, non-uniform tract descriptions for each lessor, and the existence of multiple units for operation and development purposes.[146] To the contrary, the inclusion of standard lease terms, without more, weighs heavily in favor of apportionment in a community

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[138] 6 Williams & Meyers, § 904 (2012).

[139] The non-apportionment rule is derived from the common law rule of capture, which holds that a landowner is entitled to all of the oil and gas produced from wells located on his tract, absent government restrictions. *See* Thomas W. Whittington, *Voluntary Communitization--When Will It Be Implied in Oil and Gas Leases?,* 22 Rocky Mtn. Min. L. Inst. 16 (1976); *see also* Japhet v. McRae, 276 S.W. 669 (Tex. Com. App. 1925).

[140] 6 Williams & Meyers, § 904 (2012).

[141] *See, e.g.*, Phillips Petroleum Co. v. McIllroy, 178 F. Supp. 107 (N.D. Tex. 1959).

[142] 4 Summers Oil and Gas § 54:13 (3d ed. 2012); *See* Clark v. Elsinore Oil Co., 138 Cal. App. 6, 31 P.2d 476 (4th Dist. 1934), Lynch v. Davis, 79 W. Va. 437,92 S.E. 427 (1917).

[143] 4 Summers Oil and Gas § 54:13 (3d ed. 2012); Howell v. Union Producing Co., 392 F.2d 95 (5th Cir. 1968), Samson Lone Star, Ltd. Partnership v. Hooks, 2012 WL 195113 (Tex. App. Houston 1st Dist. 2012), French v. George, 159 S.W.2d 566 (Tex.Civ.App. 1942) (*writ refused n.r.e.)*.

[144] 4 Summers Oil and Gas § 54:13 (3d ed. 2012); *See* Peerless Oil & Gas Co. v. Tipken, 1942

OK 140, 190 Okla. 396, 124 P.2d 418 (1942).

[145] 4 Summers Oil and Gas § 54:13 (3d ed. 2012); *See* Fontenot v. Humble Oil & Refining Co., 210 So. 2d 340 (La. Ct. App. 3d Cir. 1968); Leonard v. Barnes, 75 N.M. 331, 404 P.2d 292 (1965).

[146] Whittington, *supra* note 139.

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lease.[147] While the majority of states have not considered this question, a title examiner can assume, based on existing case law, that there is a rebuttable presumption of apportionment when a community lease is executed.

The apportionment and non-apportionment rules are applied differently when a subdivision of mineral interest occurs after the execution of a community lease. For example, assume that S and R each own adjacent 320 acre parcels in a section, and S and R lease the mineral rights to Company X by community lease. At this point, royalties are presumed to be apportioned between S and R equally. Through a subsequent conveyance, S sells 160 acres to B, subject to the Company X lease, and a well is drilled on S's remaining parcel. Under the non-apportionment rule, the owner of the tract where the producing well rests is entitled to all royalty payments under the lease. Thus, S would receive all the royalties for the 320 acre parcel, and B would receive nothing. R's apportioned royalty would be unaffected. The rule of non-apportionment of royalties after subdivision is followed in the majority of states.[148]

The minority rule of apportionment of royalties after subdivision has been adopted in only Pennsylvania, California and West Virginia.[149] In the example above, S would be forced to share its royalties with B in the proportion that the mineral acreage was owed (*i.e*. a 50%-50% split) even though the well was placed on S's land.[150]

1. Comment and Requirement Drafting Tips

As illustrated in the example above, knowing when to apply the apportionment or non-apportionment rule is circumstantially driven, and requires the title examiner to clearly set forth the facts surrounding the allocation of lessor royalties. A title examiner should first determine (1) whether the lease is a community lease, as described above, (2) whether the lease has an apportionment clause, (3) whether a subdivision of the subject lands has occurred following the execution of the lease, and (4) how that subdivision is handled, if at all, in the apportionment clause. If the apportionment clause in the lease unambiguously sets forth how royalties are to be apportioned, the title examiner should schedule them accordingly, and draft a comment that clearly and concisely explains how the royalties were scheduled in conformance with the lease.[151] the lease is silent as to apportionment and there is no subdivision of mineral acreage after the execution of the lease or conflicting state law, a title examiner may schedule the lessors' royalty interests in proportion to mineral acreage ownership. In any case, a title examiner should

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[147] 4 Summers Oil and Gas § 52:13 (2012), *citing* Louisiana Canal Co. v. Heyd, 189 La. 903, 181 So. 439 (1938).

[148] Several states that apply the non-apportionment rule to royalties in subdivision-after-lease cases are Colorado (*see* Moshiek v. Linger, 130 Colo. 266, 274 P.2d 965 (1954)), Kansas (*see* Carlock v. Krug, 151 Kan. 407, 99 P.2d 858 (1940)), Louisiana (*see* French v. Quebes, 200 La. 654, 8 So.2d 631 (1942)), New Mexico (*see* Leonard v. Barnes, 75 N.M. 331, 404 P.2d 292 (1965)), Oklahoma (*see* Magnolia Petroleum Co. v. Ouart, 200 Okla. 258, 192 P.2d 698 (1947)), Texas (*see* Japhet v. McRae, 276 S.W. 669 (Tex. Com. App. 1925)), and Nebraska (*see* Hafeman v. Gem Oil Company, 163 Neb. 438, 80 N.W.2d 139 (1956). Other states which have

adopted the rule include Arkansas, Illinois, Indiana, Kentucky, Ohio, and West Virginia. 2 Williams & Meyers, § 520 (2012).

[149] *See* 2 Williams & Meyers § 521.2 (2012); Whittington, *supra* note 139.

[150] The apportionment after subdivision rule was founded under the assumption of the Pennsylvania Supreme Court that minerals could be produced equally from all subdivided parts of land. Wettengel v. Gormley, 28 A. 934 (Pa. 1894).

[151] For an example of an unambiguous apportionment clause, see 28A West's Legal Forms, Specialized Forms, § 22:54 (4th ed., updated 2012).

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always base her comment upon how royalties will be apportioned pursuant to the lease and the statutory and case law of the particular state involved. The title examiner should also always include a comment specifically and concisely explaining which community lease apportionment rule is used, and how that rule was applied to the allocation of royalty interests in the ownership schedules.

When an apportionment clause is ambiguous, analysis becomes more difficult. The title examiner must first examine the lease for further evidence of the intent of the parties. As noted above, factors that courts have found that favor non-apportionment include noncontiguous tracts, non-uniform tract descriptions for each lessor, and the existence of multiple units for operation and development purposes. Also, the existence of Pugh clauses, retained acreage clauses, or statutory unitization requirements that are inconsistent with joint ownership will weigh towards a finding of non-apportionment. The title examiner should comment on the relevant statutory and case law of the state, describe the evidence for or against the parties' intent to apportion, and, based upon the same, make a determination as to whether she will apply the apportionment rule to the lease in order to schedule royalty ownership. She should then describe how the ownership schedules are affected.

The title examiner should require her client to contact the lessors (or the agent or the holder of executive rights as set forth in the lease) to inquire about the lessors' intent to apportion and request that the lessors provide a properly executed and recorded amendment for clarification. If the lessors' intent was misconstrued and causes the ownership schedules to be changed, the title examiner should request that the client advise her of the same so that she can update her ownership schedules as needed.

C. *Cross-Assignment of Interests*

In several jurisdictions, the execution of a community lease, pooling agreement or unitization agreement creates a cross-assignment of the underlying mineral interest.[152] The Texas Supreme Court has held that unitization agreements “are essentially a conveyance of interest in realty,”[153] holding that the owners of mineral acreage in a unitized area or community lease are treated as joint owners of all royalties reserved in the lease or several leases in such area.[154] Similarly, several California cases state that each lessor that executes a community lease assigns to his co-lessors a portion of the oil produced from his land, and that royalty interest is “an incorporeal hereditament analogous to the right to receive future rents.[155] The cross-assignment theory is problematic because all communitized owners are now, in theory, joint owners of the tracts. While there is considerable authority in other states that rejects this theory,[156] a title examiner drafting an opinion covering Texas or California lands should be aware of it.

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[152] Richard B. Johns, *Title Examinations on Unitized Lands,* 26A Rocky Mtn. Min. L. Inst. 17

(1990).

[153] Renwar Oil Corporation v. E. L. Lancaster, 276 S.W.2d 774 (Tex. 1955).

[154] Johns, *supra* note 152.

[155] Johns, *supra* note 152, at 1, *citing* Tanner v. Title Insurance & Trust Co., 129 P.2d 383 (Cal. 1942), Tanner v. Olds, 173 P.2d 6 (Cal. 1946). Illinois and Mississippi also have adopted the cross-assignment theory.

[156] States that have expressly rejected cross-assignment theory include Kansas, Oklahoma, Pennsylvania, West Virginia, and others. Johns, *supra* note 152, at 1, fnt. 9.

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1. Comment and Requirement Drafting Tips

Because cross-assignment theory may create an ownership interest in all of the tracts, a title examiner should describe the case law that supports cross-assignment theory and schedule all interests in the lessors collectively based upon the same. More often than not, the lessors probably did not intend to convey interests in their acreage to one another by a community lease. The title examiner may request that the client confirm with the lessors their intent to cross-assign their interests. If their intent was not to cross-assign these interests, the title examiner should recommend that all of the lessors properly execute and record an amendment clearly stating their intent not to cross-assign their interests.

In the unlikely event that the lessors did intend to cross-assign their interests, the title examiner should be aware that all conveyances of the underlying mineral interest or royalty following the lease should be executed or ratified by all of the lessors, who would now all own a joint interest in each other's property. If such conveyances are not properly executed, the title examiner should draft comments requiring that the incorrectly executed deeds are corrected by amendment executed by the necessary parties and recorded in the subject county or counties. Additionally, the title examiner should require, if necessary, that all leases and assignments are properly ratified by the necessary parties and properly recorded in the subject counties.

## VIII. Conclusion

As illustrated in this paper, there are many scenarios that raise complicated title issues during the preparation of a title opinion. The title examiner must have the foresight to recognize complicated issues and the ability to clearly and concisely draft comments and requirements pertaining to the issues. The final written title opinion should be adequately prepared to protect the title examiner from liability, and, more importantly, to accurately describe all title issues and to advise proper resolutions of those title issues to the client.

The views expressed in this paper are solely those of the author (or authors).

Please cite as: Howe, Sheryl L., and Turner, Scott L, "Advanced Mineral Conveyancing and Title Issues - Part 1," *Advanced Mineral Title Examination - Oil, Gas, and Mining,* Paper 1, Page No. ___ (Rocky Mt. Min. L. Fdn. 2014).

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Advanced Mineral Conveyancing and Title Issues- Part 1

Sheryl Howe and Scott Turner

Welborn Sullivan Meek & Tooley, P.C.

Dealing With Complicated Title Issues

- Identify
- Comments: clear, concise, organized
- Requirements: State what is necessary to solve the title issue and consider practicalities

**[Page 1-36]**

*"If there is a more repulsive requirement to a landman than a Quiet Title Action, I don't know what it is. Most Quiet Title suits take at least 10 - 15 months and stir up much more flack than is justified. If possible and if an alternative is available which will protect the leasehold title, suggest that the suit be deferred until the worth of the property has been established. A dry hole is an effective - if costly - remedy for title headache."*

The quote on the preceding slide was taken from E. J. (Gene) Wentworth, "The Title Examiner and His Opinions as Viewed by the Landman - Curative" *Mineral Title Examination Institute,* Paper 9, page 9-4 (Rocky Mnt. Min. L. Fdn. 1977).

**[Page 1-37]**

What Was Conveyed?

- Minerals: "In, on and under"
- Royalties: "Produced and saved from"

— A 50% non-participating royalty is possible!

— *See Gavenda v. Strata Energy, Inc.*, 705 S.W.2d 690 (Tex. 1986).

- Fractions: Fractional Royalty v. Fraction of Royalty

Common Co-Tenancies

- Tenancy In Common: Concurrent and alienable
- Joint Tenancy: Possession, Interest, Time, Title
- Tenancy by the Entirety: Marriage and Wyoming

**[Page 1-38]**

*Pirate Storms Ship and Purloins Captain's Gold*

Reservations to Strangers to Title

The Rule Against Perpetuities Is Still Alive, but the Courts and Statutes Are Chipping Away at the Rule

- The Traditional Rule

*"No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest"*

**[Page 1-39]**

Extinct Rule Jumps Out of Grave and Slaps Down Farmer

The Rule Against Perpetuities Violated

The New Rule Against Perpetuities

• Wait and See: “A nonvested property interest is invalid unless within **1,000 years** after the interest's creation the interest vests or terminates.” - Utah Code Ann. § 75-2-1203 (West)

• Reformation: “Upon the petition of an interested person, a court shall reform a disposition in the manner that most closely approximates the transferor's manifested plan

Of distribution . . . .” -- Utah Code Ann. § 75-2-1205 (West)

**[Page 1-40]**

“All Together Now” Life Tenants and Remainderman

• A life tenant leasing alone commits waste

• A remainderman leasing alone trespasses

• They have to lease or produce together

The Open Mine Doctrine

If the lease predates the creation of the life estate (or production in some states), then the life tenant gets paid.

**[Page 1-41]**

Know what you own, know what you are conveying, and hire a (good) lawyer!

The mineral ownership pie is valuable

People slice it up and make a mess of it (sometimes)

**[Page 1-42]**

The *Duhig* Rule

• Seller owns Blackacre, and conveys to Buyer 1, reserving an undivided 1/2 mineral interest.

• Buyer 1 conveys Blackacre to Buyer 2 by warranty deed, reserving an undivided 1/2 mineral interest with no exceptions.

• Results in Seller owning an undivided 1/2 mineral interest, Buyer 2 owning an undivided 1/2 mineral interest, and Buyer 1 owing nothing.

Anti-Washout Provisions

**[Page 1-43]**

Extension and Renewal Clauses

• Timing: Is there a gap between expiration of old lease and execution or effective dates of new lease?

• Extent of Similarities between Old and New Leases

Same lands?

Same primary term, royalty?

Changes to Pugh clause, pooling cause?

Inclusive Overrides

One case held that an overriding royalty equal to the “difference between . . . burdens . . . existing on the effective date of this Assignment” and 25% led to an override that did not change when an extension lease was taken with a higher royalty. *EOG Resources, Inc. v. Hanson Production Co.*, 94 S.W.3d 697 (Tex. App. 2002).

**[Page 1-44]**

Community Leasing

In conclusion . . .

• Correctly recognize and identify issues.

• Clearly, concisely and accurately draft comments and requirements.

• Consider your client's priorities when suggesting resolutions.

• Avoid liability.

**[Page 2-i]**