Nuts & Bolts of Mineral Title Examination (Apr 2015)

CHAPTER 15
OVERVIEW OF COMPLICATING FACTORS AFFECTING TITLE

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INTRODUCTION

Every title opinion has a life of its own and will present the title examiner with a variety of

complications. This paper provides a broad overview of just some of the potpourri of issues that a title examiner will face. Every title examiner should be aware of the effects that bankruptcy, foreclosures, tax sales, liens and adverse possession may have on title. Additionally, as horizontal drilling has become a common method of drilling for oil and gas, title examiners must be mindful of the implications of using other lands to reach the minerals underlying another tract of land, as is common for many horizontal wells. Similarly, understanding pooled units and working interest units is critical to providing the most accurate title opinion possible. Finally, a title examiner whose opinion will cover Indian lands must become familiar with the applicable treaties, statutes, executive orders, and secretarial orders that may apply to the particular reservation located on the lands covered by the opinion. We have attempted to present an overview of the complicating issues a title examiner may encounter under these diverse topics and to provide advice to the title examiner on how to assist their client in addressing those issues.

I. Effects of Bankruptcy, Foreclosure. Tax Sales and Liens

A. Introduction

The effects of bankruptcy, tax sales, foreclosure, liens and adverse possession on title were discussed in detail in a paper written last year for the “Advanced Mineral Title Examination: Oil, Gas, and Mining” Special Institute.[1] Below we have excerpted portions of that paper (and updated where applicable) to summarize these issues.

B. Bankruptcy

The following discussion is a brief overview of the primary issues for a title examiner that typically arise in the event that evidence of a bankruptcy filing by a record owner appears in the materials he or she is provided. There are often exceptions to the general rules discussed below which could be applicable under the specific facts of a given situation. If a transfer by a debtor or a trustee in bankruptcy appears in the chain, the examiner will have to determine the date of the filing of the petition and investigate the details of the Bankruptcy Code in effect on that date and their application to the facts apparent from the record materials.

The Bankruptcy Code[2] does not place persons dealing with the debtor or its property on

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[1] Laura Lindley and Sarah Sorum, “Advanced Mineral Conveyancing and Title Issues--Part 2,” *Advanced Mineral Title Examination: Oil, Gas, and Mining* 2-1 (Rocky Mt. Min. L. Fdn. 2014).

[2] 11 U.S.C. §§ 101 -1532.

constructive notice of the filing of a petition in bankruptcy. Therefore, the title examiner is under no duty to examine the docket of the bankruptcy court in which the property is located or in which the property owner resides.[3] Of course, if a copy of the petition in bankruptcy or other evidence of the pendency of a bankruptcy proceeding is recorded in accordance with the real property laws of the applicable state,[4] then the public is on notice of the bankruptcy and its potential effects on title to the debtor's property as provided under the recording statute of the state.

The filing of a petition in bankruptcy creates an estate comprised of the pre-bankruptcy property of the debtor.[5] The estate is a separate legal entity from the debtor, and is administered by the bankruptcy trustee or, in a Chapter 11 or 13 proceeding, by the debtor-in-possession.[6] A debtor-in-possession has the same powers as a trustee for the bankruptcy estate[7] but holds title to the property of the bankrupt estate for the benefit of the estate; it may not deal with the property except as authorized under the Bankruptcy Code.

The filing of a petition in bankruptcy imposes an automatic stay of any action or proceeding to recover a pre-petition debt from the debtor or to enforce a pre-petition lien or judgment.[8] Any action commenced or continued in violation of the automatic stay is void, even where the creditor had no notice of the existence of the stay.[9] A creditor can, however, seek relief from the automatic stay from the bankruptcy court.

The trustee or debtor-in-possession has the power to set aside transfers to or for the benefit of a creditor relating to a prior debt owed to the creditor if the transfer was made within ninety days before the filing of the petition in bankruptcy and if the debtor was insolvent at the time of the transfer.[10] The purpose for allowing the trustee or debtor-in-possession to set aside

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[3] *See, e.g.*, Standard 16-01, *North Dakota Title Standards* (2012).

[4] *See, e.g.*, N.D. Cent. Code § 47-19-53 (providing for recording certified copies of petitions, decrees, or orders from the bankruptcy court in the office of the recorder of any county where property of the bankrupt is located).

[5] 11 U.S.C. § 541(a). There are some exceptions to the definition of the property of the debtor, including interests of the debtor in hydrocarbons under a farmout agreement or transferred by a production payment conveyance to an entity that does not participate in the operation of the property. *Id.* § 541(b).

[6] Id. §§ 1107, 1303.

[7] *Id.*

[8] *Id.* §362(a)(1)-(8).

[9] There was a great deal of disagreement among the courts as to whether the bona fide purchaser provision of 11 U.S.C. § 549(c) applied to transfers in violation of the automatic stay. *Compare In re* Morris, 365 B.R. 613 (Bankr. E.D. Va. 2007) and *In re* Mitchell, 279 B.R. 839 (B.A.P. 9th Cir. 2002) *with In re* Taylor, 884 F.2d 478 (B.A.P. 9th Cir. 1989). However, as a result of the 2005 amendments to the Bankruptcy Code, as to cases commenced after October 17, 2005, when a debtor makes a post-petition transfer of real property for fair equivalent value to a transferee without knowledge of the debtor's bankruptcy case, the transfer is neither avoidable by the trustee under section 549 (discussed below), nor void as a violation of the automatic stay. 11 U.S.C. § 362(b)(24); *see also In re* Ellis, 441 B.R. 656, 663 (Bankr. D. Ida. 2010).

[10] 11 U.S.C. § 547.

such “voidable preferences” is to prevent the debtor from diminishing the property of the bankrupt estate in favor of one creditor over another. For example, a deed in lieu of foreclosure could be a voidable preference if it was made within the ninety-day period.

Once the petition in bankruptcy is filed, the trustee or debtor-in-possession may sell property of the estate in the ordinary course of business without notice or hearing.[11] However, a sale of real property will not typically be considered to be within the debtor's ordinary course of business unless the debtor is, for example, a real estate developer selling lots. A sale other than in the ordinary course of business can be made by the trustee or debtor-in-possession after notice and a hearing.[12] Therefore, if the record reflects a transfer of real property made by the record owner after the petition in bankruptcy was filed by that owner, the examiner should require that an order of the bankruptcy court authorizing the transfer be recorded. However, there may not be a court order authorizing the sale if the trustee or debtor-in-possession gave notice of intention to sell the property to the required parties and no timely objections were received. In that case, the examiner would need to examine evidence of the fact that proper notice was given and no objections were received within the time permitted by the rules of the bankruptcy court.[13]

If a trustee has been appointed, the examiner should confirm the authority of the trustee. If the estate is being administered by the debtor-in-possession, the examiner should confirm that no trustee has been appointed. A certificate from the clerk of the bankruptcy court may be relied upon

to establish these facts.[14]

Post-petition transfers of the real property of the bankrupt estate may not be avoided by the trustee if the transfer was made to a good faith purchaser without knowledge of the commencement of the bankruptcy case and if the transfer was made for "present fair equivalent value," unless notice of the petition for bankruptcy was recorded in the real property records prior to the transfer.[15] The title examiner can determine whether notice of the bankruptcy was recorded prior to the transfer but will not be able to independently confirm from the public records that the transferee had no actual knowledge of the pendency of the bankruptcy proceeding, nor will he or she be able to confirm that the property sold for "present fair equivalent value." An action or proceeding to set aside a post-petition transaction must be commenced no later than the earlier of (1) two years after the date of the transfer, or (2) the time when the case is closed or dismissed.[16]

Real property (unless exempt as, for example, under state homestead laws) of the

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[11] *Id.* § 363(c)(1). A sale or lease in the ordinary course of business first requires that the operation of the business have been authorized under the Bankruptcy Code or by an order of the bankruptcy court. A debtor-in-possession or the trustee in a Chapter 11, 12 or 13 case is authorized to operate the debtor's business. *Id.* §§ 1108, 1203, 1204, 1304. However, a trustee in a Chapter 7 case is not authorized to operate the debtor's business unless it has been authorized to do so by order of the bankruptcy court. *Id.* § 721.

[12] *Id.* § 363(b)(1).

[13] *Id.* § 363(b)(1); Fed. R. Bankr. P. 2002, 6004.

[14] Fed. R. Bankr. P. 2011(a).

[15] 11 U.S.C. § 549(c).

[16] *Id.* § 549(d).

bankruptcy estate remains part of the estate until it is either abandoned or sold. Property might be abandoned if it has no economic value to the estate, and there are procedures that must be observed in order for the property to be treated as abandoned.[17] Property which is not "scheduled" on the exhibit of real property of the estate remains property of the estate even after the bankruptcy case is closed.[18] If the property was part of a bankruptcy estate under Chapter 11, the examiner will have to review the confirmed plan of reorganization, confirm that proper notice of the plan and disclosure statement were given as required by the rules,[19] and that the transfer was made in conformance with the plan.

Some states' title standards contain detailed provisions on the effects of bankruptcy on real property titles.[20] However, bankruptcy is not mentioned in the title standards adopted in a number of states.[21]

C. Tax Sales

The title examiner will frequently encounter a tax sale followed by issuance of a tax deed to a new owner by the authorized county official, particularly during the dust bowl and depression years.[22] Many commentators have noted the inherent uncertainty of title derived through a tax deed.[23] Courts historically have viewed any kind of forfeiture with disfavor. The fact that a tax sale proceeding is, in most states, an in rem proceeding and the taxpayer may receive notice only through publication, seems to have contributed to a tendency by courts to find reasons to protect the dispossessed taxpayer. The North Dakota title standard on tax titles provides an excellent summary of the lack of title security associated with title derived through a tax deed:

There is no way of knowing what the courts will consider to be a jurisdictional defect [in the tax sale proceeding], but historically they have been exceedingly stringent in requiring exact and precise compliance with all of the statutory steps in the tax sales (now tax lien foreclosure) proceedings. Moreover, NDCC 57-45-11--which has generated a great deal of case law--specifically authorizes a quiet

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[17] *Id.* §554.

[18] *Id.* § 554(d); *see also In re* Dunning Brothers Co., 410 B.R. 877, 888 (Bankr. E.D. Cal. 2009) (case re-opened, under prior Bankruptcy Act, 73 years after it was closed to administer unscheduled property).

[19] Fed. R. Bankr. P. 2002, 3017(a) *see also* Van Sickle v. Hallmark & Assocs., Inc., 840 N.W.2d 92, 102-3 (N.D. 2013) (finding creditors unbound by reorganization plan when they were not provided notice of the confirmation hearing).

[20] *See, e.g.*, Tex. Prop. Code Ann. tit. 2, app., ch. XII, *Texas Title Examination Standards* (West 2014); *2012 Title Examination Standards Handbook*, ch. 34 (Oklahoma Bar Ass'n); Standard 16-01 to 16-16, *North Dakota Title Standards* (2012).

[21] *E.g.*, *Colorado Real Estate Title Standards* (2012 Colo. Bar Ass'n Real Estate Section); *Title Standards of the Wyoming State Bar* (1980).

[22] *See generally* David T. Beito, *Taxpayers in Revolt* (1989).

[23] Randall M. Case, "Tax Deeds and 'Defendable Titles,'" 22 *Rocky Mt. Min. L. Inst.* 14-1, 14-1 (1976); Janet N. Harris, "Analyzing and Curing Title Requirements," 31 *Rocky Mt. Min. L. Inst.* 20-1, 20-24 (1985).

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title action by an interested party against the tax deed grantee of the county, which seemingly indicates a legislative lack of confidence in the regularity of tax sales or tax lien foreclosure proceedings. . . . For these reasons tax titles are considered inherently suspect in the absence of an appropriate curative action or occurrence as specified in the standard.[24]

As a result, most title examiners are unwilling to pass title that is derived through a tax deed, unless there has been (a) a conveyance to the tax sale purchaser or its successors from the taxpayer or its successors, (b) a quiet title decree quieting title in the purchaser at tax sale or its successors, or (c) a curative statute clearly applies. Unfortunately, most curative statutes (such as adverse possession statutes) require actual possession as one of their elements, so that they are generally unavailable to cure a tax title where the minerals have been severed from the surface and there has been no actual possession of the minerals. Landmen are frequently frustrated by the title examiner's requirement to cure what appears to be an ancient tax deed but, in many cases, the examining lawyer would risk liability for malpractice if the requirement to cure the tax title is not included in the opinion.

Each state has its own statutory procedures for assessing, levying, and collecting real property taxes and for foreclosing on unpaid tax liens. Unfortunately, these procedures vary significantly from state to state, so the applicable statutes must be reviewed in each instance. Moreover, these statutes can vary significantly over time, so it is not enough for the examiner to be familiar with just the current statutes. The statutes in effect at the time the tax lien attached, the tax sale was held, and the tax deed was issued must be examined with respect to the applicable tax sale proceeding (which usually means a trip to the state's dusty archives will be required to dig out copies of the old statutes, as they are often not available on computerized legal search services).

Although each state's laws set forth different procedures for taxing real property, collecting the tax, and foreclosing on unpaid tax liens, they all share certain similar basics.[25] All real property (subject to exemptions provided for in a state's constitution or statutes) is taxed. The tax is assessed against the owner of record as of the assessment or valuation date, and different

interests in the property (*e.g.*, surface estate and severed minerals, in some states) are separately assessed. The property is valued, usually by the county assessor, and, almost universally, the tax lien attaches as of the assessment or valuation date. The amount of the tax is established by statute and the taxing authority (usually the county treasurer).

Tax notices of the amount due are sent to the record owner or owners, with the tax payable by the date set by statute (in many states, the tax may be paid in two installments, with a discount offered if the entire tax is paid by the first installment date). If payment is not made by the statutory deadline, then penalties and interest are added to the tax bill. The statutes then provide for a public sale of the unpaid tax liens, with a tax sale certificate being issued to the purchaser at the sale or, if the lien is not sold, the lien is "struck off" to the county. A period is provided for the taxpayer to redeem the tax lien by paying the past due amounts (including

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[24] Standard 1 -03, *North Dakota Title Standards* (2012).

[25] *See generally* Mark K. Buchi and David K. Detton, "Keeping the Tax Assessor at Bay: A Guidebook to Property and Production Taxes," 34 *Rocky Mt. Min. L. Inst.* 2-1 (1988).

penalties, interest, and costs). If redemption does not occur within the time prescribed, then the treasurer will issue a tax deed to the holder of the tax sale certificate. As the saying goes, the devil is in the details, and failure of the assessor or treasurer to comply with any statutory detail frequently gives rise to defects which make the tax title less than defensible.

Today's foreclosure statutes generally require personal service or service by registered or certified mail on the owner of the property before the lands are sold at tax sale and before the tax deed issues. However, the laws in some states, at least prior to 1983, allowed notice to be given to property owners only by publication or posting notice of the sale at the courthouse. In *Mennonite Board of Missions v. Adams*,[26] the Supreme Court set aside a 1977 Indiana tax sale under a statute that did not require notice to a mortgagee of the property other than by publication.[27] Because a mortgagee has a legally protected property interest, the Fourteenth Amendment to the United States Constitution requires that the mortgagee receive Due Process before it is deprived of that property interest by the State.[28] The Court held, relying on *Mullane v. Central Hanover Bank & Trust Co.*,[29] that the mortgagee is entitled to notice "reasonably calculated to apprise him of a pending tax sale."[30] Under the circumstances in *Mennonite*, the Court held that the mortgagee must be provided notice by personal service or mail at its last known address available from the public records.[31]

Since the decision in *Mennonite*, questions have arisen as to whether its rule must be applied retroactively to invalidate tax sales that occurred long before the decision was issued. In one recent case, *Quantum Res. Mgmt., LLC v. Pirate Lake Oil Corp.*,[32] the Supreme Court of Louisiana refused to apply *Mennonite* retroactively to invalidate a 1925 tax sale in which no notice of the sale was given to the record owner of the property. The court reviewed the Supreme Court's evolving rules on retroactive application of constitutional decisions to hold that *Mennonite* only applies retroactively to cases pending "on direct review" when the Supreme Court decision was rendered.[33] Under Louisiana law, any defect in the tax deed was cured by the applicable five-year statute of limitations, and the retroactive application of the *Mennonite* rule is, according to the Supreme Court of Louisiana, limited by principles of res judicata and statutes of limitations or repose.[34] The court noted that a contrary rule would produce chaos in the legal system, and courts in New York[35] and West Virginia[36] have adopted similar

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[26] 462 U.S. 791 (1983).

[27] *Id.* at 798-99.

[28] *Id.* at 800.

[29] 339 U.S. 306 (1950).

[30] *Mennonite*, 462 U.S. at 798.

[31] *Id.* at 799. *See also* Miles Homes Div. of Insilco Corp. v. City of Westhope, 458 N.W.2d 321, 324-25 (N.D. 1990) (construing North Dakota's prior tax lien statute in light of *Mullane*).

[32] 112 So.3d 209 (La. 2013), *cert. denied*, Haydel v. Zodiac Corp., No. 12-1487, 2013 WL 3193353 (U.S. Oct. 7, 2013).

[33] *Quantum Res. Mgmt., LLC*, 112 So.3d at 217.

[34] *Id.* at 217-18.

[35] McCann v. Scaduto, 519 N.E.2d 309, 315 (N.Y. 1987) ("Recognizing that our declaration could have broad, unsettling effect on the marketability of otherwise settled titles to property, we conclude that our decision in these cases is to have no general retroactive application and shall apply only to cases where tax titles are 'still in the normal litigating process.'") (quoting Gurnee v. Aetna Life & Cas. Co., 433 N.E.2d 128, 130 (N.Y. 1982))).

[36] Geibel v. Clark, 408 S.E.2d 84, 90 (W. Va. 1991) ("Thousands of sheriffs' tax sales of real property with only constructive notice thereof occurred in this state under *W. Va. Code*, 11A-3-2 between 1941 and 1983. The retroactive application of *Mennonite Board of Missions* to invalidate all of these sheriffs' tax sales would create extreme uncertainties in thousands of land titles in this state containing a tax deed in the chain of title during that period of time.").

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approaches. On the other hand, the Supreme Court of Mississippi concluded that *Mennonite* must be applied retroactively.[37] However, the issue in that case involved lack of notice to owners of severed minerals, although notice had been served on the surface owners.[38] The Mississippi Supreme Court noted that *Mennonite* did not require actual notice in every circumstance and that notice by publication may suffice if an owner's identity or whereabouts could not be ascertained with due diligence.[39] Because the Mississippi law in effect at the time of the tax sale (1942) imposed a duty on the owners of severed minerals to have their interests separately assessed (which these owners did not satisfy) and because it would be unduly burdensome on the county if it had to search the conveyance records to identify the owners of severed mineral interests, the court held that publication notice and notice to the surface owners did not violate the mineral owners' due process rights.[40]

As a result of the decisions discussed above, there is uncertainty about the constitutional adequacy of any tax sale (other than those in Louisiana, New York and West Virginia) conducted under a state law that did not require at least mailed notice of the tax sale to the owners of interests in the property. As mentioned above, the laws in the states with which these authors are familiar did require personal service of notice or mailed notice to owners, so the cases have turned on the extent of compliance with the applicable statute rather than on whether the notice was constitutionally sufficient.

In conclusion, historically, tax titles have been considered to be "inherently suspect,"[41] because so many errors could occur in the tax sale proceedings or in the manner in which notice of the sale, of redemption periods, or of issuance of the tax deed was given to the owner to whom the property was taxed. More recent cases and legislative efforts suggest an attempt to make challenges to tax deeds more difficult so as to promote certainty of title derived through a tax deed. Nonetheless, as discussed in some of the cases above, the courts will still protect the rights of the owner to redeem his property and whether those rights have been foreclosed by proper notice under the statute is not always evident from the public records available to the title examiner. Even where the tax deed was issued many years earlier so that defects are likely to have been cured by the possession of

the tax sale purchaser, possession is a factual matter that cannot be confirmed from the public records. Possession may also be unavailable as a cure for a defective tax deed where severed minerals are involved and there has been no actual possession of the minerals. Consequently, title examiners must continue to proceed cautiously when there is a tax deed in the chain of title.

D. Foreclosure

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[37] AARCO Oil & Gas Co. v. EOC Res., Inc., 20 So.3d 662, 669 (Miss. 2009).

[38] *Id.* at 667.

[39] *Id.* at 669.

[40] *Id.* at 670.

[41] Standard 1-03, *North Dakota Title Standards* (2012).

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It is rare to examine title to a 640 or 1, 280 acre spacing unit in North Dakota that does not include at least one mortgage foreclosure in the early part of the twentieth century. Though somewhat less common, it is not unusual to have foreclosures during the depression and dustbowl eras in Colorado and Wyoming titles. The materials provided to the examiner do not always include sufficient information to allow the examiner to conclude that the foreclosure was conducted in conformance with the laws in effect at the time. In most of the Rocky Mountain states, a mortgage or deed of trust is a lien and not a conveyance.[42] If the debt which is secured by a mortgage or deed of trust is not paid, the mortgagee may foreclose, either by sale or by judicial proceeding, depending on the terms of the mortgage or deed of trust and the laws of the applicable state. Most states have statutes providing the mortgagor with a right to cure or redeem before the property is foreclosed.

Whether or not a foreclosure affects title to minerals acquired after the mortgage was executed depends on the language used in the mortgage. Parties may agree to include future interests, but absent an express intent, typically these interests would not be affected if the mortgage is later foreclosed upon.[43]

As discussed in Part I.C., above, where state action is involved, there must be notice of the foreclosure given to owners of interests in the property which is reasonably calculated to apprise the owner of the pending sale. This includes the record owners as well as owners of easements and other encumbrances granted after the mortgage. In most states, where a junior lienholder is not provided with the appropriate notice of a foreclosure action, it is left with an unextinguished right to redeem.[44]

Several courts have held that private, non-judicial sales (such as under a power of sale) do not implicate state action so as to require compliance with the Due Process Clause of the Fourteenth Amendment.[45] However, where a mortgage is judicially foreclosed and the property is sold at a sheriff's sale, courts will likely find sufficient state involvement in the process so as

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[42] *See, e.g.*, Colo. Rev. Stat. § 38-35-117; N.D. Cent. Code § 35-01-08; Cliff & Co. v. Anderson, 777 P.2d 595, 601 n.8 (Wyo. 1989).

[43] *See* Rasnic v. ConocoPhillips Co., 854 N.W.2d 659 (N.D. 2014) (finding that the plain language of the foreclosed mortgage applied only to mineral interest owned by the mortgagors when the mortgage was executed, and thus that the subsequent foreclosure of the mortgage did not impact minerals acquired later).

[44] *See, e.g.*, Rohrich v. Rohrich, 434 N.W.2d 343 (N.D. 1989); *see also* Standard 8-14, *North Dakota Title Standards* (2012).

[45] Apao v. Bank of New York, 324 F.3d 1091, 1095 (9th Cir. 2003) (finding no state action under Hawaii's non-judicial foreclosure statute); Charmicor, Inc. v. Deaner, 572 F.2d 694, 696 (9th Cir. 1978) (finding no state action under Nevada's non-judicial foreclosure statute); Barrera v. Sec. Bldg. & Inv. Corp., 519 F.2d 1166, 1174 (5th Cir. 1975) (finding no state action under Texas' non-judicial foreclosure statute); Garfinkle v. Superior Court of Contra Costa Co., 578 P.2d 925, 933 (Cal. 1978) (finding no state action under California's non-judicial foreclosure statute).

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to require constitutionally sufficient notice to affected property owners.[46]

E. Liens

Liens encumber real property to secure a debt owed by the property owner. These can be contractual, statutory or judicial. Most states' statutes offer a variety of liens for creditors to secure payment of unpaid child support, alimony, taxes, and costs incurred to improve real property. The most common type of lien encountered in a basic title search is a laborer's lien, sometimes called a mechanics' or materialmen's lien. This is a “statutory lien made available under specified circumstances to the supplier of goods and services.”[47] Some states also provide for liens specific to mining operations, as well as liens specific to oil and gas operations. Generally, these liens encumber real property interests to prevent unjust enrichment when labor and materials have been used to improve the property but have not been paid for.[48] Because the right to these liens is entirely statutory, the relevant state statutes must be carefully examined.

Title examiners should also be on the lookout for judgments against mineral owners, and should be aware that these judgments may not be recorded in the county clerk and recorder's office. In most states, the judgment may be recorded in the county records, at which time it constitutes a lien on all of the debtor's non-exempt real property in the county.[49] In Colorado, the judgment also serves as a lien upon any new property the debtor acquires in the county until the expiration of the lien.[50]

Under the typical lien statute, a lien statement must be recorded in the county records, which statement can be filed as soon as the lien attaches. However, most statutes also provide a window within which the lien statement can be filed (e.g., within ninety days after the completion of work).[51] During this time the lien constitutes a “secret” encumbrance which will not be revealed from an examination of the county records.[52]

Valid liens, especially those encumbering the leasehold estate, must be noted by the title examiner. As described above, because the lien may attach prior to recorded notice, title examiners may also wish to include a blanket statement to the effect that the property may be subject to liens which are not disclosed in the record. Luckily, because most states' lien statutes provide for an expiration of liens when an action to foreclose has not been commenced within the prescribed period, older liens may be disregarded when the record does not contain a lis pendens providing notice of such proceedings. The title examiner should check the relevant state statutes to determine the expiration date of the lien.

II. Adverse Possession

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[46] *See* Davis Oil Co. v. Mills, 873 F.2d 774, 787 (5th Cir. 1989) (finding state action under Louisiana foreclosure law providing for seizure and sale by the sheriff).

[47] 8 Patrick H. Martin & Bruce M. Kramer, *William & Meyers, Oil and Gas law* 597 (2012).

[48] *See* Kobayashi v. Meehlis Steel Co., 472 P.2d 724, 727 (Colo. 1970).

[49] *See, e.g.*, Colo. Rev. Stat. § 13-52-102(1).

[50] *Id.*

[51] N.D. Cent. Code § 35-27-13.

[52] George A. Snell, III, "Finding, Accessing, Running, and Examining the Local Records and Preparing the Chain of Title," *Mineral Title Examination* 4-60 (Rocky Mt. Min. L. Fdn. 2007).

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Adverse possession is a doctrine by which a person in actual, open, notorious, exclusive, and continuous possession of lands for a certain period, and which possession is hostile to the true owner and under a claim of right or color of title, can obtain title as against the legal record owner.[53] The required period of possession is now prescribed by statute in all states, with those statutes establishing a limitations period on an action to quiet title that runs against the record owner of the property. In some states, the required possession period is as short as three years;[54] in others the required period is as long as thirty years.[55]

From the title examiner's perspective, adverse possession is a potential cure to title defects in the record title. However, because the existence of adverse possession for the period required under the applicable law is a factual determination, the title examiner cannot conclusively determine based on the public records whether adverse possession in fact cures the defect. Therefore, the client must either decide that the risk is low that the claimant under the record title could defeat the actual possession of the lands by the current owner in possession and assume that risk, or a quiet title decree must be brought quieting title in the party in possession as against the claims of the adverse record owner.

A recent Wyoming case provides a good example of the "peculiarly factual nature" of an adverse possession claim.[56] In that case, the trial court granted summary judgment in favor of the party asserting adverse possession but the Supreme Court reversed because the affidavits provided asserted only ultimate facts.[57] The court explained that the possession of the party asserting title by adverse possession must have been with the intent to assert the adverse claim against the true owner and that intention must be established by objective evidence.[58] The court also noted that, because claims of adverse possession are not favored in the law, its review of the summary judgment will proceed "with more exacting scrutiny."[59] Obviously, there would be great risk for the title examiner to conclude, based on, at most, an affidavit of possession from an interested party, that the elements of adverse possession had been satisfied in a given case.

Similarly, the Kansas courts have held that whether title is acquired by adverse possession is a question of fact, and every presumption is in favor of the holder of the legal title.[60] In addition, in Kansas, a party seeking to establish title by adverse possession must present clear and convincing evidence that the statutory requirements have been met.[61] Oklahoma imposes a similar heightened evidentiary standard for adverse possession claims,

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[53] *See, e.g.*, Akin v. Castleberry, 286 P.3d 638, 641 (Okla. 2012); Helm v. Clark, 244 P.3d 1052, 1057 (Wyo. 2010).

[54] Tex. Civ. Prac. & Rem. Code Ann. 16.027 to 16.028.

[55] La. Civ. Code art. 3486 to 3488.

[56] Braunstein v. Robinson Family L.P., 226 P.3d 826, 835 (Wyo. 2010).

[57] *Id.* at 837.

[58] *Id.* at 835.

[59] *Id.* at 836.

[60] Stith v. Williams, 605 P.2d 86, 89 (Kan. 1980); Crone v. Nuss, 263 P.3d 809, 815 (Kan. App. 2011).

[61] *Crone*, 263 P.3d at 815.

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requiring the party claiming title adversely to prove every element by clear and positive proof.[62]

Of course, as discussed above with respect to tax titles, adverse possession is usually unavailable to cure title defects to severed minerals unless there is actual possession of the minerals by production. After the severance of the mineral estate from the surface estate, adverse possession of the surface alone does not constitute possession of the minerals.[63]

Though we could write a treatise on the various elements necessary to prove adverse possession, the relevant point for the title examiner is that adverse possession may be available as a means to cure defects in title. However, because the elements of adverse possession require proof (and sometimes clear and convincing proof) of the facts evidencing each element, the title examiner is not in a position to conclude that adverse possession has cured a title defect.

III. Horizontal Drilling Complexities

A. Introduction

Horizontal drilling has become one of the most common methods of drilling for oil and gas in the United States. Unlike drilling a vertical well, a horizontal well will often begin at a single surface location, penetrating the surface and moving laterally through adjacent or neighboring lands (the "off-tract lands"), in order to reach the minerals (the "subject minerals") underlying the lands covered by the title opinion (the "subject lands"), like the following depiction:

We note that for purposes of our discussion herein, the off-tract minerals will only be drilled through and the wellbore will not be opened to production in the off-tract minerals.

Although drilling from a single surface location is more environmentally and

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[62] *Akin*, 286 P.3d at 641.

[63] *See, e.g.*, Sickler v. Pope, 326 N.W.2d 86, 91 (N.D. 1982); Calvat v. Juhan, 206 P.2d 600, 603 (Colo. 1949).

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economically efficient, doing so creates a myriad of issues for the surface owner who must bear the brunt of the surface operations for a well drilled to a bottomhole location on lands other than his own. It is important for a title examiner to make the client[64] aware of the potential issues created by drilling a horizontal well that traverses off-tract lands and what may be necessary to conduct operations on off-tract lands.

B. Using Neighboring Lands to Access the Subject Minerals: Surface and Subsurface Agreements

1. How Will the Title Examiner Know?

Although not always evident to the title examiner, for numerous reasons the client may intend to or be forced to drill a horizontal well from a surface location on off-tract lands which must traverse the off-tract minerals to reach the subject minerals. The terrain of the surface of the subject lands may make it impracticable or impossible to access the subject minerals. For example, the subject lands may contain a large body of water, mountains, hills, a residential subdivision, or commercial buildings that will restrict the operator's ability to drill to the subject minerals from the surface of the subject lands. Additionally, a title examiner may encounter deeds, leases or other instruments which restrict surface use on the subject lands. Moreover, it is not uncommon for a "no surface

occupancy” (“NSO”) oil and gas lease to cover all or part of the subject minerals.

(a) Information Provided by the Client

There are several ways a title examiner may determine that the client cannot access the subject minerals by virtue of operations on the surface of the subject lands. It is common for the client (or the abstractor or landman compiling the abstracts) to send a title opinion request letter along with the abstracts and other pertinent records to be examined for the opinion (“materials examined”). The letter usually includes the legal description of the subject lands and may also include a specific well to which the opinion will be limited and/or a legal description for the lands with which the subject lands will be spaced. If a specific well is described in the request letter, the client may also indicate the proposed surface and bottomhole locations of the well. Since 1,280 acre (or more in some states!) spacing has become fairly common, it is not unusual for either the surface location or bottomhole location of a well to be located on off-tract lands. This information may tip the title examiner off to the fact that the operator plans to drill on or through off-tract lands to reach the subject minerals.

(b) Information Found on the Internet

If a title opinion request letter does not detail the well(s) location(s) or provide a description of the spacing unit, the title examiner should visit the state conservation commission website in which the subject lands are located in order to obtain any spacing information. The challenges of navigating these websites vary by state, but most of the Rocky Mountain states

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[64] Used herein interchangeably as the “client” and the “operator.” Both terms are referring to the party requesting the title opinion on the subject lands.

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have a commission website[65] where the title examiner simply enters the legal description of the subject lands to determine whether a spacing unit has been formed that covers the subject lands and/or adjacent lands and whether an Application for Permit to Drill has been filed for a well on the subject lands. For example, the Wyoming Oil and Gas Conservation Commission website allows the title examiner to input the quarter-quarter, section, township and range for the subject lands to obtain all relevant spacing orders. A PDF version of the application for spacing and exhibits are also available and provide relevant information for the future operations on the surface lands. The search will also produce a map showing all of the surface and bottomhole locations for future and existing wells on the subject lands (and lands spaced therewith).

Additionally, the always evolving World Wide Web provides the title examiner with access to other information which is helpful in understanding more about the subject lands. For example, Google Earth[66] has become a handy tool that provides the title examiner with a visual depiction of any roads, buildings, bodies of waters, highways, railroads, hills, mountains, structures, and more which are located on the subject lands. Other tools found on “the net” include a searchable map on the public land survey system website[67] and maps and plats provided by the county assessors' website. The information provided by each of these online resources will contain helpful clues as to whether it may be impracticable, impossible or unlikely that the surface of the subject lands can be used to drill to the subject minerals.

(c) Instruments of Record

Restrictions on the use of the surface of the subject lands may also appear in deeds, leases or other instruments contained in the materials examined for the opinion. For instance, a deed which severs the surface and mineral estate of the subject lands may expressly prohibit the mineral

owner or his lessee from accessing the surface of the subject lands. Additionally, the title examiner may be tipped off that a surface location on off-tract lands will be necessary to drill to the subject minerals when the subject minerals are covered by a NSO lease. A NSO lease is exactly what it sounds like: an oil and gas lease which restricts the lessee's right of access to the surface of the tract of land covered by the lease (which may be all or part of the subject lands) by prohibiting all oil and gas operations on the surface at all times. NSO stipulations are often attached to federal and state leases.[68]

In most title opinions, although not always the case, the title examiner splits the subject lands into several smaller tracts based on the ownership of the subject minerals. When the

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[65] To search for spacing orders in Colorado, go to http://cogcc.state.co.us/ and click “Orders”; to search for spacing orders in Wyoming, go to http://wogcc.state.wy.us/ and click “Spacing”; in North Dakota, go to https://www.dmr.nd.gov/oilgas/; in Utah, go to http://oilgas.ogm.utah.gov/Spacing/spacing_main.htm; in New Mexico, go to https://wwwapps.emnrd.state.nm.us/ocd/ocdpermitting/Data/Wells.aspx; in Montana, go to http://bogc.dnrc.mt.gov/WebApps/DataMiner/; in Nebraska, go to http://www.nogcc.ne.gov/olNOGCCOnlineGIS/.

[66] A very helpful Google Earth tool can be found at http://www.earthpoint.us/TownshipsSearchByDescription.aspx.

[67] http://www.geocommunicator.gov/blmMap/MapLSIS.jsp.

[68] Any discussion regarding NSO leases in this paper is limited to fee leases.

subject lands are comprised of only one tract which is covered by one NSO Lease, the title examiner will immediately know that the subject minerals are only accessible from off-tract lands. On the other hand, when the subject lands are split into multiple tracts, the issue becomes somewhat more difficult for the title examiner to identify. When there are multiple tracts and all of the tracts are covered by a NSO Lease, the title examiner will know that off-tract lands are necessary to access the subject minerals. In some cases, where the subject lands include multiple tracts, and some tracts are covered by NSO leases and others are not, it is possible, but not certain that off-tract lands will be necessary to access the subject minerals. Additionally, grazing, agricultural, farming or other types of surface leases granted by the surface owner of the subject lands may appear in the materials examined. Depending on whether the minerals and surface were severed prior to the execution of the surface lease, oil and gas development may be limited or even prohibited on some or all of the subject lands by these types of surface leases.

As discussed above, instruments contained in the materials examined or other instruments provided by the client may clue the title examiner in to the fact that off-tract lands will be necessary to drill to the subject minerals. However, if that is not the case, there are resources on the “net” available to the title examiner which will help determine the same. Ultimately, if the title examiner believes that access to off-tract lands will be necessary to drill to the subject minerals, it is crucial to understand and alert the client to the legal issues when doing so.

2. So, You Think the Client Needs Access to Off-Tract Lands to Reach the Subject Minerals: What Kinds of Agreements are Necessary?

Assuming the title examiner discovers that surface operations on the subject lands will not be possible, the title examiner will then know that access to off-tract lands will be necessary to drill to the subject minerals. In that case, it is critical to understand whether consent to access the off-tract lands is required from the surface owner(s), mineral owner(s), and/or mineral lessee(s) of the off-tract lands so that the operator does not commit trespass and avoids any potential liabilities.[69]

(a) General Principles of Surface Use

At common law, when the minerals underling the subject lands are severed from the surface of the subject lands, the mineral estate is considered dominant (the “dominant estate”) to the surface estate (the “servient estate”).[70] The instrument severing the surface estate from the

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[69] Our discussion of this issue in this paper is limited to fee lands. For an in depth discussion of this issue as related to federal lands, see Kathleen C. Schroder, “Make Sure Your Well Is the Only Thing Going Sideways: Permitting Issues Associated With Horizontal Development on Federal Lands and Minerals,” *Horizontal Oil & Gas Development* 11-1 (Rocky Mt. Min. L. Fdn. 2012).

[70] 8 Patrick H. Martin & Bruce M. Kramer, *William & Meyers, Oil and Gas Law* 276 (2014); *see also* J. Michael Morgan & Glen Droegemueller, “Accommodation Between Surface Development and Oil and Gas Drilling,” 24 Colo. Law. 1323, 1323 (1995) (“[B]ecause rights of surface access for the mineral owner are in the nature of an easement, they are considered ‘dominant,’” and, in the event of irreconcilable conflict, “[t]he rights of surface access of the mineral owner will actually be superior to those of the surface owner.”).

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mineral estate may contain language granting or reserving an “express easement” to the mineral owner for the use of the surface of the land. Oil and gas leases covering the mineral interest may also provide similar language granting the mineral lessee an express easement to use the surface for operations on the subject lands. On the other hand, if the granting instrument and/or oil and gas lease is silent as to the use of the surface of the land, courts have held[71] that the mineral owner and/or his lessee has an “implied easement” to access and develop the mineral estate.[72]

Where a deed or oil and gas lease includes an express easement to use the surface of the land, the express easement is generally limited in scope to the surface of the lands covered by the deed or lease (and does not expressly include off-tract lands).[73] However, although seldom, an express easement may include language expressly granting the right to access off-tract lands.[74] Similarly, where there is no express easement and the mineral owner and/or lessee seeks to access their interest by virtue of the implied easement to conduct operations on the surface estate, generally the implied easement does not give the mineral owner and/or lessee an easement for the benefit of property other than the lands covered by the deed or lease.[75] To do so would constitute “an excessive use [] of [the implied] surface easement [].”[76] Thus, because the implied easement does not extend to the surface of off-tract lands, the mineral lessee of the subject lands may not use the surface of off-tract lands to access the subject minerals without appropriate

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[71] 1 Patrick H. Martin & Bruce M. Kramer, *William & Meyers, Oil and Gas Law* § 218 n.8 (2014)(citing a number of cases for this proposition).

[72] *Id.* § 218 (“By implication, the lessee or mineral owner may make such use of the surface of the land as is reasonably necessary for exploration, development and production of minerals.”).

[73] Russell v. Tex. Co., 238 F.2d 636, 642 (9th Cir. 1956) *cert. denied*, 354 U.S. 938 (1957) (“It is a well established principle of property law that the right to use the surface of land as an incident of the ownership of mineral rights in the land, does not carry with it the right to use the surface in aid of mining or drilling operations on other lands.”); Franz Corp. v. Fifer, 295 F. 106 (9th Cir. 1924) (finding use of the surface for off-leasehold operations constitutes excessive use).

[74] 1 Patrick H. Martin & Bruce M. Kramer, *William & Meyers, Oil and Gas Law* § 218 n.1 (2014).

[75] Bruce M. Kramer, “Pooling for Horizontal Wells: Can They Teach an Old Dog New Tricks?” 55 *Rocky Mtn. Min. L. Inst.* 8-1, 8-9 (2009) (“[I]t is an axiomatic rule of oil and gas law that “the use of the surface by a mineral owner or lessee, in connection with operations on other premises, constitutes an excessive user of his surface easements.”)(quoting 1 Patrick H. Martin & Bruce M. Kramer, *Williams & Meyers, Oil and Gas Law* § 218.6 (2008))). *See also* 1 Patrick H. Martin & Bruce M. Kramer, *Williams & Meyers, Oil and Gas Law* § 218.4 (2014) (“The usual express easements and implied surface easements of a mineral owner or lessee are limited to such surface use[] as is reasonably necessary for exploration, development and production on the premises described in the deed or lease. Of course the instrument may expressly grant easements in connection with operations on other premises; such an express provision is common in joint or community leases or instruments which authorize pooling and unitization. Absent such express provision, clearly the use of the surface by a mineral owner or lessee in connection

with operations on other premises constitutes an excessive use[] of his surface easements .... The consensus is that such veto power exists, although there is little case authority on the matter. The reason for the dearth of such authority is that such veto power appears generally assumed . ...").

[76] 1 Patrick H. Martin & Bruce M. Kramer, *William & Meyers, Oil and Gas Law* § 218.4 (2014).

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consent. But is the consent of the surface owner(s), mineral owner(s), or mineral lessee(s), or one, some or all these parties, required prior to accessing the surface of off-tract lands to drill to the subject minerals?

(b) Whose Consent do you Need?

The issue of whether the surface owner(s), mineral owner(s) or mineral lessee(s) of off-tract lands is the appropriate party to authorize the operator to construct a horizontal well which will traverse the off-tract lands is unsettled. Without proper consent, the operator may be subject to liability for trespass and a court may grant an injunction requiring the operator to remove the wellbore from the off-tract lands which the well traverses. Similarly, the operator could be liable to the surface owner(s), mineral owner(s) and/or mineral lessee(s) of the off-tract lands for monetary damages. Although it is fairly clear that, at a minimum, consent from the surface owner of the off-tract lands is required to conduct surface operations thereon; courts have answered the question of whether the mineral owner(s) and/or mineral lessee(s) must also provide consent in different ways. Thus, to minimize risk and avoid potential liability, ideally the operator should obtain consent from the surface owner, mineral owner(s) and mineral lessee(s) of any off-tract lands through which the wellbore will traverse.

i. Using the Surface of the Off-Tract Lands

Assuming there is no express easement to access the surface of the off-tract lands, the operator cannot rely on its implied easement to use the surface of the subject lands to access the surface of the off-tract lands. Instead, the operator must either purchase the surface of that portion of the off-tract lands it wishes to use or obtain consent via agreement from the surface owner(s) of the off-tract lands. Nevertheless, even if the operator obtains consent from the surface owner(s) of the off-tract lands, where the surface and minerals underlying the off-tract lands have been severed, the mineral owner(s) and/or lessee(s) of the off-tract lands may still claim that the operator's use of the of the surface of the off-tract lands to access the subject minerals will interfere with their express or implied easement to use that same surface to develop their mineral interests. Thus, it will also be necessary to obtain a subsurface easement to traverse the off-tract lands. Herein lies the most difficult and unanswered question: Does the surface owner(s), mineral owner(s) and/or mineral lessee(s) of the off-tract lands have the authority to grant a subsurface easement necessary for the horizontal well to traverse the off-tract lands?

ii. Traversing the Off-Tract Minerals

(1) Is Consent from the Surface Owner(s) Enough?

Based on the cases discussed below, it can be argued that only the consent of the surface owner(s) of the off-tract lands is required prior to traversing a wellbore from the surface of the off-tract lands to the subject minerals. Moreover, some courts have held that the rights to grant a pipeline easement, grant gas storage rights and permit the injection of salt water are all rights held by the surface owner.[77] It may be argued that, like a buried pipeline, the horizontal

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[77] *See* Brookshire Oil Co. v. Casmalia Ranch Oil & Dev. Co., 103 P. 927 (Cal. 1909); *see generally* Watt v. W. Nuclear, Inc., 462 U.S. 36, 53 (1983) (finding surface estate to include soil).

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wellbore will simply be transporting fluids to and from the subject lands across the off-tract lands. However, at least one court has disagreed[78] and rejected the pipeline analogy, and others have expressed concern over the potential damage to the mineral estate caused by a traversing wellbore as opposed to a pipeline.[79] Therefore, it is unclear whether a court would be willing to rely on the pipeline analogy in determining whether consent from the surface owner of the off-tract land(s) is all that is required to traverse the off-tract lands.

Similarly, some courts have held that "[a] structure that might be suitable for the underground storage of extraneous gas" is the property of the surface owner, and that therefore the surface owner has the authority to grant gas storage rights.[80] Courts have also found that the surface owner has the right to inject salt water into a subsurface formation.[81] Thus, because the surface owner has the authority to consent to gas storage rights and to the injection of salt water into the subsurface, it may be argued that the surface owner also has the authority to consent to a wellbore traversing the subsurface of off-tract lands.

Finally, in the case of severed surface and mineral estates, many courts have held that the "pore space" or rock beneath the surface is owned by the surface owner,[82] but ownership of the

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[78] Hancock Oil Co. v. Meeker-Garner Oil Co., 257 P.2d 988 (Cal. App. 1953) (distinguishing a wellbore from a pipeline after the owner of the traversed mineral estate claimed that drainage would occur).

[79] *See* Union Oil Co. v. Domengeaux, 86 P.2d 127, 129 (Cal. App. 1939); Chevron Oil Co. v. Howell, 407 S.W.2d 525, 528 (Tex. Civ. App. 1966) ("[A]ny time you drill into something there is bound to be damage.").

[80] Humble Oil & Refining Co. v. West, 508 S.W.2d 812, 815 (Tex. 1974) ("[T]he surface of the [] lands . . . include[s] the geological structures beneath the surface, together with any such structure that might be suitable for the underground storage of extraneous gas produced elsewhere.") (citing Enemy v. United States, 412 F.2d 1319 (1969))). *But see* Bruce M. Kramer, "Horizontal Drilling and Trespass: A Challenge to the Norms of Property and Tort Law," 25 Colo. Nat. Res., Energy & Envtl. L. Rev. 291, 294 (2014) ("The Williams and Meyers treatise posits a contrary position, at least when it comes to the underground storage of gas, namely that the severed surface owner should not be entitled to compensation in any eminent domain action, nor should the surface owner's consent be required before [] gas is stored.").

[81] Sunray Oil Co. v. Cortez Oil Co., 112 P.2d 792, 794 (Okla. 1942) ("[S]ubject to the [] interest in the oil and gas and other mineral rights . . . the [surface owner] has the right to so use the surface and substrata of her land as she sees fit, or permit others so to do, so long as such use does not injure or damage other persons.").

[82] *See* United States v. 43.42 Acres of Land, 520 F. Supp. 1042, 1045 (W.D. La. 1981) ("[T]he mineral owner cannot be considered to have ownership of the subsurface strata containing the spaces where the minerals are found."); Miss. River Transp. Corp. v. Tabor, 757 F.2d 662, 672 (5th Cir. 1985) ("The surface owner owns the right to use the surface lands and the reservoir underlying the land for storage purposes and must be compensated for the expropriation of these rights."); Burlington Res. Oil & Gas Co., LP v. Lang & Sons, Inc., 259 P.3d 766, 770 (Mont. 2011); Ellis v. Arkla Gas Co., 450 F. Supp. 412, 421-422 (E.D. Okla. 1978) (in determining that the surface owner has the right to authorize the injection or storage of natural gas in the subsurface stratum, the court stated that "the surface owner alone should be compensated for the use per se of a stratum. He is the owner of this formation, and like an owner of a warehouse, he is entitled to the rental or other compensation paid for the use of his property."); U.S. Steel Corp. v. Hoge, 468 A.2d 1380 (Penn. 1983).

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pore space in the surface owner is far from being established as the majority rule.[83] Some courts have deemed only empty pore space, meaning there are no producible hydrocarbons remaining, as being owned by the surface owner. Assuming the surface owner is the owner of the pore space and that the wellbore would merely traverse empty pore space below the surface, merely obtaining an easement or agreement from the surface owner(s) would seem to be enough. Nevertheless, because each of the above arguments is based on legal doctrines that have not been uniformly adopted and are merely analogous to a traversing wellbore, the most cautious approach is for the

operator to obtain consent from the mineral owner(s) and lessee(s), too.

(2) What about the Mineral Owner(s) and/or Lessee(s)?

Even if the surface owner(s) has the sole power to consent to a wellbore traversing the off-tract minerals, the mineral owner(s) and/or lessee(s) have certain rights that cannot be trampled upon. Just like the mineral owner of the subject minerals has an implied easement to access the surface of the subject lands, the off-tract mineral owner has an implied easement to access the surface of the off-tract lands. For instance, the physical nature of the surface of the off-tract lands (*i.e.*, hills, mountains, rivers, lakes) may already limit the number of possible wellpads and allowing an adjacent landowner to drill from the off-tract surface may severely limit his ability to do the same. Additionally, many states have minimum setback rules which require "producible wells" to be drilled a certain number of feet from one another. If the owner of the subject minerals uses a surface location on the off-tract lands and drills a producing well, setbacks may create a large radius around the surface location which is unusable by the mineral owners of the off-tract lands to develop its own minerals.

The challenge then will be for a court to balance these competing interests. To date, courts have taken two approaches in determining the rights of the surface owner(s) vis-a-vis the mineral owner(s)/lessee(s) with regards to using off-tract lands for various operations on the subject lands: (1) an ad hoc fact-based approach in which the mineral owner(s) may seek injunctive relief or damages only upon showing that the surface owner(s)' actions will "unreasonably" interfere with its rights to develop its mineral interests;[84] and (2) a rebuttable

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[83] Kramer, *supra* note 80, at 294 (citing to 1 Patrick H. Martin & Bruce M. Kramer, *William & Meyers, Oil and Gas Law* § 203.4 (2014) in noting that whether the pore space is owned by the surface or mineral owner is unclear, and stating that "Professors Williams and Meyers noted that there is a suggestion in a number of cases that courts treat the severed oil and gas owner as owning the 'rock' wherein the hydrocarbons are located."); *see also* Owen L. Anderson, "Geologic CO2 Sequestration: Who Owns the Pore Space?," 9 Wyo. L. Rev. 97 (2009) ("The lack of consistent Texas case law leads to the inefficient, yet realistic, conclusion that permission from both the surface owner and mineral owner is certainly the cautious approach. Nevertheless, I submit that the most likely 'owner' of the pore space is the surface owner.").

[84] Humble Oil & Refining Co. v. L & G Oil Co., 259 S.W.2d. 933 (Tex. Civ. App. 1953); Atlantic Refining Co. v. Bright & Schiff, 321 S.W.2d. 167 (Tex. Civ. App. 1959).

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presumption that a traversing wellbore will cause inevitable damage[85] to the mineral estate underlying the off-tract lands.[86]

Several scholars suggest that some version of the first approach is the most reasonable and practical approach and promotes the most efficient development of the minerals.[87] If courts uniformly determine that consent from every mineral owner and mineral lessee of the off-tract lands is required before the off-tract minerals can be traversed, drilling from off-tract lands will likely become costly and impracticable. Due to the highly fractionated nature of mineral interests today, obtaining consent in the form of a separately negotiated agreement from every co-tenant mineral owner (of every depth) would likely be incredibly difficult, if not impossible.

(c) An Alternative to Consent: What about Pooling?

As discussed above, obtaining consent from the surface owner(s), mineral owner(s) and mineral lessee(s) of the off-tract lands may be difficult, if not impossible. So, what if the mineral

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[85] Courts have expressed concern that a horizontal well traversing off-tract lands may cause physical damage to the mineral formation such that the ability of the mineral owner(s) of the off-tract lands to recover from that formation

is reduced or made impossible. Additionally, by traversing the off-tract minerals, courts are concerned that drainage of those minerals will occur. *See Union Oil Co.*, 86 P.2d at 129 (noting it would find trespass in the absence of a showing of irreparable injury to the mineral estate because in cases of subsurface tunneling "the injury is irreparable in itself"); *Chevron Oil Co.*, 407 S.W.2d 525 (holding injunction was appropriate to prevent locating well on surface estate and drilling into mineral estate in absence of evidence of damage to mineral estate). It is also possible that courts would consider the disclosure of geophysical information about the traversed estate that is contained in well logs as "damage" to the off-tract mineral estate. *See* Grynberg v. City of Northglenn, 739 P.2d 230 (Colo. 1987) (claiming loss of market value of lease resulting from publication of geophysical information about lease); *cf.* Mustang Prod. Co. v. Texaco, Inc., 754 F.2d 892 (10th Cir. 1985).

[86] *Chevron Oil Co.*, 407 S.W. 2d 525; *Hancock Oil Co.*, 257 P.2d 988.

[87] 1 Patrick H. Martin & Bruce M. Kramer, *William & Meyers, Oil and Gas Law* § 218.7 (2014) ("[W]here drainage [of oil and gas]. . . will not be the consequence of the particular operation involved, exclusive authority in the surface owner to authorize such operation would amount to an interference with and would injure the prior exclusive severance of minerals in and under [the off-tract lands]."); Kramer, *supra* note 80, at 294 ("[W]hile not universal in nature, the ubiquitous nature of spacing regulation should minimize drainage concerns and thus support the Williams & Meyers view that consent of the surface owner is sufficient in these types of cases in the absence of a showing of an unreasonable interference with the mineral owner... I support the first of these approaches where the surface owner has given consent to the use of the 'rock' as a conduit for a wellbore. I would place the burden of proof on the mineral owner to show that the wellbore unreasonably interferes with the mineral owner's easement."); Owen L. Anderson, "Subsurface 'Trespass': A Man's Subsurface Is Not His Castle," 49 Washburn L.J. 247, 264 (2010) ("[The right to grant permission to traverse the off-tract lands] should continue to rest with the surface owner, who should be under no obligation to the mineral owner to prohibit such use unless it would effectively bar the mineral owner from using the property to exploit its minerals . . . well spacing and density regulations should provide sufficient protection to the invaded mineral owner in most circumstances.").

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lessee(s) of the subject lands has pooled or unitized the subject lands with the off-tract lands? Can the mineral lessee then drill from the surface of the off-tract lands through the off-tract minerals to access the subject minerals? There is no clear answer to this question, as courts in many states and even within the same state have taken different stances on the issue.[88]

However, in a recent decision, the Texas Supreme Court held that a mineral lessee, which had pooled tracts of land subject to its mineral leases, had the right to use a road on the surface of off-tract lands to access its oil well on the subject lands.[89] Other states have also allowed the surface estate to be burdened by unit operations on off-tract lands.[90] However, some courts have added the caveat that this rule only applies where the lease with the pooling clause is executed by a mineral owner who is concurrently the surface owner.[91] In other words, where the surface and mineral ownership of the off-tract lands are severed, and the minerals are covered by an oil and gas lease with a pooling or unitization clause, the pooling or unitization with the off-tract lands would only permit the lessee to use the surface of the off-tract lands if the lease was executed prior to the severance of the surface and mineral estates. Additionally, a mineral lessee of the subject lands may be permitted to use the surface of the off-tract lands when the minerals have been severed, but where the surface owner has ratified the pooling or unitization agreement.[92]

C. Other Surface and Subsurface Agreements Affecting Title

It is not uncommon for a title examiner to see numerous instruments of conveyance in a chain of title which refer to other agreements to which that instrument is "made subject." A title examiner should be wary of the existence and effect of these agreements on the leasehold ownership of the subject lands. It is possible that a joint operating agreement, participation agreement, farmout agreement, AMI agreement, gas balancing agreement and/or other agreements contain preferential rights that affect the alienability of the leasehold interest, development obligations and/or restrictions on the leasehold interest, additional overriding

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[88] *See* 2 Bruce M. Kramer and Patrick H. Martin, *The Law of Pooling and Unitization*, § 20.06[1], 20-120-132 (3d. ed. 2011). For a useful discussion of the divergent decisions within Texas courts on this issue see Kramer, *supra*

note 80, at 332-33.

[89] Key Operating & Equip., Inc. v. Hegar, 435 S.W.3d. 794, 799 (Tex. 2014) ("[W]e conclude that once pooling occurred, the pooled parts of the [subject lands] and [off-tract lands] no longer maintained separate identities insofar as where production from the pooled interests was located. So the legal consequence of production from the pooled part of the [subject lands] is that it is also production from the pooled part of the [off-tract lands] . . .[and] [b]ecause production from the pooled part of the [subject lands] was legally also production from the pooled part of the [off-tract lands], [the mineral lessee of the subject lands] had the right to use the road to access the pooled part of the [off-tract lands].").

[90] Holt v. Sw. Antioch Sand Unit, Fifth Enlarged, 292 P.2d 998, 1000 (Okla. 1955); Reimer v. Gulf Oil Corp., 664 S.W.2d 456 (Ark. 1984); Gulf Oil Corp. v. Deese, 153 So.2d. 614 (Ala. 1963).

[91] Kramer, *supra* note 80, at 291 ("[T]he prevailing, but clearly not unanimous, view, is that the geographic extent of the allowed surface or subsurface use is now the pooled unit or unitized area, except where the surface estate severance antedated the creation of the pooled unit or unitized area.")

[92] Cole v. Anadarko Petroleum Corp., 331 S.W.3d 30, 36 (Tex. App. 2010).

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royalty interests or other events which may trigger the working interest owner to be obligated to convey the leasehold interest to another party. Additionally, a title examiner examining Colorado lands should be aware that in Colorado,[93] a reference in a recorded document to an unrecorded instrument does not constitute constructive or inquiry notice.[94]

Unfortunately, it is quite common for these agreements to be unrecorded. Thus, it is important that when a title examiner sees a reference to an unrecorded agreement in the chain of title to draft a title comment identifying the unrecorded document and requiring the operator to obtain a copy and provide it to the title examiner to ensure that ownership as set out in the opinion was not altered by any unrecorded agreement.

D. Conclusion

The use of horizontal drilling has created numerous complications for modem operators. The ability to use the surface of off-tract lands to access the subject minerals has become increasingly important where there are barriers to drilling from the surface of the subject lands. It is important for the title examiner to recognize situations in which the client may need to use the surface of off-tract lands to access the subject minerals and to understand and communicate the potential pitfalls and requirements necessary to do so. Unfortunately, courts have yet to come up with a straightforward and uniform method for operators seeking to use off-tract lands to access the subject minerals. If the subject minerals and off-tract minerals are leased under leases containing pooling clauses (and the leases were granted by a mineral owner who is or was concurrently the surface owner of the off-tract lands), pooling the subject minerals with the off-tract minerals may alleviate the need to obtain consent from the mineral owner(s) and mineral lessee(s) of the off-tract lands.

IV. Pooled Units and Working Interest Units

A. Introduction

There are a number of different types of "units" in the oil and gas industry that may be encountered when examining title. This section of the paper focuses on pooled units and working interest units. To fully understand the effect a working interest unit or a pooled unit has on the title examination process, and ultimately, conclusions in the title opinion, the title examiner must first have a basic understanding of the different types of units, how each unit is formed and the purpose of each unit. Below we have outlined this basic information, as well as some specific issues a title examiner should be aware of when the lands under review are included within a

pooled unit or a working interest unit.

B. Pooled Units

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[93] Colo. Rev. Stat. § 38-35-108

[94] For an in-depth analysis of the specific recording laws of other states, see George A. Snell, III, "Constructive Notice - A Multi-State Perspective," *Nuts and Bolts of Mineral Title Examination* 5-1 (Rocky Mtn. Min. L. Inst. 2012).

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1. What is a Pooled Unit and How is it Formed?

At the outset, it is important to distinguish a pooled unit from a spacing unit. A spacing unit is also commonly referred to as a "drilling and spacing unit" and a "drilling unit." A spacing unit is defined as "[t]he area allocated to [one] well under a well spacing order."[95] Please note, however, that in some states, a spacing order may establish a spacing unit with more than one well permitted.[96] State statutes and regulations limit the number and location of wells over an oil and gas pool for purposes of waste prevention, to avoid the drilling of unnecessary wells and for the protection of correlative rights.[97] A spacing unit is formed by order of the state conservation commission.[98] A pooled unit, on the other hand, is defined as a "unit formed by the bringing together of separately owned interests under the provisions of pooling clauses of leases or of some special agreement."[99] The "separately owned interests" pooled are mineral and

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[95] 8 Patrick H. Martin & Bruce M. Kramer, *William & Meyers, Oil and Gas Law* 779 (2014); *see also* Colo. Rev. Stat. § 34-60-116(2) ("[N]o drilling unit shall be smaller than the maximum area that can be efficiently and economically drained by one well"); Wyo. Stat. Ann. § 30-5-109(b) ("In establishing a drilling unit, the acreage to be embraced within each unit and the shape thereof shall be determined by the commission from the evidence introduced at the hearing but shall not be smaller than the maximum area that can be efficiently drained by one (1) well").

[96] *E.g.*, Colo. Rev. Stat. § 35-60-116(4) ("The commission, upon application, notice, and hearing, may decrease or increase the size of the drilling units or permit additional wells to be drilled *within the established units* in order to prevent or assist in preventing waste or to avoid the drilling of unnecessary wells, or to protect correlative rights, and the commission may enlarge the area covered by the order fixing drilling units, if the commission determines that the common source of supply underlies an area not covered by the order.").

[97] State conservation commissions and spacing and pooling regulations were developed in large part in response to the "rule of capture." Michael J. Wozniak and Matthew J. Lepore, "Fundamentals of Drilling and Spacing Units and Statutory Pooling," *Mineral Title Examination* 17-1, 17-3 (Rocky Mtn. Min. L. Fdn. 2012). The rule of capture provides that "the owner of a tract of land acquired title to the oil and gas which he produces from wells drilled thereon," even if it was proven that part of such oil or gas migrated from adjoining lands. *Id.* This rule led to excessive drilling and consequently waste. *Id.* State conservation commissions and regulatory schemes with spacing and pooling regulations were designed to prevent such waste and to protect correlative rights. "The doctrine of correlative rights is the concept that each owner has an opportunity to secure a fair share of oil and gas in the reservoir." Gregory J. Nibert, "Title Curve Balls Thrown by Units," *Mineral Title Examination* 17-1, 17-3 (Rocky Mt. Min, L. Fdn. 2007). For a more in depth discussion on drilling and spacing units and their origins, see Michael J. Wozniak, "Expanding Authority of Oil and Gas Conservation Commissions," 52 *Rocky Mtn. Min. L. Inst.* 15-1, 15-5 through 15-14 (2006).

[98] See Michael J. Wozniak and Matthew J. Lepore, "Fundamental of Drilling and Spacing Units and Statutory Pooling," *Mineral Title Examination* 17-1, 17-5 through 17-8 (Rocky Mtn. Min. L. Fdn. 2012) for a more in depth discussion on spacing orders.

[99] 8 Patrick H. Martin & Bruce M. Kramer, *William & Meyers, Oil and Gas Law* 779 (2014). Please note that a "pooled unit" is known as a "spacing unit" in New Mexico. N.M. Stat. Ann. § 70-2-18.

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leasehold interests in tracts that are often too small to be entitled to a well permit under the applicable state spacing rules. Nearly all of the producing states' statutes contemplate a spacing

order as a prerequisite to a pooling order.[100] "The reason for this requirement is that there must be a unit into which one's interest is to be 'pooled'; otherwise, the well is drilled on a lease basis."[101] This is why spacing units and pooled units often comprise the same acreage.

A pooled unit can be created by either voluntary pooling or statutory pooling. Statutory pooling is also commonly referred to as compulsory pooling and force pooling. Voluntary pooling may be accomplished pursuant to a pooling clause in an oil and gas lease or by a separate agreement. Williams & Meyers provide the following pooling clause as a "typical" example:

> Lessee is granted the right, power and option at any time or times to pool and combine the lands covered by this lease or any portion thereof with any other land, lease or leases in the vicinity thereof when in the Lessee's judgment it is necessary or advisable to do so. Such pooling may include all oil, gas and other minerals or may be limited to one or more such substances and may extend to all such production or may be limited to any one or more zones or formations.[102]

The above pooling clause is often referred to as "broad form" pooling clause. There are, however, pooling clauses such as the following that limit the size of the pooled unit:

> Lessee, at its option, is hereby given the right and power to pool or combine the land covered by this lease, or any portion thereof, as to oil and gas, or either of them, with any other land, lease or leases when in lessee's judgment it is necessary or advisable to do so in order to properly develop and operate said premises, such pooling to be into a well unit or units not exceeding forty (40) acres, plus an acreage tolerance of ten percent (10%), for oil, and not exceeding six hundred forty (640) acres, plus an acreage tolerance of ten percent (10%), for gas, except that larger units may be created to conform to any spacing or well unit pattern that may be prescribed by governmental authorities having jurisdiction. Lessee may pool or combine acreage covered by this lease, or any portion hereof, as to oil or gas in any one or more strata.

Pooling clauses containing such acreage limitations are common.

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[100] *See, e.g.*, Colo. Rev. Stat. § 34-60-116(6) ("When two or more separately owned tracts are embraced within a drilling unit, or when there are separately owned interests in all or part of the drilling unit, then persons owning such interests may pool their interests for the development and operation of the drilling unit."); N.D.C.C. § 38-08-08(a) ("When two or more separately owned tracts are embraced within a spacing unit, or when there are separately owned interests in all or a part of the spacing unit, then the owners and royalty owners thereof may pool their interests for the development and operation of the spacing unit.").

[101] Michael J. Wozniak, "Expanding Authority of Oil and Gas Conservation Commissions," 52 *Rocky Mtn. Min. L. Inst.* 15-1, 15-20 (2006).

[102] 8 Patrick H. Martin & Bruce M. Kramer, *William & Meyers, Oil and Gas Law* 781 (2014).

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If a lessee has express authority to commit the leasehold interests to a pooled unit pursuant to a pooling clause, it should evidence the exercise of such authority by filing a declaration of pooling with the county clerk and recorder. Often times a pooling clause will require the lessee to execute and place of record a declaration of pooling identifying and describing the pooled acreage and the leases to be pooled.[103] If authority to pool is not granted in the oil and gas lease, an agreement to pool from the royalty, overriding royalty or other interests in production must be secured.[104] Evidence of such pooling agreement should also be filed with the county clerk and recorder.

In the absence of voluntary pooling, the lessee has no power to pool the leasehold interests without a statutory pooling order from the state conservation commission. Nearly all states provide

for some type of statutory pooling. Most state statutory pooling provisions require: (1) a statutory pooling application filed with the state conservation commission detailing the proposed unit, well location, interest owners and the proposed allocation of costs and proceeds from production; (2) notice of the application to all interest owners; (3) a commission hearing upon the application; and (4) the issuance of an order by the commission "upon terms and conditions that are just and reasonable" allocating to each interest owner their fair share of production.[105]

Finally, when lands within a spacing unit include state and/or federal minerals, communitization of the state and/or federal leases with the other fee leases in the spacing unit will be necessary. Communitization is essentially the pooling of state and/or federal (including Indian) lands and is defined as "the agreement to combine small tracts for the purpose of committing enough acreage to form the spacing and proration unit necessary to comply with the applicable state conservation requirements."[106]

2. Pooled Units and Title Examination

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[103] Most pooling clauses will contain language similar to the following: "Lessees shall file for record in the appropriate records of any county in which the leased premises are situated an instrument describing and designating the pooled acreage as a pooled unit; the unit shall become effective as provided in said instrument, or if said instrument makes no such provision, it shall become effective upon the date it is filed for record." John S. Lowe, Owen L. Anderson, Ernest E. Smith & David E. Pierce, *Forms Manual to Accompany Cases and Materials on Oil and Gas Law* 155 (5th ed. 1998) (form Oil, Gas and Mineral Lease).

[104] *See* Nibert, *supra* note 97, at 17-5 (stating the agreement can be as simple as a one-page declaration of pooling or as complicated as a multi-page communitization agreement, but noting that such agreements commonly identify the spacing unit, the leases pooled, contain a statement of parties to commit their interest to allow the drilling of the well on the spacing unit, and provide for the allocation of production to the individual tracts on an acreage basis).

[105] 6 Patrick H. Martin & Bruce M. Kramer, *Williams & Meyers, Oil and Gas Law* § 905.3 (2014).

[106] 8 Patrick H. Martin & Bruce M. Kramer, *William & Meyers, Oil and Gas Law* 172 (2014).

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(a) Production from the Pooled Unit is Production from All Unit Lands

The principal effect of a pooled or communitized unit is that operations and production from any part of the unit are deemed operations and production on all leases and lands committed to the unit. In other words, if a unit well is completed as a producer,[107] leases committed to the unit that are within their original primary terms (or otherwise held by production) will be extended so long thereafter as oil and gas is produced in paying quantities by production from anywhere within the unit. If leases within a pooled or communitized unit are beyond their primary terms and are held only by unit production, the title examiner should require the client to confirm that there have been no cessations of production that might result in the termination of a lease committed to the unit.

(b) Spacing is Not Pooling

The creation of a spacing unit does not accomplish pooling. Oklahoma is an example of an exception to this rule in that the creation of a spacing unit in this state effectively pools the lands and interests within the unit.[108] Remember, however, in nearly all states, spacing is not pooling, and pooling is not automatic. As detailed above, pooling is accomplished when a lessee exercises its pooling power under a pooling clause which is evidenced by a declaration of pooling or by some other agreement recorded in the county records or by a statutory pooling order.

(c) All Pooled Unit Lands Should be Examined

Ideally, all lands within the pooled unit should be examined to confirm that the entire unit area is leased and to ensure all tracts and leases were properly committed to the unit. For various reasons, however, clients may not request a title opinion covering the entire pooled unit. If all lands within the pooled unit are not examined, the division of production set forth in the opinion will not reflect the net interest of the owners in production from the unit. For example, if the client advises you that it plans to develop the subject lands, with adjoining lands, on a 1,280 acre horizontal well basis but the materials cover only 640 acres, the title examiner must include a title comment stating that the opinion covers only the subject lands, and that the division of production assumes proper pooling or communitization of the subject lands only on a 640 acre basis. This title comment should note that if the subject lands are pooled with other lands, the figures set forth in the division of production will be need to be reduced according to each

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[107] *See* Gregory J. Nibert, "Non-Record Title Considerations," *Mineral Title Examination III* 11-1, 11-30 (Rocky Mtn. Min. L. Fdn. 1992) (providing that a declaration of pooling, communitization agreement or some other consent to pool should be obtained prior to the date of first production of the unit well (or be dated effective as of the date of first production) because if the same are obtained after the date of first production a question arises as to whether the production obtained from the date of first production through the date the declaration/ratifications were secured should be allocated on an acreage basis or only to those parties owning an interest in the tract on which the well was drilled).

[108] Okla. Stat. Ann. tit. 52, § 87.1 (West 2014).

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owner's proportionate share in the 1,280 acre unit.

(d) Production from the Pooled Unit is Allocated on an Acreage Basis

The division of production in a division order title opinion sets forth the net interests of leased and unleased mineral owners, overriding royalty owners, owners of other burdens on production and working interest owners. Absent some other agreement, production from a pooled or communitized unit is generally allocated on an acreage basis. Each interest owner is allocated production based on their tract interest multiplied by the number of acres in their tract divided by the total number of acres in the pooled unit multiplied by the total production proceeds. The division of production in a division order title opinion would show this allocation less the multiplication by the total production proceeds. For example, if John Smith owns a 50% mineral interest covered by a lease with a 12.5% royalty in Tract 1, which contains 40 acres, and the pooled unit contains 320 acres, the net interest of John Smith in the unit is 50% × 12.5% × 40/320 = 0.78125%.

(e) Commitment of All Interest Owners to the Pooled Unit is Required

Proper commitment of all interest owners to the pooled unit through voluntary or statutory pooling is required. It is important to note that federal and state leases do not contain pooling clauses and cannot be statutorily pooled.[109] Consequently, where state and/or federal minerals are involved, a communitization agreement must be obtained and approved by the appropriate state official and/or the authorized officer of the Bureau of Land Management.[110] On the other hand, pooling clauses authorize lessees to commit most fee leases to a pooled unit. If a lessee has no pooling authority, consent from such interests must be obtained by virtue of an agreement; otherwise, statutory pooling will be necessary. Instead of executing the actual declaration of pooling, other pooling agreement or communitization agreement, interest owners may execute and file of record with the county clerk and recorder ratifications of the same to commit their interests to the pooled/communitized unit.

C. Working Interest Units

1. What is a Working Interest Unit and How is it Formed?

A working interest unit has been described as an arrangement between working interest owners to join their operating interests in order to develop lands covering more than one spacing unit.[111] A working interest unit is most often formed when all working interest owners in an area (the "contract area") execute a joint operating agreement ("JOA"), but can also be formed by

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[109] 6 Patrick H. Martin & Bruce M. Kramer, *Williams & Meyers, Oil and Gas Law* § 905.1, pg. 19 (2014).

[110] Nibert, *supra* note 107, at 11-30 (citing 43 C.F.R. § 3105.2-2 and 2-3 (1990); 30 U.S.C. § 226(m) (1991 Supp.)).

[111] *E.g.*, J. Matthew Snow, "Other Federal Conservation Mechanisms," *Federal Onshore Oil and Gas Pooling and Unitization* 19-1, 19-17 (Rocky Mt. Min. L. Fdn. 2006) (citing Kurt M. Peterson, "Unconventional Units," *Federal Onshore Oil and Gas Pooling and Unitization II* 19-1, 19-25 (Rocky Mt. Min L. Fdn. 1990)).

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some other form of agreement. A JOA creating a working interest unit equitably pools the rights of the working interest owners so that operating costs and production are allocated based upon the formula specified in the JOA, which usually provides for the sharing of costs and production based upon proportionate contract area leasehold ownership.[112] In addition to the allocation of costs and production, the JOA also sets forth the terms under which the working interest owners will explore, drill, develop and produce oil and gas within the contract area. For example, the JOA will designate an "operator" who will be responsible for the drilling of all wells within the contract area.[113]

There are two types of working interest units: (1) a standard working interest unit; and (2) a beneficial working interest unit.[114] In a standard working interest unit, costs and production are usually allocated based upon the net acres that party contributes to the contract area, although production is generally only allocated to the extent of the lowest burdened tract.[115] Working interest owners then bear their excess leasehold burdens (e.g., royalty, overriding royalty or other burdens on production) on any leases contributed by the same on a well-by-well basis.[116] Such allocation of production can excessively penalize working interest owners in tracts with high leasehold burdens.[117] In a beneficial working interest unit, the JOA generally allocates production on a beneficial basis (which takes into account the differing lease burdens contributed by a working interest owner) throughout the contract area, and not on a tract basis.[118] "The beneficial working interest unit calculates the beneficial interest of each lessee on each tract committed to the unit up front, and then uses those beneficial interest figures as the basis for allocating [proceeds of] production [to each working interest owner from production obtained]

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[112] Nibert, *supra* note 107, at 11-11. It is important to note that under a JOA there is no cross-conveyance of interests in the individual leases contributed--meaning just because the working interest owners combined their interests to form the working interest unit does not mean title to each tract in the unit is considered to be owned by each party to the agreement. In fact, the A.A.P.L. Form 610-1989 Model Form Operating Agreement specifically states that "[n]othing in this [agreement] shall be deemed an assignment or cross-assignment of interest covered hereby, and in the event two or more parties contribute to this agreement jointly owned Leases, the parties' undivided interests in said Leaseholds shall be deemed separate leasehold interests for the purposes of this agreement." Lowe et al., *supra* note 103, at 281-82 (A.A.P.L. Form 610-1989 Model Form Operating Agreement, Article III(B) ¶ 4, Interests of Parties in Costs and Production).

[113] *See*, e.g., Lowe et al., *supra* note 103, at 281-82 (A.A.P.L. Form 610-1989 Model Form Operating Agreement, Article V(A), Designation and Responsibilities of Operator).

[114] Nibert, *supra* note 97, at 17-6 and 17-7. For a more in depth discussion on what constitutes a standard working interest unit see *id.* at 17-23 through 17-24.

[115] Jon D. Tjornehoj, "Complications of Examining Title Within A Pooled Unit, Working Interest Unit, Exploratory

Unit, or Secondary Recovery Unit," *Advanced Mineral Title Examination: Oil, Gas and Mining* 7-1, 7-8 (Rocky Mt. Min. L. Fdn. 2014).

[116] *Id.*

[117] Nibert, *supra* note 97, at 17-7; Tjornehoj, *supra* note 115, at 7-8.

[118] Nibert, *supra* note 97, at 17-24. For a more in depth discussion on what constitutes a beneficial working interest Unit see *id.* at 17-24 through 17-25.

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anywhere in the unit."[119] Thus, beneficial interest calculations determine each working interest owner's net revenue interest in the entire contract area, which is then used as the basis for disbursing proceeds from production from the entire contract area.

The formation of a working interest unit allows working interest owners to consolidate resources and risks associated with mineral exploration and development over a large area and it allows them to collectively share land and geologic data in order to jointly formulate an efficient and effective plan of development for the contract area. The freedom to formulate such a plan is inherent in the fact that the unit is formed by a JOA (or some other agreement) in which the parties are free to contract with respect to any and all aspects of the agreement.[120]

2. Working Interest Units and Title Examination

(a) The Entire Contract Area Should be Examined

Review of the entire contract area is necessary to provide the client with a complete and accurate title opinion for a few reasons. First, if the entire contract area is not reviewed, the title examiner cannot verify the purported interests of the working interest owners set forth in the JOA. Second, JOAs usually contain loss of title provisions.[121] In the event of a failure of title of a lease committed to the JOA, an adjustment to the allocation of costs and production proceeds set forth in the JOA may be necessary.[122] If the title examiner is not reviewing the entire contract area and an adjustment to the interests set forth in the JOA is necessary due to a loss of title issue on those lands not under review, the title examiner cannot accurately report how costs and production proceeds should be allocated among the working interest owners. For these reasons, examination of the entire contract area is necessary and a title comment and requirement to that effect should be included in a title opinion where only a portion of the contract area is covered. If the client does not want a title opinion covering the entire contract area, the title examiner should require the client to satisfy itself that the interests and allocation of those interests reported in the JOA are accurate and that provisions of the JOA have not or will not

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[119] Tjornehoj, *supra* note 115, at 7-9 (noting that the beneficial working interest unit essentially levels out the differential burdens across the entire unit area).

[120] Peterson, *supra* note 111, at 19-25 (noting there is no form agreement required in forming a working interest unit), although we note that the A.A.P.L. Form 610-1989 Model Form Operating Agreement is most often used as a starting place for the parties' agreement.

[121] *See* Nibert, *supra* note 107, at 11-20 (noting that (1) adjustment to the allocation of costs and proceeds in the JOA may depend on whether the loss of title is a "joint loss" or an "individual loss" borne by the party who contributed the leases or leases at issue; (2) loss of title for lease expiration at the end of the primary term or upon cessation of production is generally deemed to be a "joint loss," but that, in any event, review of the specific loss of title provision in the JOA is necessary to determine whether the allocated interests must be adjusted; (3) "more recent operating agreements [often] provide that unless a replacement lease is secured within 90 days from the discovery of the failure of title, the interests of parties are readjusted throughout the entire contract area, with the new ownership being calculated on the revised acreage basis"; and (4) if the interests of the parties are readjusted a memorandum giving notice of the adjustment should be recorded in the county).

[122] Nibert, *supra* note 107, at 11-11 and 11-12.

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alter the interests as set out in the opinion.[123]

Practically speaking, clients often do not request a title opinion covering the entire contract area. When the lands under review do not include the entire contract area, the title examiner may not know the effect a working interest unit JOA will have upon the title until after the title opinion is completed. Unless the client provides the title examiner with the JOA as part of the materials examined, it is likely that the title examiner will only become aware of the JOA when he or she sees an assignment in the chain of title made subject to the JOA.

In addition to loss of title provisions, JOAs contain a number of provisions that directly affect how costs and production are allocated including, for example, nonconsent provisions, sharing of burdens of production, assignment limitations, preferential rights to purchase, renewal leases and lien provisions. For this reason, it is important for the title examiner to include a title comment explaining that because the title examiner has not reviewed the JOA, he or she cannot advise the client as to its terms, conditions and its effect on the allocation of production. The title examiner should require the client to obtain and review a copy of the JOA to which assignments in the chain of title were made subject to and confirm that nothing contained therein affects the allocation of production as set forth in the opinion. Because a JOA creating a working interest unit will alter the way production is distributed, the division of production in a drilling and division order opinion will need to be revised accordingly.

(b) Who is Bound by the JOA?

Exhibit A to a JOA generally contains a list of all working interest owners who are parties to the agreement, among other information. Clearly the working interest owners who execute a JOA are bound by its terms, conditions and allocations. However, determining who is bound by a JOA can become complicated when not all working interest owners listed on Exhibit A execute the JOA. The very first paragraph to the A.A.P.L. Form 610-1989 Model Form Operating Agreement provides as follows:

> THIS AGREEMENT entered into by and between _____, hereinafter designated and referred to as "Operator," and the signatory party or parties other than the Operator, sometimes hereinafter referred to individually as "Non-Operator," and collectively as "Non-Operators."[124]

Identical language to that emphasized above was analyzed by the Texas Court of Appeals in *Imco Oil & Gas Co. v. Mitchell Energy Corp.*[125] In *Imco*, the court stated that "[t]his language expressly indicates the agreement is between those who choose to sign the document, and . . . that this language modifies the use of the word 'parties' throughout the remainder of the document to those who actually sign the agreement."[126] The *Imco* court found that the signing parties are bound to the agreement even if not all named parties signed the agreement unless

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[123] *Id.* at 11-12.

[124] Lowe et al., *supra* note 103, at 275 (A.A.P.L. Form 610-1989 Model Form Operating Agreement, ¶ 1) (emphasis added).

[125] 911 S.W.2d 916, 920 (Tex. Ct. App. 1995).

[126] *Id.* at 920.

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signatures by all named parties was clearly a condition precedent to the validity of the agreement.

[127]

Under *Imco*, some, but not all, working interest owners would be bound by the JOA creating the working interest unit. If a title examiner encounters a JOA in which not all working interest owners listed on Exhibit A executed the agreement, he or she should advise the client that it should obtain ratifications of the JOA from those working interest owners who did not execute the JOA. In the alternative, the client could obtain a new JOA executed by all parties.

(c) The Creation of a Working Interest Unit Does Not Relieve the Working Interest Owners of Underlying Obligations

It is important to remember that a working interest unit is only a working interest concept. The terms of a JOA creating a working interest unit do not affect the underlying oil and gas leases, royalty owners, overriding royalty owners, or owners of other burdens on production.[128] Specifically, production from one lease within the contract area does not extend other leases within the contract area.[129] This fact is very important for a title examiner to remember when determining whether leases beyond their primary terms within the contract area may be held by production. Additionally, the creation of a working interest unit does not relieve working interest owners of their duty to enter into pooling or communitization agreements to combine leases and tracts of land together to form a pooled unit.[130] Failure to properly record a declaration of pooling or communitization agreement may result in the termination of leases on non-drill site tracts within the pooled unit.[131] Generally speaking, where there is a working interest unit, working interest owners remain bound by all applicable laws, regulations, notices, orders and lease obligations, including payment of delay rentals, payments due to royalty owners, overriding royalty owners and other burdens on production, as well as the duties of diligent development and protection against drainage.[132]

V. Differences for Indian Lands

A. Introduction

The program committee requested that this paper on “complicating factors” affecting title also address differences between Indian lands and other categories of lands. The short answer to that question is: Everything! A title examiner should proceed cautiously when examining title to lands held in trust for Indian tribes or individual Indians. Time and space constraints permit only a 30,000 foot overview of the differences between Indian lands and other kinds of lands. The

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[127] *Id.*

[128] This result differs from a federal unit, for example, in which royalty and working interest owners execute and are bound by the unit agreement. Peterson, *supra* note 111, at 19-26 and 19-27.

[129] *Id.* at 19-27.

[130] Nibert, *supra* note 107, at 11-12.

[131] *Id.*

[132] Peterson, *supra* note 111, at 19-26 and 19-27.

examiner is referred to the resources listed in the footnote for a more detailed discussion of some of the topics highlighted below.[133]

B. Trust Property

References in this paper to “trust property” mean real property held by the United States, in trust for an Indian tribe or individual Indian, or property owned by a tribe or individual Indian that is subject to a restraint on alienation contained in the acquisition document or imposed by federal law.[134] Generally, tribal lands are usually owned by the United States, in trust for the tribe, while allotted lands (see discussion below) are more often vested in the individual Indian, but subject to restriction on conveyance or alienation without approval of the Secretary of the Interior. Regardless of the manner in which title is held, the effect is to prevent transfers without the approval of the Secretary.

There are mechanisms for removing restrictions on alienation and for transferring trust property to the tribe or individual Indian in fee. However, because the lands become subject to state and local property taxes once they become unrestricted or removed from trust status, tribes and individual Indians do not frequently request that their property be removed from trust status. Tribes sometimes purchase property in fee for a particular tribal purpose. That title is held free of the supervisory authority of the federal government unless the tribe successfully petitions the U.S. to take the property into trust status.[135]

There are unique rules applicable to the lands of Alaska Natives which are not addressed in this paper. The reader is referred to the sources cited in the footnote.[136]

C. Tribes' Sovereign Status and the Federal Government's Fiduciary Relationship to Tribes

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[133] A particularly useful paper to which title examiners should refer is Michael E. Webster, Craig B. Bums & Colby L. Branch, “Examination of Title to Indian Lands,” *Mineral Title Examination* 19-1 (Rocky Mt. Min. L. Fdn. 2012). *See also* Marian C. LaLonde, “Federal Management of Tribal Lands and Resources,” *Energy and Mineral Development in Indian Country* 3-1 (Rocky Mt. Min. L. Fdn. 2014); Felix S. Cohen, *Handbook of Federal Indian Law* (2005); Michael E. Webster, “Mineral Development of Indian Lands: Understanding the Process and Avoiding the Pitfalls,” 39 *Rocky Mt. Min. L. Inst.* 2-1 (1993); Lynn H. Slade, “Mineral and Energy Development on Native American Lands: Strategies for Addressing Sovereignty, Regulation, Rights and Culture,” 56 *Rocky Mt. Min. L. Inst.* 5A-1 (2010); Tim Vollmann, “Exploration and Development Agreements on Indian Lands,” 50 *Rocky Mt. Min. L. Inst.* 12-1 (2004); 2 Rocky Mountain Mineral Law Foundation, *Law of Federal Oil and Gas Leases*, ch. 26 (LexisNexis Matthew Bender 2014).

[134] 25 C.F.R. § 151.2(d), (e) (2014).

[135] *See id.* Part 151.

[136] *See* James D. Linxwiler, “The Alaska Native Claims Settlement Act at 35: Delivering on the Promise,” 53 *Rocky Mt. Min. L. Inst.* 12-1 (2007); Stephen F. Sorensen, “Mineral Development on Native Lands: The Alaska Perspective,” *Natural Resources and Environmental Regulation in Indian Country* 3-1 (Rocky Mt. Min. L. Fdn. 1999); James D. Linxwiler, “The Alaska Native Claims Settlement Act: The First 20 Years,” 38 *Rocky Mt. Min. L. Inst.* 2-1 (1992); Joseph J. Perkins, Jr., “The Great Land Divided but Not Conquered: The Effects of Statehood, ANSCA, and ANILCA on Alaska,” 34 *Rocky Mt. Min. L. Inst.* 6-1 (1988).

[Page 15-32]

The U. S. Supreme Court early on held that Indian tribes are “domestic dependent nations” which retain certain inherent sovereign powers. The parameters of the tribes' retained sovereignty are not easy to describe and are subject to continuing refinement by decisions of the Supreme Court. For our purposes, it is clear that tribes' sovereign authority extends to tribal lands and lands of its members within the reservation boundaries, including activities of non-members of the tribe on Indian lands within the reservation, but the extent of tribal authority within the reservation over non-Indian activities on non-Indian lands is unclear. Chief Justice Marshall compared the relationship of an Indian domestic dependent nation with the United States to that of a “ward to his guardian,” thus giving rise to the duty of trust owed by the United States to Indian tribes and individual Indians. As relevant to this paper, the fiduciary duty owed by the United States to Indians means that the Department of the Interior must act in the best interest of the Indian in approving oil and gas leases, mineral development agreements, communitization agreements,

and the like. If the United States breaches that fiduciary obligation, the lease or agreement under which the oil and gas developer is operating could be deemed invalid.

D. Know the Laws Affecting the Applicable Reservation

The laws applicable to Indian lands within the boundaries of one reservation are not necessarily the same as those applicable to another reservation. Any time the examiner undertakes to examine title to lands in a reservation in which that examiner has not previously worked, the examiner must collect the treaties, statutes, executive orders, and secretarial orders applicable to that reservation. The applicable documents are usually[137] referenced in the historical index maintained by the Bureau of Land Management ("BLM") for the townships within the reservation. Copies of the documents can then be retrieved from the aperture cards the BLM maintains for the lands. If the examiner is reviewing title to a discrete tract in the interior of the reservation, the exact boundaries of the reservation may not be important. However, it can often be quite difficult to tie the boundaries of a reservation to a section, township and range description from the documents (treaty or executive order) that established the reservation because those boundaries are frequently described with reference to natural features (e.g., the crest of a certain mountain range). For example, the northern boundary of the Northern Cheyenne Indian Reservation in Montana is tied to the southern boundary of the Northern Pacific Railroad grant.[138] Identifying that line requires an examination of the plat of the railroad through that part of Montana filed by the Railroad with the Secretary of the Interior. Fortunately, most examinations of title to tribal or allotted lands do not require such a detailed historical search.

E. Federal Supervision of Transactions Affecting Indian Lands

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[137] Almost no generalizations can be made about the location of laws or other documents affecting title to Indian lands. Although most statutes affecting Indian lands are codified in Title 25 of the U. S. Code, statutes applicable to only a specific reservation or tribe are usually not codified and can be located only by searching the Statutes at Large. The BLM State Offices usually, but not always, maintain copies on microfilm of relevant treaties, executive orders and secretarial orders affecting Indian lands within the areas administered by that State Office.

[138] Act of July 2, 1864, ch. 217, 13 Stat. 365.

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Virtually every transaction affecting title to Indian lands (*e.g.*, deeds of trust property, issuance of oil and gas leases or agreements, assignments of such leases or agreements) requires approval by the Secretary of the Interior or his/her delegate. The Bureau of Indian Affairs ("BIA") exercises this approval authority for the Secretary.[139] This requirement can create confusion if, for example, an individual Indian purports to convey his property by a deed recorded in the county records but not filed with and approved by the BIA. Such a purported transfer is void unless and until BIA approval is obtained.[140]

Secretarial approval is also required for transfers upon death, by will or intestacy. Indian probates are supervised by the Secretary[141] and a probate of a deceased Indian erroneously conducted under state law is not binding on the Department of the Interior.[142]

F. General Allotment Act

Tribal land is owned by the tribe, for the benefit of its members. Individual tribal members cannot transfer or inherit tribal property. Federal policy early on promoted the transfer or "allotment" of tribal property to individual Indians under the theory that property ownership by individual Indians would encourage assimilation. However, the original statutes authorizing such allotments did not provide for restrictions on alienation and, as a result, many of those lands ended up in the hands of non-Indians. The allotment policy was formalized on a nationwide basis (with some exceptions,

notably the Five Civilized Tribes of Oklahoma, which are covered by a different allotment statute) with the enactment of the General Allotment Act (or Dawes Act) in 1887.[143] The General Allotment Act provided for allotment of certain quantities of land to individual tribal members and, following approval of the selected allotment by the Department of the Interior, a patent containing a restriction on alienation was issued to the allottee. Although the initial period of restriction was 25 years from the date of the patent, that period has been extended, as authorized by the General Allotment Act.[144]

Allotments are designated by number and the BIA's title records pertaining to that allotment are generally filed by that number. Because the allotted lands cannot be transferred without approval of the Secretary, the title to such lands often becomes highly fractionated over time as the allottee's descendants increase in number. Leasing such lands can be very difficult due to the sheer number of owners of undivided interests in the tract and the cost to locate each owner. Congress has attempted to find solutions to the problems of increasing fractionated

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[139] Delegations of authority from the Director (previously called Commissioner) of the BIA to Regional Directors (formerly called Area Directors) or Agency Superintendents can be found in the agency manual.

[140] 25 U.S.C. § 348 (2014).

[141] *Id.* §§ 372, 373; 25 C.F.R. Parts 15-18 (2014).

[142] *See Estate of Malcolm Muskrat*, 29 IBIA 208 (1996).

[143] Ch. 119, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. §§ 331-358 , repealed in part).

[144] 25 U.S.C. §§ 391, 462 (2014).

ownership of allotted tracts through the Indian Land Consolidation Act of 1983, as amended in 2000,[145] and the American Indian Probate Reform Act of 2004.[146]

G. Statutory Authority for Indian Leasing and Similar Agreements

1. Allotted Lands Mineral Leasing Act

The Act of March 3, 1909 authorizes individual Indians to lease their lands for mining purposes, subject to the approval of the Secretary.[147] Although the statute authorizes the Secretary to negotiate leases on the owners' behalf under certain circumstances, allotted lands leases are almost always issued following advertisement and sealed bid or oral auction. The advertisement and other procedures outlined in the regulations must be strictly followed or the resulting lease is subject to cancellation. Each owner of the allotted tract must execute the lease, except when the owner is deceased and the heirs or devisees have not yet been determined or some or all of them cannot be located.[148] The Indian Land Consolidation Act Amendments of 2000 authorize the Secretary to approve a lease of allotted lands if 50% or more (depending on the number of owners) of the owners of the tract have executed the lease.[149] The allotted lands leasing regulations have not yet been amended to incorporate this authority.

The authority to approve leases of allotted lands is usually delegated to the agency superintendent.

2. Indian Mineral Leasing Act of 1938

The Omnibus Mineral Leasing Act of 1938 authorizes the Secretary to approve oil and gas leases (and leases for other minerals) covering tribal lands.[150] The Secretary has no authority to lease tribal lands without tribal consent. The lands must be offered for competitive lease at a public sale

following notice and advertisement.[151] The lease sale procedures must be strictly observed, and confirming that they were is one of the tasks of the title examiner. In 1982, the Court of Appeals for the Tenth Circuit held that sales of leases covering Jicarilla Apache tribal lands failed to comply with the publication requirements of the regulations.[152] However, the

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[145] *Id.* §§2200-2221.

[146] *Id.* §§ 348, 464, 2201, 2204-06, 2212-16, 2218, 2220-21. *See generally*, Jeffrey Hunt, Stephanie P. Kiger & Sharon Pudwill, "Allottee Issues," *Energy and Mineral Development in Indian Country* 8-1 (Rocky Mt. Min. L. Fdn. 2014).

[147] 25 U.S.C. § 396 (2014); 25 C.F.R. Part 212 (2014).

[148] 25 C.F.R. § 212.21 (2014).

[149] 25 U.S.C. § 2218 (2014). If there are five or fewer owners of undivided interests in the tract, 90% of the owners must have executed the lease; if there are six to ten owners, 80% of the owners must have consented to the lease; if there are 11-19 owners, 60% consent must be obtained; and if there are 20 or more owners, then a simple majority of the interest owners is required in order for the Secretary to approve the lease.

[150] 25 U.S.C. §§ 396a -396g (2014); 25 C.F.R. Part 211 (2014).

[151] 25 C.F.R. § 211.20 (2014). A tribe may submit negotiated leases for approval, without advertisement and public sale, although that option is rarely if ever used. *Id.* § 211.20(d).

[152] Jicarilla Apache Tribe v. Andrus, 687 F.2d 1324 (10th Cir. 1982).

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court of appeals refused the Tribe's request to cancel the leases, instead agreeing with the district court that the "technical" violation of the regulations affected only the amount of the bonus and not other terms of the leases. Based on expert witness testimony, the district court devised a remedy by which the lessees could pay an adjusted bonus equal to the difference between the bonus actually paid and 60% of the bonus that the expert testified he would have recommended to a bidder, and thereby maintain the leases. The "technical" defect in advertising the leases for sale involved the use of a "short form" sale notice which was published at least 30 days prior to the sale and a "long form" notice which contained all of the information required by the regulations. The long form notice was distributed to a mailing list of potential bidders but was not published as required by the regulation. Prior to the decision in the *Jicarilla* case, virtually all tribal lease sales used the short form/long form sale notice process. The BIA developed a ratification process by which that technical deficiency could be remedied. If the examiner is reviewing title to older HBP Indian leases then it would be necessary to confirm that the sale of the lease was either accomplished in strict compliance with the regulations or that the lease was ratified under the procedure adopted by the BIA.

The title examiner should also review evidence that the lease was executed by a properly authorized tribal representative. If the lease was executed on behalf of the tribe by a person other than the tribal chairman or other chief executive of the tribe, then the tribe's constitution, charter, ordinances or resolutions should be reviewed to confirm the authority of the executing party.

3. Indian Mineral Development Act of 1982 ("IMPA")

Although leases are still offered under the 1909 Allotted Lands Act and the 1938 Leasing Act, tribes are more frequently using the authority granted by the Indian Mineral Development Act of 1982[153] ("IMDA") to enter into agreements authorizing exploration for and development of tribal (and, under certain circumstances, allotted) minerals. The IMDA provides more flexibility to tribes to customize the terms for the development of tribal minerals. The statute broadly defines an IMDA "Minerals Agreement" to include joint ventures, operating, production sharing, service, managerial,

lease or other agreements.[154] An IMDA Minerals Agreement can be privately negotiated between the tribe and a mineral development company, but the agreement still must be approved by the Secretary. The Secretary is required to approve or disapprove an IMDA Minerals Agreement within 180 days after its submission by the tribe or 60 days after compliance with applicable provisions of the National Environmental Policy Act,[155] whichever is later.[156] A tribe may withdraw its consent to a proposed IMDA Minerals Agreement any time prior to approval by the Secretary. Because the Secretary is required to provide the tribe with at least 30 days written notice[157] of his/her findings on whether the agreement is in the tribe's best interest before approving or disapproving the agreement (and those findings are treated as

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[153] 25 U.S.C. §§ 2101 -08 (2014).

[154] *Id.* § 2102(a).

[155] 42 U.S.C. § 4332(2)(C) (2014).

[156] 25 U.S.C. § 2103(a) (2014).

[157] *Id.* § 2103(c).

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proprietary to the tribe), the Secretary's commentary on the agreement may encourage a tribe to withdraw its approval of the proposed agreement.[158]

The BIA regulations on IMDA include a list of provisions which should be included in the agreement, including the term, indemnification of the Indian lessor and the United States, valuation procedures, bond and insurance requirements and the like.[159]

4. Indian Tribal Energy Development and Self-Determination Act of 2005

The Indian Tribal Energy Development and Self-Determination Act of 2005 was enacted as Title V of the Energy Policy Act.[160] The goal was to promote tribal self-determination and, toward that end, authorized tribes to enter into certain energy related agreements without approval of the Secretary. However, the procedural mechanisms outlined in the statute are cumbersome so that, so far, tribes have not availed themselves of the provisions of this law.[161]

H. Records to Be Examined

1. Bureau of Land Management

As mentioned above, the records of the BLM State Office for the state in which the Indian lands are located will contain historical records relevant to title.[162] The Master Title (MT) plat combined with the Historical Index for the applicable township will show the documents that established and, in some cases, revised the reservation boundaries *(i.e.*, treaties, executive orders, acts of Congress, secretarial orders). If the lands have been allotted, the BLM records will usually reflect the allotment patents, though no transactions subsequent to the patent.

Sometimes portions of a reservation will have been opened to non-Indian settlement under the homestead laws, in which case the BLM records may reflect fee patents of lands within the reservation boundaries, with or without reservations of minerals to the United States, depending on the homestead law under which the lands were patented. Depending on the terms of the reservation opening order or the cession (often forced) by the tribe to the U.S. of a portion of the reservation, the reserved minerals may be owned by the United States or they may be treated as tribal interests.[163]

[158] *See* Quantum Exploration, Inc. v. Clark, 780 F.2d 1457 (9th Cir. 1986).

[159] 25 C.F.R. § 225.21 (2014).

[160] Pub. L. No. 109-58, 119 Stat. 594, 763 (2005) (codified at 25 U.S.C. §§ 3501 -3505).

[161] *See* Scot W. Anderson, "Regulating Commerce: Federal Oversight of the Development of Oil, Gas, and Coal Resources on Indian Lands," *Energy and Mineral Development in Indian Country* 7-1,7-15 (Rocky Mt. Min. L. Fdn. 2014).

[162] For many states, the MT plat and Historical Index are available on the BLM website: www.glorecords.blm.gov. However, it may be necessary to visit the State Office or request copies in order to examine copies of the documents referenced in the Historical Index.

[163] *See* Crow Tribe of Indians v. Montana, 650 F.2d 1104 (9th Cir. 1981), *amended*, 665 F.2d 1390 (1982).

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Determining the status of ceded lands can be a complex task. The courts have found that cessions by Indian tribes result in extinguishment of the reservation as to the ceded lands only if that result was clearly intended by Congress.[164]

The BLM approves unitization and communitization agreements that may affect Indian lands.[165] BLM requires BIA approval of such agreements before it will approve them so the records of the BIA may contain information on such unit agreements. However, it is often easier to review those records in the BLM office. In some states, unit and communitization agreements are administered in the State Office and in others they are handled by the Field Offices.

2. BIA Land Titles and Records Offices

The BIA maintains five "Land Titles and Records Offices," commonly called title plants, which are "the offices of record for land records and title documents and are hereby charged with the Federal responsibility to record, provide custody, and maintain records that affect titles to Indian land..."[166] The title plants are located in Aberdeen, South Dakota, Albuquerque, New Mexico, Anadarko, Oklahoma, Billings, Montana and Portland, Oregon.[167] The regulations state that "all" title documents shall be submitted to the appropriate title plant for recording immediately after final approval, issuance or acceptance of the document.[168] The BIA official with the authority to approve title documents is responsible for prompt compliance with the recording requirements of the regulations. However, in the past, oil and gas leases covering Indian lands and assignments of such leases were seldom recorded in the title plants and could be found only in the BIA agency office (discussed below) for that reservation. The regulation states that the title plants are the "offices of record" charged with the responsibility for "recording," and "recording" is defined as the acceptance of a title document by the appropriate title plant.[169] The definition of recording further states that the purposes of recording include "to give constructive notice of the ownership and change of ownership and the existence of encumbrances to the land."[170] There is no statute which provides that third parties are on constructive notice of documents recorded in the title plants but the regulation seems to create that effect, assuming that the BIA has the authority to do so. Consequently, it is a concern when the oil and gas or other mineral lease or assignments of a lease do not appear in the title plant and, historically, many BIA Agency Offices did not consider it necessary to send those documents for recording in the title plants. More recently, the BIA has been more diligent in

[164] See Ute Indian Tribe v. Utah, 773 F.2d 1087 (10th Cir. 1985), Hagen v. Utah, 510 U.S. 399 (1994) and Ute Indian Tribe v. Utah, 114 F.3d 1513 (10th Cir. 1997), for cases dealing with the effect of allotment legislation and the withdrawal of lands for the Uintah National Forest on the Uintah Valley Reservation. *See also* South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998).

[165] 25 C.F.R. §§ 211.4, 212.4, 225.4 (2014).

[166] *Id.* §150.3.

[167] *Id.* §150.4. This regulation describes which Indian lands are under the jurisdiction of the applicable title plant. 25 C.F.R. § 150.5 also describes three other offices where title services are provided for a few additional tribes.

[168] 25 C.F.R. § 150.6 (2014).

[169] *Id.* § 150.2(m).

[170] *Id.*

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ensuring that all title documents, including mineral leases, affecting Indian lands are filed in the title plants.

The title plants can prepare "title status reports" on a particular tract of Indian land at the request of "those persons authorized by law to receive such information."[171] Requests for title status reports must be made by or through the BIA office that has administrative authority over the lands (*i.e.*, the agency office). Title status reports are frequently prepared for allotted lands but less often for tribal lands. A title status report provides current ownership information on a tract. The title plants are also instructed to maintain maps of all reservations showing land status.[172]

3. BIA Regional Offices

There are 12 BIA regional offices, previously called area offices, which may have records relevant to title. For example, the regional office usually maintains copies of lease sale notices for reservations within their jurisdiction, along with proof of publication of the sale notice, tribal resolutions requesting that the lands be leased and resolutions accepting the high bid for a lease on tribal lands. Some of the contents of these files, particularly any information relevant to economic evaluations, will be kept confidential. The sale records can often also be found in the agency offices but, depending on the degree of organization of the realty office for the particular agency, it may be simpler to retrieve that information from the regional office.

4. BIA Agency Offices

Agency offices are usually located in the same town as the headquarters of the applicable tribe. The realty office of the agency should have files for each mineral lease sale. In addition, the realty office should have lease files for each approved lease containing the lease, assignments and other post-lease matters. The quality of these files varies widely from agency to agency, as does the BIA's view on whether the contents of lease files are confidential. Some realty offices have separate confidential and public lease files. Of course, it is impossible to know whether the confidential file contains information relevant to title. In the experience of the authors, when it appears from gaps in title that assignments of a lease may be missing, such assignments can often be found in the "confidential" file, after a request to the head of the realty office to search that file for any assignments.

5. Tribal Realty or Energy Offices

Although the tribe is not the official records repository under the BIA regulations, some tribes maintain duplicate title information on mineral leases that may be more complete and more organized than that maintained by the BIA realty office. In addition, on many reservations, the BIA forwards assignments of tribal leases to the tribal realty or energy office for its recommendation before processing the assignment, so assignments may be located in the tribal offices that do not appear in the BIA offices. Whether the tribe allows title examiners to review its files must be determined in a case by case inquiry to the tribe.

6. County Records

[171] *Id.* §150.8.

[172] *Id.* § 150.9.

[Page 15-39]

Although all transfers of trust property should appear in the BIA records, the county records should still be examined, particularly with respect to title to the oil and gas leasehold interests. The regulations require that all assignments of interests in allotted and tribal leases and in IMDA agreements be filed for approval with the BIA.[173] However, overriding royalties or payments out of production are not considered to be interests in Indian leases,[174] so the county records may contain assignments of those interests that do not appear in the BIA records. Mortgages or other encumbrances may also appear only in the county records. Even though assignments of the leases must be filed for approval with the BIA, it is surprising how often the examiner will find assignments that have been recorded in the county but not filed with the BIA. Those assignments, or at least assignments from the last approved owner in the BIA records to the apparent current owner according to the county and BIA records, must be filed for approval in order to properly vest title in the actual current owner.

I. Access to BIA and Tribal Records

The most frightening aspect of examining title to mineral leases of Indian lands is the concern that the examiner has not seen all of the relevant documents. Many agency realty offices have less rigorous filing procedures than do, for example, BLM state offices or county clerk's offices. It is not unheard of for an examiner to leave the realty office having been assured that the file contained all of the assignments, only to return and have a different employee point out the pile of loose assignments on top of the filing cabinet that need to be leafed through to see if any affect the lease at issue. As tribes become more sophisticated in managing their mineral resources (the Southern Ute Indian Tribe in southwestern Colorado is a good example), the tribe's records are often more reliable than those of the BIA agency realty office, whose budgets are invariably inadequate. Of course, the tribes are not undertaking to create public title records but many tribes recognize the importance of accurate and accessible records showing ownership of leases covering tribal lands, and so may be willing to allow a title examiner to review its records, given a polite request and reasonable notice.

The BIA regulations pertaining to the land titles and records offices state that “the usefulness of a Land Titles and Records Office depends in large measure on the ability of the public to consult the records contained therein. It is therefore, [sic] the policy of the Bureau of Indian Affairs to allow access to land records and title documents unless such access would violate the Privacy Act, 5. U.S.C. 552a or other law restricting access to such records, or there are strong policy grounds for denying access where such access is not required by the Freedom of Information Act.”[175] The land titles and records offices will not disclose information concerning any living individual until the manager has consulted the Privacy Act to determine whether the information can be released without the written consent of the person to whom it pertains.[176] There have been occasions when the manager of the land titles and records office

[173] *Id.* §§211.53,212.53,225.33.

[174] 25 C.F.R. § 211.53(d) (2014).

[175] *Id.* §150.11(a).

[176] *Id.* §150.11(b).

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believed that this regulation prohibited a title examiner from reviewing records pertaining to an oil and gas lease granted by a living individual Indian.

The Privacy Act concerns are usually less significant when the lease covers tribal lands than when it covers allotted lands. Nonetheless, because the regulation referenced above applies only to the land titles and records offices, BIA employees at the regional or agency offices may adopt a more restrictive interpretation of the Privacy Act than the examiner might think is legitimate.[177] If tribal lands are the subject of your examination, it is sometimes possible to enlist the aid of the staff in the tribe's realty or energy office, as those persons may understand the need for access to the official title records in order to facilitate development of the tribal minerals. Some agency offices require that the examiner provide a letter of authority from the lessee of record authorizing the examiner to review the oil and gas lease files pertaining to leases owned by that lessee. It is always a good idea to talk with the agency realty office to find out what authorizations it may require in order to review files and to make an appointment to view the files, so that a trip to the agency office is not wasted.

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

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[177] For an excellent discussion of the difficulties in accessing BIA title records, see Phillip Wm. Lear & Christopher D. Jones, “Access to Indian Land Records,” *Natural Resources Development & Environmental Regulation in Indian Country* 4-1 (Rocky Mt. Min. L. Fdn. 1999).

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Overview of Complicating Factors Affecting Title

HEATHER BULLER AND ALLISON PREISS

Bjork Lindley Little PC

Too many issues, not enough time

[Page 15-42]

Overview of Bankruptcy, Tax Sales, Foreclosure & Liens

Effects of Bankruptcy: Primary Issues for the Title Examiner

NOTICE

- No constructive notice is given by filing of the bankruptcy petition; therefore, title examiner has **no duty to examine the bankruptcy court docket.**
- However, **if the petition** or other evidence **is properly recorded, then the public is on notice.**

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THE PETITION WAS FILED....NOW WHAT?

- Filing the petition **creates an estate** comprised of the pre-bankruptcy property of the debtor.

  This is a separate legal entity.

  Administered by a “trustee” or “debtor-in-possession”

- Can the trustee/debtor-in-possession sell the property in the estate?

  If in the “ordinary course of business” - YES!

  If not in the “ordinary course of business” - **only if notice, hearing and no timely objections.**

WHAT HAPPENS WHEN THE CASE CLOSES?

- Real property of the bankruptcy estate remains part of the estate until it is abandoned or sold.

  Specific procedures to be deemed abandoned.

  Property not “scheduled” on the exhibit remains in the estate.

- Chapter 11 Bankruptcy - specific set of requirements

[Page 15-44]

Tax Sales & Title Through Tax Deeds

INHERENT UNCERTAINTY OF TITLE DERIVED THROUGH TAX DEED

- Courts tend to find reasons to protect the dispossessed taxpayer.

- Title examiners are wary and often unwilling to pass title derived through a tax deed, unless there has been:

  A conveyance to the tax sale purchaser or successors from the taxpayer or its successors,

  A quiet title decree quieting title in the purchaser at the tax sale or its successors, or

  A curative statute clearly applies.

TAXATION OF REAL PROPERTY: THE BASICS

- In some states, different interests are separately assessed.

- The property is usually valued by the county assessor.

- Generally, the tax lien attaches as of the assessment or valuation date.

- The amount of the tax is established by state statute.

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BECOME FAMILIAR WITH STATE STATUTES

- Each state has its own statutes for assessing, levying, and collecting real property taxes and for foreclosing on unpaid tax liens.

- Title examiners must be familiar with the current statutes and the statutes in effect at the time the tax lien attached, the tax sale was held and the tax deed was issued.

THE FORECLOSURE PROCESS

- If taxes are not paid by statutory deadline, penalties + interest are assessed.
- Public sale of unpaid tax liens
- Issuance of tax sale certificate to purchaser at the sale
- If not sold, the lien is “struck off” to the county.
- Redemption period
- If not redeemed, the treasurer issues a tax deed to holder of certificate.

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Foreclosure

- If debt secured by mortgage/deed of trust is not paid, mortgagee may foreclose by:
  - Sale
  - Judicial proceeding
- Most states have statutes which allow the mortgagor to cure or redeem prior to foreclosure.
- Materials do not always include enough information for title examiner to conclude foreclosure conducted with laws at the time.

Liens

- Liens encumber real property to secure a debt owed by the property owner.
- Types of liens:
  - Statutory
  - Contractual
  - Judicial
- Under a typical lien statute, a lien statement can be recorded when the lien attaches, but most statutes provide a window (*e.g.*, 90 days after work completed).
- What should the title examiner do?
  - Note all liens
  - Make blanket statement

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Horizontal Drilling Complexities

Horizontal Drilling Complexities: An Example

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Horizontal Drilling Complexities: How will the Title Examiner Know?

INFORMATION PROVIDED BY THE CLIENT

- Title opinion request letter

  Generally includes the legal description for the subject lands and lands to be spaced with

  May include information on the proposed surface and bottomhole locations of the well

- Ask the client

  If you think this may be an issue, call the client and ask for more information.

INFORMATION FOUND ON THE INTERNET

- State Conservation Commission websites

  Search for spacing orders and APDs

- Google Earth

  Look for roads, buildings, bodies of water, hills, mountains, etc.

- Public land survey system website

- Maps & plats from county assessors' website

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INSTRUMENTS OF RECORD

- Restrictions in deeds, leases or other instruments

- No Surface Occupancy (NSO) Leases

- Other types of surface leases or agreements (*e.g.*, grazing, agricultural, farming)

Horizontal Drilling Complexities

GENERAL PRINCIPLES OF SURFACE USE

- When the surface and minerals are severed:

  Mineral estate = dominant estate

  Surface estate = servient estate

- Instrument severing may provide an “express easement.”

  Generally limited to the subject lands, but can include off-tract lands

- If no express easement is granted, courts have held that the mineral owner has an “implied easement.”

  Generally limited to the subject lands, but may include off-tract lands when pooled with the subject lands

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WHOSE CONSENT DO YOU NEED?

To use the surface of the off-tract lands:

- If no express easement, get surface owner(s) consent.

- Even if you get the consent of the surface owner(s), there are still issues.

Traversing the off-tract minerals:

- Arguments that only consent from surface owner(s) required.
    - Other similar rights are in the surface owner.
    - Pore space argument
- Arguments that you need mineral owner(s) consent, too
    - Their implied easement would be trampled upon.
    - Physical nature may restrict their ability to develop.
- Challenge for courts to balance competing interests -two approaches to date:

    Ad hoc fact-based approach

    Rebuttable presumption of inevitable damage

- Scholars have suggested the first approach is the more reasonable and practical approach and promotes the most efficient development of the minerals.
- Consent from all parties where there are multiple surface owners, mineral owners, and/or lessees is incredibly costly and impracticable.

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IS POOLING AN ALTERNATIVE TO CONSENT?

- Courts have taken different approaches, so there is no uniform answer.
- TX Supreme Court case (*Key Operating*) allowed the surface estates of multiple tracts within a unit to be burdened by unit operations.
- Some courts add caveat that mineral and surface owner must be the same when power to pool is granted.

Pooled Units

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Distinguish Pooled Units from Spacing Units

Spacing Unit

- Area allocated to one well (or more in some states) under a well spacing order
- Formed by state conservation commission order

Pooled Unit

- Unit formed by the bringing together of separately owned interests (mineral & leasehold) under a pooling clause in a lease or some other agreement

Voluntary Pooling

- **By pooling clause** in an oil and gas lease

  "Lessee, at its option, is hereby given the right and power to pool or combine the land covered by this lease, or any portion thereof, as to oil and gas, with any other land or lease(s) when in lessee's judgment it is necessary or advisable to do so."

  Pooling clauses limiting unit size are common.

  Record a Declaration of Pooling.

- By **separate pooling agreement**

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Statutory Pooling

- **Application** filed with state conservation commission
- **Notice** of application to all interest owners
- Commission **hearing**
- Issuance of pooling **order** by the state conservation commission

Communitization

- Essentially pooling of state and/or federal lands within a spacing unit
- Accomplished by a Communitization Agreement

  No pooling clauses in state and federal leases and cannot be statutorily pooled

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Pooled Units & Title Examination

POINTS TO REMEMBER

- Production from the pooled unit is production from all unit lands.
- Spacing is not pooling in most states.
- All pooled lands should be examined.
- Production from a pooled unit is allocated on an acreage basis.
- Ensure commitment of all interest owners to the pooled unit.

Working Interest Units

[Page 15-55]

What is a Working Interest Unit?

- An arrangement between working interest owners to join their operations in order to develop lands covering more than one spacing unit
- Area covered - "contract area"

- Most often created by joint operating agreement

Two Types of Working Interest Units

- **Standard Working Interest Unit**

  Costs and production allocated based on net acres contributed to the contract area

  Production usually allocated to the extent of the lowest burdened tract

  Working interest owners then bear their excess leasehold burdens on any lease contributed on a well-by-well basis

- **Beneficial Working Interest Unit**

  Substantial calculations up front

  Not common

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Working Interest Units & Title Examination

POINTS TO REMEMBER

- Ideally, the entire contract area should be examined
- The creation of a working interest unit does not relieve the working interest owners of underlying obligations, including: all applicable laws, regulations, notices, orders and lease obligations

Adverse Possession

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Requirements of Adverse Possession

- Actual
- Open
- Notorious
- Exclusive
- Continuous
- Hostile to the true owner
- Under a claim of right or color of title
- For period of time prescribed by statute

Adverse Possession as a Title Cure

- Adverse possession is a **question of fact**
- Adverse possession of minerals requires possession of the minerals by production
- Adverse possession of the surface does not constitute possession of the minerals after

severance of the surface and mineral estates

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Title Examination of Indian Lands

Questions?

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