Title Curative for Colorado, Wyoming, Montana and North Dakota

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Biography

Susan J. Alfson received her Juris Doctorate from the University of North Dakota, School of Law in 1978. She began her career in oil and gas as a landman working for Alfson Energy Company in 1972, and following law school as a landman with Energy Reserves Group, Inc. and Sabine Corporation, both in Denver, CO. Her land experience includes leasing, curative, title preparation, Federal unit administration, joint operations negotiations and management, and other aspects of energy exploration and development including lease plays in oil, gas, potash and coal in the Rocky Mountain Region and oil exploration offshore California. Her teaching experience includes legal research and writing, contract drafting and contract negotiations.

While taking time away from the oil industry during the 1990s, Susan continued to develop expertise in negotiations, management and business operations in telecommunications, mining and manufacturing, including work in Asia, Mexico, Canada and Europe.

In 2004, Susan established Alfson Energy Land Services, Inc., a firm specializing in the mitigation of title risks related to oil and gas field development and corresponding projects for the benefit of oil and gas filed operators, as well as exploration leasing. Areas of specialization include title curative, due diligence, exploration and development leasing, suspense fund resolution, and any other special needs their clients have relating to land work and title issues. Located in Greenwood Village, CO, Alfson Energy serves the Rocky Mountain Region.

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Topical Index

Title Curative for Colorado, Wyoming, Montana and North Dakota

Title curative is the process of correcting a deficiency in the title to real property - or in the context of the oil and gas industry, the title to mineral property. Title deficiencies can occur for a myriad of reasons and be simple to correct or almost blindingly complicated. There is no limit as to the complexities of issues that can affect a mineral title – or to the ingenuity of people in devising creative ways to confound us all[1].

As if the Division Order Analyst (DOA) didn't have enough to do, he or she often stands as the final line of defense in protecting the economic interests of the oil company from erosion created by title errors. While this paper will discuss certain aspects of title curative in the states of Colorado, Wyoming, Montana and North Dakota, including trends of which the DOA needs to be aware, much of this discussion will have relevance for other oil and gas producing states as well. At a minimum, it may red flag areas of concern that provide good reason for localized research by the DOA.

Colorado, Wyoming, Montana and North Dakota were chosen as representative of issues and trends that continue or are becoming noticeable in the Northern Rockies. These four states comprise the core of the American Association of Petroleum Landman's Region Seven, which was reported as the second most active region for oil and gas land work in the U.S. and Canada in 2007.[2] The level of activity in these states since 2007 has been on a continual rise.

By the time the DOA becomes involved in a lease or block of leases dedicated to a sale, purchase or a drilling program some of the title issues will have been identified and hopefully dealt with by others (e.g., field land services contractors, company landmen, title attorneys, etc.) through either the leasing process or drillsite curative activities. While some of these earlier curative activities will have an impact on the payment of revenues from production, operating companies routinely rely on an abstract examination by a licensed title attorney specifically focused to ensure proper payment of revenues – the division order title opinion. If the DOA is involved in intake for properties that are being purchased or preparation of properties to be sold, he or she may be lucky enough to receive an attorney's title opinion that focuses on marketability of title in support of the purchase or sale transaction – an acquisition title opinion.

In either case, it is the title attorney's responsibility to identify:

- all the parties who have an economic interest that includes a right to receive proceeds, along with their most recent addresses of record;

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1 For a general discussion and several aides for managing title curative please refer to author's prior paper published by NADOA for the 2008 conference entitled "You Paid for the Title Opinion, Now What do You do With It? Handling Title Curative".

2 AAPL Compensation Study Executive Summary published July / August 2008.

- the nature of each party's interest (e.g., lessor's royalty interest, revenue interest associated with a working or participating interest, overriding royalty interest, statutory unleased mineral owner's royalty, etc.);
- any thresholds or conditions, which when reached would change the interest of a party (e.g., before payout interests, after payout interests, optionally convertible overrides, variable interests tied to producing formations, etc.); and
- any terms from oil and gas leases or contracts, to the extent the title attorney is provided unrecorded contracts, that have a bearing on the payment of proceeds or revenues.

The title attorney is also going to identify any issues raised during examination of the abstract that could potentially jeopardize the buyer's, seller's or operator's ability to realize its own financial objectives. These are stated in the form of advisories – statutes or regulations requiring compliance – or as requirements that need to be cured. Most title attorneys will also recommend how the "cure" should be done.[3]

Those who regularly work in the active states of the Northern Rocky Region are familiar with, or soon will be, issues relating to availability of title attorneys and the oftentimes serious problems that result from delays in obtaining oil and gas-related title opinions. There appears to be a shortage of qualified title attorneys to undertake – and complete in a timely manner – all the work that is being demanded. In the author's opinion, based on recent conversations with several title attorneys, the problem is further aggravated by the lack of time and availability to train new attorneys to undertake the landslide of title work that is waiting to be done. One operating company that the author is familiar with is currently utilizing over fifty title attorneys to meet the operator's demand for division order title work in one oil field alone.

Since most of the curative that comes under the oversight of the Division Order Department results primarily from division order title opinions, and sometimes acquisition title opinions when exchanges of producing lease properties are made through a sale, I'd like to begin the substantive portion of this paper by addressing two critical process steps: the ordering of abstracts and the ordering of title opinions.

I. Ordering Abstracts for Division Order or Acquisition Title Preparation

The majority of the following discussion is based on the author's experience and conversations with the head of the title opinion group for one of the leading oil and gas law firms in Denver.

If responsibility for ordering abstracts that will be used for division order or acquisition title opinions (collectively referred to hereafter as TOs) falls to the Division Order group there are some things that

[3] Information on how to set up a project plan to manage curative requirements is discussed in the author's prior paper as cited in footnote 1.

should be carefully considered. Delays in completing TOs often occur because the abstracts that are provided to the title attorney are inadequate. Often this can be traced directly back to the instructions provided by the person who ordered the abstract. In today's environment, oil and gas abstracts are generally ordered from an abstract company such as Deister Ward & Witcher, which has been providing abstracts to the industry since 1943[4], or from an oil and gas broker or field landman who prepares a "Landman's Abstract". There are often material inconsistencies in the final product, particularly in abstracts ordered from brokers and field landmen.

The following checklist[5] [6] should be carefully considered when ordering an abstract and specific instructions in the form of the checklist, can be provided to the party preparing the abstract to ensure the title attorney receives a complete and consistent abstract to work from. It is intended that the person ordering the abstract would check those boxes that they want the preparer of the abstract to pay attention to. One additional comment in regard to names searches in the district court records. It is unlikely that the attorney is going to require a search of every name in the title chain so it is not uncommon for the name search portion of the project to be left until such time as the attorney can identify which names should be searched. The company ordering the subsequent TO and the title attorney need to coordinate on whether the preparer of the abstract or the attorney will conduct the name search at such time as the list of names is available.

4 www.dwwtitles.com

5 The checklist is included for the reader's use as a form in the appendix.

6 If you would like a copy in electronic format please contact the author at www.alfsonenergy.com.

Abstract Order - Checklist

Ordered by: **Order Date:**

To be prepared by:

Examining Attorney / Law Firm:

Date Required:

Land Description: State: County:
Twp: Rng:
Sec: Description:
Sec: Description:
Sec: Description:

Abstract Formatting

- ☐ Hardcopy, bound for legal sized documents (for attorney)
- ☐ In electronic format on disc (for attorney)
- ☐ Copy of electronic format on disc (for company)
- ☐ A photographic image of all indices used at the clerk's office or abstract company where records are examined
- ☐ A legible copy of <u>all</u> documents recorded or filed against the subject lands from the first document recorded to present, excluding the following:
  - ☐ Exclude fully released mortgages less than 50 years old
  - ☐ Exclude all mortgages greater than 50 years old
  - ☐ Exclude all <u>fully</u> released oil and gas leases
  - ☐ Exclude process documents related to mortgage foreclosures
  - ☐ Exclude process documents related to tax sales
  - ☐ Exclude <u>full</u> exhibits attached to any recorded documents, but include relevant pages

Additional Inclusions

- ☐ Include examination of files for corporate name changes and mergers for companies appearing in the title chain
  - ☐ From the county clerk's files
  - ☐ From the secretary of state records for the following states
    - ___ Delaware
    - ___ State where company doing business
    - ___ State where corporate headquarters located
    - ___ Other ____________________
- ☐ Include name searches in the District Court records for all names in the chain of title
- ☐ Include examination of tax assessor's records for status of property taxes for the preceding 5 years

<u>*Annotation:*</u>

Items in blue text need to be verified with the examining attorney before the abstract is ordered

If you know them, be sure to include any alternate descriptions where they exist (e.g. NE/4 also described as Lots 1, 2, and S/2NE/4; or S/2S/2 also described as Tract 47 of the XYZ plan of development).

Always request that an electronic copy of the abstract be provided to the attorney.

Always request a back-up copy for yourself.

Attorneys would be thrilled to get these documents, which are rarely included; although some abstract companies and clerk's offices will not allow photo reproductions of indices.

Any illegible or missing documents that can't be corrected need to be identified and explained for the benefit of the attorney, by the party preparing the abstract.

Many counties will file this information in separate files that are not indexed against any land descriptions. These searches can also be conducted through the Secretary of State records for Delaware (the most common state of incorporation) and other logical states.

Sometimes these documents will resolve what appear to be strangers to title but are in fact name changes or mergers. It may also resolve small discrepancies in a company's name (e.g. XYZ Production Company vs. XYZ Oil and Gas Exploration Company -- one may be a subsidiary of the other).

Not all District Court offices will allow access to their records, most will conduct name searches for you if the list of names are provided. If the abstract preparer is using an on-line search application such as www.COCourts.org make certain that the abstract preparer identifies for the attorney any limitations on the search. COCourts does not allow access (based on election by individual counties) to records involving family matters such as divorces and probate unless the party searching was one of the attorneys involved or a family member. This is critical since both probates and divorces deal with disposition of property.

- [ ] Plat of the lands
- [ ] Table of contents for all documents included in the abstract
    - [ ] Paginated for the documents in the abstract
    - [ ] In chronological order from earliest to most recent by date of recording
    - [ ] Showing the following
        - [ ] Type of document
        - [ ] Book, page and reception #
        - [ ] Grantor
        - [ ] Grantee
        - [ ] Annotation as to any documents shown in the index but missing from the records
        - [ ] Annotation as to location in TOC where document is "released", "partially released" or "satisfied"
- [ ] Other
    - [ ] Include a statement of location of records search by entity (e.g. Clerk, Assessor, etc.) including the date and time of day
    - [ ] Include a statement of the month and date the last document was indexed
    - [ ] Include an Affidavit of Record Title Examination signed by the person responsible for creating the abstract
    - [ ] Include a list of all names that were searched in the District Court records and a statement as to any limitations on the
    - [ ] Statement of disclaimers
    - [ ] Statement of exclusions

Additions for Federal Lands

- [ ] A legible copy of <u>all</u> documents recorded or filed against the subject lands from the first document recorded to present
    - [ ] From the county where the lands are located (see instructions above)
    - [ ] From the Bureau of Land Management Lease Files
        - [ ] In order as documents appear in the file
        - [ ] Include all correspondence
    - [ ] From the Bureau of Land Management Unit Files
- [ ] Other:
    - [ ] Prepare abstract for county records in separate document from Federal abstract
    - [ ] All protocols given above for table of contents and other documentation are to be followed for all abstracts

Sometimes books are lost or stolen and more recently as microfiche / microfilm ages documents recorded on these media are "disappearing" due to damage and mis-use of the film. The attorney needs to be alerted when this happens.

This helps the examining attorney track full and partial releases of documents that may not have perpetual survival (e.g. oil and gas leases, mortgages, process documents related to foreclosure proceedings or tax sales, etc.). It will be less expensive and time consuming to have the abstract preparer annotate these items than to pay the attorney to flip back and forth through the Title Opinion to find these related documents.

If a future supplement is required, the new exam will start from this date and time.

There is often a lag in time between when a County Clerk or an abstract company receives a document for recording and when the document is indexed -- in some CO counties recently it was as much as 90 days. The attorney needs to know that while the abstract creation concluded on March 9 the last document indexed was January 16.

It should be noted that some states have a title examination standard for attorneys that requires District Court search of all names appearing in the chain of title.

In addition to any annotation in the table of contents there should be a list at the back of the abstract of any documents that are indexed but cannot be found because of missing books, destroyed film, or unreadable aged handwritten text.

When federal lands are involved, it is crucial to prepare an abstract of both the county records and the BLM records. Ideally they should be mirror images of each other but <u>never</u> are.

This is where copies of approved communitization agreements are filed.

Figure 1: Abstract Order - Checklist

II. Ordering Division Order or Acquisition Title Opinions

Again, when responsibility for ordering division order or acquisition title opinions falls to the Division Order group some things should be carefully considered. Title attorneys who provide this work product will not need coaching on how to put the TO together. However, as can be seen from the prior checklist, they should be consulted about certain items before the abstract is ordered. If they are not, they should be apprised of the following matters in particular when the TO is ordered.

1. Corporate Mergers and Name Changes: if this research is not provided as part of the creation of the abstract, the title attorney will want to do this research as part of the TO preparation. If the party ordering the TO is willing to waive this requirement it needs to be done after a discussion with the attorney on the potential consequences of such a waiver.
2. District Court Record Searches: this is not a research element that can be waived for the simple fact that probates, divorces, quiet title actions and some judgments cause ownership of land and minerals to change hands. When this happens, final decisions and orders issued by the court should also be recorded in the county records but frequently are not. If the preparer of the abstract is not instructed to conduct this search the title attorney will need to and should be alerted to this when the TO is ordered.[7]
3. Tax Assessor's Records: this is also not a research element that can be waived unless it was adequately covered in the Drillsite Title Opinion. It is important to note that some states, such as Colorado, give their counties the option to assess property taxes on severed mineral interests. While there are a number of issues with such assessments, especially in the area of due diligence relating to notices, counties in Colorado that do levy taxes on severed mineral interests can foreclose on those interests and sell them at a tax sale. Since severed mineral owners often live far from where the minerals are located, there is always a probability that the mineral owner is unaware that the tax is being assessed and unaware of subsequent attempts to foreclose for non-payment. If the abstract preparer does not address the status of property taxes for the surface, and where applicable, mineral ownership, the title attorney needs to be properly informed.

Before leaving this topic, two other important issues need to be mentioned and those are limitations on the TO and reliance on prior title opinions. The person ordering the title opinion needs to carefully consider whether the TO is to cover all depths or only ownership in certain formations or to certain depths. In addition, companies often ask the examining attorney to rely on title opinions created previously, possibly by other law firms or title attorneys.[8] One issue in particular needs to be emphasized again here: if the attorney is being asked to issue a TO relying on prior title opinions be certain that the prior title opinions cover all of the same lands and all of the same depths or formations that will be included in the new title opinion.

[7] If the preparer of the abstract has only limited access to such records, the title attorney should be made aware that additional research will be required as part of TO preparation.

[8] The pros and cons, mostly cons, of this practice are discussed in some detail in the author's paper cited in footnote 1.

Now that the DOA has ordered the abstract and the title attorney has provided the title opinion, the DOA is confronted with the task of ensuring that the right party is being paid in the right amount and on time. If the title attorney has found a perfect chain of title, at least as far as ownership of mineral-related interests are concerned, the DOA's job is trouble-free. If, on the other hand, the title attorney has identified a broken or ambiguous chain of title, the DOA needs to take whatever steps are necessary to ensure that the <u>right party</u> is being paid <u>in the right amount</u> and on time.

What are title problems exactly and why is it important to cure them? This may seem like an overly obvious question to anyone that has been working with division orders for awhile; but, it deserves some consideration. More simply stated, what we need to know is when may the DOA pay someone who says they have a claim even though that claim is not crystal clear? If there are ten parties in the chain of title with clear interests adding up to 100% and an eleventh party comes along, one or more of the ten are going to have their interests decreased or eliminated if the eleventh is successful. The DOA should find help in the title opinion and the attorney's recommendations; but what happens when property changes hands and that exchange happens after the TO has been completed or if the claim is made based on an unrecorded or improperly indexed document? As shown above, this becomes a problem for the analyst when there are claims being asserted that are as defensible or appear to override or cancel out the claims of another.

When there is a perfect chain of title and the DOA gets all systems in alignment, everyone is making money and everyone is happy. When there is not a perfect chain of title, the importance of the DOA's role in making the right decisions cannot be understated. But really, why do some people get to make a claim and how are those claims supported or not supported by the laws that apply?

When we speak of "laws" here we are talking about statutes, government regulations and what's called common law – meaning decisions made by courts or other adjudicating bodies or commonly accepted historical practices that have or may set a precedent in how later questions concerning mineral ownership are interpreted in the absence clear direction from a statute. In the following sections of the paper we will discuss topics that deal with interpretations of the various state statutes, and applications of common law. Absent established company practices or direction on how to handle specific situations, the DOA should include the title attorney and other concerned parties (e.g., corporate landman, finance etc.) on resolving any questions which will require application of statutory provisions. Under the next section on Paying the Right Party, we will address one thing that may help and a couple things that can muddy the waters – marketable title acts, color of title and adverse possession statutes.

III. Paying the Right Party: Some Help for Establishing Title … and then Some Help that May Not Necessarily Be Helpful

Marketable Title and the Marketable Title Acts

Marketable title is a standard that title attorneys will consider when making judgments about what should be included as requirements for curative purposes. Marketable title says that there is a clear, unbroken chain of title from the first document in the record through the last document in the record. Therefore, A to B, B to C, C to D and so forth down to the present day owner, Z. Anyone with even a small amount of title experience knows that we are often not fortunate enough to find that clear, unbroken chain. Marketable title acts attempt to provide relief when there is a question as to traceable, unbroken ownership due to missing or improper conveyances in the past that may create a question of reliable title in the present.

Many states have enacted marketable title statutes, which provide that if an owner has a clear chain of title shown in the public records back to a *root of title*, such as a deed, for a specified period (usually 20 to 40 years), then that title is free from all interests that were recorded before the root of title.

The most controversial issue with respect to marketable title legislation is whether or not an exception should be made for mineral rights. The Uniform Marketable Title Act (UMTA)[9] does not make an exception for mineral rights. Reasoning that any major exclusion largely defeats the purpose of marketable title legislation by forcing the title examiner to search back for an indefinite period for claims falling under the exception. The UMTA, however, contains an optional provision, Section 7(5), for states that choose to exclude mineral rights from the interests cut off by the UMTA. The UMTA suggests adopting the Uniform Dormant Minerals Act, in addition to the UMTA, as an alternative way for states to deal with mineral interests.[10]

For purposes of this discussion, it is important to note that neither <u>Colorado</u> nor <u>Montana</u> has enacted a Marketable Record Title Act, while North Dakota and Wyoming have. However, mineral rights under the statutes are treated differently in each state.

<u>North Dakota</u> has enacted both a Marketable Title Act and a Dormant Minerals Act, which will be discussed later. The North Dakota *Marketable Record Title Act* makes no exceptions for oil, gas and other minerals, meaning mineral interests are subject to the same treatment as surface interests[11]. Under the ND Marketable Title Act (broken out by the author for ease of reading): "any person…

- …having the legal capacity to own real estate in this state,

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9 Uniform acts are those that are drafted at the request of multiple states or legal bodies by a "conference of commissioners" to provide language that can be adopted by all states on certain common topics that would allow for the same – or uniform treatment – everywhere. These acts concern topics that aren't under the control of the federal government. There is a Uniform Probate Act, a Uniform Commercial Code for handling business transactions, etc. Uniform acts are recommendations until a state adopts them. Each state is free to adopt the act as written, adopt the act with the state's own modifications, or reject the act altogether.

10 Uniform Marketable Title Act, drafted by the National Conference of Commissioners on Uniform State Laws, http://www.law.upenn.edu/bll/archives/ulc/fnact99/1990s/umta90.pdf

11 In Sickler v. Pope, the North Dakota Supreme Court addressed the Act in regards to mineral interests. In Pope, a surface owner attempted to use the North Dakota act to defeat a severed mineral interest. The North Dakota Supreme Court held that the surface owner, who had occupied the land and had granted oil and gas leases during the 20-year statutory period, had nevertheless not been in possession of the severed mineral estate and had therefore failed to meet the possession requirement of the North Dakota act.

- who has an unbroken chain of title to any interest in real estate by that person and that person's immediate or remote grantors
- under a deed of conveyance which has been recorded for a period of twenty years or longer, and
- is in possession of such real estate,

shall be deemed to have a marketable record title to such interest, subject only to such claims thereto and defects of title as are not extinguished or barred by …

- the application of the provisions of this chapter,
- instruments which have been recorded less than twenty years, and
- any encumbrances of record not barred by the statute of limitations."[12]

The question raised in regard to the North Dakota Marketable Title Act for a severed mineral interest is: what constitutes being "in possession" for purposes of the statute? As we will see under the section on adverse possession, being "in possession" of a severed mineral interest means that the minerals must be in the process of being extracted or developed. It is not clear if that same standard would be applied under the Marketable Title Act.

Wyoming on the other hand has adopted a Marketable Record Title Act that excludes mineral interests, meaning the Marketable Record Title Act does not apply to oil and gas interests. Additionally, Wyoming has not adopted a Dormant Minerals Act. Under the Wyoming Act (broken out by author for ease of reading), "Any person having …

- the legal capacity to own land in this state,
- who has an unbroken chain of title of record to any interest in land for forty (40) years or more, shall be deemed to have a marketable record title to such interest subject only to the matters stated in Wyoming Statutes Annotated §34-10-104.
- A person shall be deemed to have such an unbroken chain of title when the official public records disclose a conveyance or other title transaction of record not less than forty (40) years at the time the marketability is to be determined,
- which conveyance or other title transaction purports to create the interest,
    - either in the person claiming the interest, or
    - some other person from whom, by one (1) or more conveyances or other title transactions of record, the purported interest has become vested in the person claiming the interest,
    - so long as nothing appears of record, in either case, purporting to divest the claimant of his purported interest."[13]

Under section 34-10-108 of the Wyoming statutes, the legislature specifically excludes mineral interests from the Marketable Record Title Act: "Notwithstanding a failure to file a notice of claim, this act shall not be applied: … To bar or extinguish any title, estate or interest in and to any timber or any minerals

[12] North Dakota Century Code Annotated, §47-19.1-01.
[13] Wyoming Statutes Annotated, §34-10-103.

(including without limiting the generality of that term, oil, gas and other hydrocarbons) and any development, mining, production or other rights or easements related thereto or exercisable in connection therewith;…"[14]

Note that this exception is not limited to "severed" mineral rights which left a question as to whether the act excludes un-severed mineral rights from the effects of the statute. The Wyoming Bar Association addressed this question by adopting a title standard that provides that the exception applies only to mineral interests severed prior to the conclusion of the 40-year period following the potential root of title.[15]

For a more skeptical view on how helpful the marketable title statutes are there is an excerpt from an article written by Robert P. Hill and Richard Bate and published by the Rocky Mountain Mineral Law Foundation in 1992 included in the appendix that provides a different perspective.[16]

Color of Title

In the absence of a marketable title statute, what can be relied on if there is not a clear, unbroken chain of title from A to Z? One possible answer is a legal concept known as color of title. Color of title refers to a claim based on a land right, land warrant, land scrip or, sometimes, an irregular chain of title. In a color of title situation, a party has a piece of paper claiming to transfer title to him or her but that paper has defects. The defects generally mean that the claimant is "in possession" but the document is missing one or more of the essential elements needed to effectively grant title or that the document has not been properly registered in the public records.

For an instrument to be effective as color of title the following essential elements must be present:

- the document must claim to convey the property involved; and
- the language of the document must contain a description of the property to the degree of certainty necessary to determine the boundaries and identity of the property.

To further clarify the matter, a deed does not establish color of title if it is void for indefiniteness of description, meaning if the description is so bad that the land cannot be located, or if the lands are not described at all. The document can only apply to the land designated and described in the document. A deed that describes part of a tract does not create color of title to the part of the tract not described. The presence of an exception in a deed forbids the grantee to claim under color of title any of the land embraced in the exception. Color of title cannot be based on a mistake as to the property actually described in a deed but the mere fact that a mistake has been made in describing the land is not fatal.

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[14] Wyoming Statutes Annotated, §34-10-108.

[15] Patrick Garver and Patricia Winmill, "Medicine For Ailing Mineral Titles" An Assessment of the impact of Adverse Possession, Statutes of Limitation, and Dormant Mineral Acts," 29 RMMLF-INST 7 (1983)

[16] Rocky Mountain Mineral Law Institute 1992; MINERAL TITLE EXAMINATION III: Curing Title Defects; Robert P. Hill (Ray Quinney & Nebeker, Salt Lake City UT) and Richard Bate (Denver CO) copyright © 1992

Since color of title arises out of common law and not by statute, it would be available in any of the states referred to in this paper. If the issue exists because of defects in a document, the title attorney will provide recommendations on how the matter should be handled. However, if the issue arises after the title opinion has been rendered or as a result of an improperly registered, or unrecorded document it may come to the attention of the DOA first. The concept can be relied upon by a claimant to support a claim but if the DOA is presented with a document by a claimant that seems to suggest, but not clearly confirm ownership, the DOA needs to consult with legal counsel for further instructions. If it is determined that the elements of color of title exist it will require some type of curative and maybe even require a quiet title action in a court of law to resolve the ownership question. If royalty payments are already being made, the DOA will need to examine what other interests already receiving royalties may also be affected by the claim and take appropriate steps to suspend funds if advisable.

Color of title is often raised in adverse possession claims. If adverse possession is claimed under *color of title*, a person with a defective document describing a five acre tract will get the full five acres if they are successful. Conversely, if a person claims adverse possession under *claim of title* (possession unsupported by some kind of documentation),[17] they will get only what they actually physically possess, if successful.

Adverse Possession

With surface land, adverse possession occurs when a land owner of record ceases to occupy or otherwise concern himself with his property while someone else asserts ownership. Every state requires that the adverse possessor gain control by "open, notorious, exclusive, continuous and hostile" possession of the surface in some manner, usually by moving onto the land, paying taxes on it or engaging in overt acts exercising dominion over the surface of the land to the exclusion of anyone else.[18]

Some states have codified the law of adverse possession and provided for transfer of legal title to the adverse possessor after a stated period. There are often companion statutes that shorten the required period if the adverse possessor is in possession under color of title and has paid taxes; or which go so far as to perfect title in a person who has paid taxes on vacant lands solely under color of title.

Adverse possession of a severed mineral interest, however, cannot be established by mere adverse possession of the surface property. Because adverse possession requires actual possession *hostile* to claims of ownership by another, the severed mineral interest must be possessed in a manner that is hostile to other claimants' possession of the minerals. By nature, a severed mineral interest is owned separately from the surface. As a result, possession of the surface by the surface owner does not infringe on – nor is it hostile to – possession of the severed mineral interest lying below the surface. Tangible *working* of the mineral interest by or under the authority of the adverse possessor (e.g.,

[17] 3 Am Jur. 2d Adverse Possession §142, §130, §126

[18] William P. Pearce, Dormant Minerals and Reunification of Estates, Rights of Access, and Surface Use in Mineral Extraction Operations, Paper No. 3, Rocky Mtn. Min. L. Fdn. (2005).

development through drilling) must occur before possession for purposes of adverse possession is established.[19]

For example, Colorado case law provides that after a severance of a particular mineral estate, adverse possession of those minerals can occur only by continuous operations and production of oil and gas for the statutory period. This means that oil and or gas would actually need to be taken out of the land for a statutory period of time. The signing of an oil and gas lease does not constitute hostile possession for purposes of adverse possession.[20] In Calvat (see footnote 17) – a case involving adverse possession of the minerals by the surface owner – The Colorado Supreme Court in did not cite the statutory period for removal of minerals. The Court also held that to effectively adversely possess mineral interests, the surface owner could either physically remove the minerals or "exclude the lessee or grantee so that he cannot enter on the land to bore for oil and gas".

In Wyoming the general rule regarding adverse possession of minerals is that when the surface and mineral estates have been severed, possession of the surface by its owner cannot be adverse to the owner of the minerals, and that there can be no adverse possession of the severed mineral estate in the absence of mining operations.[21] There is not a statutory period established by Wyoming for mineral extraction to establish adverse possession.

Both Montana and North Dakota follow the rule that the surface owner must have "actual" possession of the mineral estate for a statutorily defined period of time in order to acquire the interest through adverse possession.[22] In the Sickler case the North Dakota Supreme Court held that occupying the surface of the land and signing an oil and gas lease is not sufficient to establish possession of the severed mineral estate lying under the land.

In Montana, a suit brought to establish possession must show that the plaintiff or an ancestor or predecessor in interest was in "possession" of the property for a period of five years before filing the suit to establish ownership.[23] [24]

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19 William P. Pearce, Dormant Minerals and Reunification of Estates, Rights of Access, and Surface Use in Mineral Extraction Operations, Paper No. 3, Rocky Mtn. Min. L. Fdn. (2005).

20 Calvat v. Juhan, 206 P.2d 600 (Colo. 1949) Here, the court stated that in order to accomplish effective adverse possession of minerals after severance, the surface owner must take actual physical possession of the minerals under the surface, or so exclude the mineral lessee or grantee that he could not enter on the land to bore for oil or gas. Additionally, the Colorado Supreme Court in Calvat held that color of title to a mineral estate does not merge with legal title to the surface estate. Therefore, possession with title of the surface estate is not constructive possession without title of the mineral estate.

21 Stowers v. Huntington Development & Gas Co., 4 Cir., 72 F.2d 969, 98 A.L.R. 536. The Supreme Court of Wyoming has cited Stowers in Town of Glenrock v. Abadie, 259 P. 2d 766 (Wyo. 1953). In Abadie, the Wyoming Supreme Court held that an adverse possession claim for mineral interests made by the surface owner regarding an *unsevered* mineral interest was valid in the absence of mining operations." [by the severed mineral owner].

22 Sickler v. Pope (326 N.W. 2d 86 (ND 1982), McGuiness v. Maynard (658 P.2d 1104 Mont. 1983)

23 Montana Code Annotated §70-10-401.

The statutory period for establishing adverse possession in North Dakota is ten years.[25] The Supreme Court of North Dakota has held that "The acquisition of the title to severed minerals by adverse possession requires the taking of possession of the minerals by drilling or conducting other mining activities". Determination of whether or not there has been an adverse use of the minerals is a question of fact[26] as opposed to a question of law, which means that there has to be actual evidence that the minerals have been extracted from the ground for ten years.

Keeping it in the Family – Establishing Title For Mineral Estates under Intestacy or Probate

Almost certainly, the most common problem requiring curative encountered by the DOA is when a mineral owner dies and has made no provision for the transfer of his or her minerals to heirs or devisees.[27] This isn't as likely to happen when the mineral owner also owns the surface. Once the minerals are severed, families are less likely to pay for probate when the minerals are not producing any income and therefore deemed to have uncertain value. Unfortunately, time is not on our side. It can be decades before the minerals suddenly reveal their financial potential. The deceased mineral owner, who is still the owner of record, may no longer be survived by his or her children or even grandchildren. The further removed in time from the record title owner's death, the more likely that the heirs are completely unaware the mineral interest even exists and the more difficult they will be to locate. It is a bit of irony that the advent of cars, trains and planes fueled by the oil industry has allowed the human population to put down roots far from their ancestral homes.

For establishing marketable title to minerals after the death of a mineral owner, the most ideal method is through the process of probate. Unprobated last wills and testaments ("LWT") provide the DOA some direction for establishing ownership but are not completely reliable. When an estate is probated, a judge and one or more attorneys plus the interested parties have the opportunity to examine all the evidence presumed to be available as to what the decedent intended to happen to his or her estate. *Proven LWTs* will take precedence over other documents or prior LWTs. When the reliable evidence is reviewed, the court will issue an order or decree that affirmatively names the party(ies) that now own the interest of the decedent. The probate court will authorize the personal representative to transfer title to the minerals to the devisees through a personal representative's deed.

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[24] The only cases in Montana involving adverse possession of minerals are mining cases, where actual possession was established by the act of operating the mine.

[25] North Dakota Century Code §47-06-03

[26] Burlington Northern, Inc. v. Hall, 322 N.W.2d 233 (N.D. 1982)

[27] An *heir* is a party who takes title to property from a deceased ancestor under intestate succession, and in the absence of a last will and testament; a *devisee* is a party who takes title to property from someone who has died (doesn't need to be an ancestor) under the terms of a last will and testament.

In the absence of probate or similar determination by a court,[28] reliance by a DOA on an LWT for division order purposes may be subject to attack by parties outside the LWT who claim an interest in the property by virtue of some type of relationship with the decedent. Having a signed division order protects the oil company as to the parties that have been recognized by the DOA under the LWT, but not as to any later claimants. Having a copy of the LWT along with an Affidavit of Death and Heirship <u>may</u> provide some additional assurance for the DOA as long as the affidavit is comprehensive and signed by a disinterested third party. In the face of late payment penalties provided by various state statutes, the oil company has to take some action to ensure timely payment. Whether to make payments on the basis of the unproven LWT or the affidavit of death and heirship becomes a business decision by the oil company based on an analysis of probable risk.[29]

When there is no LWT, the DOA gets some help from state statutes on intestate succession, which provide rules on who a decedent's property will go to and in what order.

In <u>Colorado</u> there are rules for intestate succession that apply before July 1, 1974[30] and other rules that apply after that date. <u>Wyoming</u> (1985), <u>Montana</u> (1993) and <u>North Dakota</u> (1973) underwent major repeals or adjustments to their rules for intestate succession in the years noted. The general rule is that a dead person cannot own property therefore the law recognizes the creation of an unmarketable interest in property in the heirs-to-be-determined upon the death of a mineral owner without an LWT. The rules of intestate succession *at the time of the decedent's death* will apply. Since following rules of intestate succession can be a little like trying to play three dimensional tic-tac-toe, tables for the various state rules have been provided in the appendix.[31]

But what happens if someone dies and the putative heirs or devisees disavow or refuse to take ownership of the decedent's mineral interest? The minerals are now considered unclaimed assets and are handled as follows:

<u>Colorado</u> – the personal representative appointed by the court to represent the estate of the decedent is required to reduce the mineral assets to cash and pay the balance from the sale of the assets to the state treasurer. The state treasurer must keep a record of the receipt of the cash payment for a period of twenty-one years and thereafter the funds become the property of the state of Colorado and are transferred to the state fund for public schools. If, during the twenty-one year period, any party who is

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[28] For a more detailed discussion on unprobated estates and handling curative for them, please refer to the discussion authored by Jeff Silver included in the Appendix.

[29] For a more detailed discussion of this issue, the use of affidavits of death and heirship, and how to conduct a business risk analysis refer to author's paper cited in footnote 1.

[30] Colorado enacted a new statute effective June 1, 2010 but the rules for intestate succession remain essentially unchanged.

[31] With thanks to the creator, Mark Tidwell, for permission to include this document. Please note: These documents are provided for informational purposes only. Questions of ownership through intestacy need to be addressed with an attorney licensed in the state where the property is located.

legally entitled to the funds establishes a bona fide claim for them, the state treasurer is required to disperse the funds, without interest, to that party.[32]

The Wyoming statutes do not specifically address the circumstances concerning a putative heir or devisee disavowing or refusing to take ownership of the decedent's mineral estate. The state would consider the minerals as unclaimed assets[33] which will be discussed in the sections following.

In Montana, an order is entered upon the final settlement of the estate for the personal representative to (1) sell all property belonging to the estate and pay the proceeds from the sale to the county treasurer for the county in which the estate is being probated; or (2) deliver a deed for the property to the state for sale at public auction after the lapse of one year. Proceeds from either sale are deposited in a private purpose trust fund held for five years. In the absence of a bona fide claim from an heir, the funds are escheated to the state after five years for the benefit of the Montana public school permanent fund.[34]

North Dakota provides that if there is no taker for the mineral interest, after exhausting the order of intestate succession, the interest passes to the state for the support of common schools. Further, the interest may be sold.[35]

Well, this has been somewhat helpful, but what if there is no personal representative appointed by the court in either Montana or Colorado to convert the mineral assets to cash? This brings us to the next topic – abandoned minerals.

When the Mineral Owner Forfeits His Minerals –
Abandoned Mineral Statutes, Unclaimed Property and Escheat

When it seems as if there is no clear avenue to establish record title ownership of severed mineral interests in an individual or entity who could be legally recognized as the next owner in the chain of title, there are other means by which these orphaned minerals can be provided a home. Some states try to help by enacting abandoned mineral statutes but in the absence of that, the minerals may need to be put in the care of a state-administered unclaimed property service or actually escheated to the state.

Abandoned Minerals Acts and the Forfeiture of Mineral Interests

Abandoned minerals and the statutes that deal with them address circumstances where the title to minerals is owned by a party who is either (1) deceased without heirs, (2) not locatable, or (3) otherwise fails to show any activity related to the mineral interest that would alert the public to that party's intent to continue to own the mineral interest.

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[32] Colorado Revised Statutes §15-12-914.
[33] Wyoming Statutes Annotated §2-12-101, 103 and 106
[34] Montana Code Annotated §72-14-204
[35] North Dakota Century Code§30.04-05.2-105

As we've stated before, prior to severance, minerals are deemed to be part of the surface; after severance, the surface and the minerals are treated as separate estates. Of the four states being considered only North Dakota has enacted a statute to deal with abandoned minerals, so for Colorado, Wyoming and Montana we need to take a quick look at common law.[36]

Common law holds that the owner of a severed mineral estate does not lose the right or the possession of his or her mineral interest by non-development or dormancy. It is not necessary to rerecord or to maintain current property records in order to preserve an ownership interest in minerals in a common law state.

Over time and after multiple conveyances or the division of property through death, a mineral interest may be divided into smaller and smaller interests with different owners. In addition, one or more mineral owners may become unlocatable or even difficult to identify. When mineral owners are missing or unidentified, problems are created for the oil company that wants to obtain lease rights to develop the mineral estate. The oil company may be liable to the missing or unknown owners if exploration proceeds without proper leases.[37]

Several states have attempted to resolve this problem by overriding common law through legislation – for us, most notably, North Dakota. Generally titled "abandoned or dormant mineral acts", these statutes provide forfeiture of the severed mineral interest to the surface owner if the severed mineral owner fails to develop the minerals within a specified time period – or at a minimum declare his or her intent to continue ownership of the minerals by a filing in the public record.

Because of the significant increase in drilling activity in North Dakota, the abandoned mineral statute, which has been relatively unused in the past, is becoming a major tool for surface owners to gain or increase a mineral interest in their property in hopes of cashing in on their share of the Bakken riches.

The "Termination of Mineral Interest Act"[38] in North Dakota provides that, in the absence of development, a severed mineral interest is considered abandoned as a matter of law if there is no indication in the public records, twenty years after the last recorded document concerning the interest, that the owner intends to continue claiming the interest. The filing of any document of record, by the severed mineral owner or his or her heirs, that contains a description of the minerals, is sufficient to restart the twenty year period. North Dakota provides that if there is no document (e.g., an oil and gas lease, change of address, etc.) relating to the minerals filed of record in a twenty year period – in other

[36] Common law is law that is created based on court decisions or long-established customary practices and not on legislation enacted by state or federal governments. Common law prevails in each state unless the state's legislature has adopted a law addressing a particular issue.

[37] Uniform Dormant Mineral Interests Act, National Conference of Commissioners on Uniform State Laws approved in 1986.

[38] Uniform Dormant Mineral Interests Act § 1, 7A Uniform Laws Annotated Pt. I (2002). N.D. Cent. Code §§ 38-18.1-01 to -08 (elec. 2007).

words if Charlie is still alive and still intends to claim the minerals in his name – the severed mineral owner can record a Statement of Claim. The Statement of Claim must contain the name and address of the mineral owner, a legal description of the land where the minerals are located, and a statement as to the type of mineral interest being claimed (e.g., minerals, perpetual royalty, etc.).[39]

A surface owner who wants to claim minerals under the statute needs to follow certain publication requirements posting notice of his or her intent to claim the "abandoned minerals" in the local newspaper for successive weeks. He or she must also mail a notice of intent to the last mineral owner of record if an address for that person is provided in the public records. If no challenge to the surface owner's claim is received, the surface owner can petition the court to issue a determination of abandoned minerals vesting title in the surface owner.

A couple of things to note: (1) only the surface owner can claim abandoned minerals; and (2) the title to the minerals does not vest in the surface owner until he or she is adjudged to own them. As long as no such claim is made by the surface owner, the oil company can lease from the severed mineral owner in year twenty-five and by virtue of recording the oil and gas lease the twenty year period is reset anew.

Unclaimed Property Services

Many states provide a service that allows for the filing of (1) unclaimed property, or (2) cash from the sale of unclaimed property, or (3) proceeds from the economic development of the property (e.g., revenues from well production) with an administrative body in the state. Generally, the property or the proceeds are placed in a fund for a period of time during which bona fide claimants can redeem the property or proceeds. The entity requesting such service must have undertaken sufficient due diligence to locate the party(ies) legally entitled to the interest before the state will accept the property for administration. We have already addressed this service in the context of mineral interests that are disavowed by putative devisees in the prior section. The service is also available when mineral owners or their heirs or devisees cannot be determined or cannot be found and the minerals are the subject of production activities (e.g., leasing, drilling, extraction, etc.).

We need to distinguish between the mineral interests themselves and revenues generated through production from those mineral interests. There are questions as to how the various states would take "possession" of the minerals themselves under unclaimed property statues that go beyond the scope of this paper so such situations will not be addressed here. Suffice it to say that circumstances that would cause a state to take actual possession of an unclaimed mineral interest are generally discussed under the section on escheat and will require the involvement of legal counsel conversant in the specific procedures of the state where such mineral interests are located.

More relevant to the interest of the DOA, revenues generated from the mineral interest in which an owner is either unable to be determined or cannot be located are another matter in which the state is

[39] A statement of claim example for has been included in the appendix.

more than happy to be involved. The end result is that after certain procedures are followed and periods of time have elapsed (varying from state to state), the revenues from the minerals will be declared property of the state.[40]

In Colorado, revenues attributable to production from an unclaimed mineral interest for a period of five years are presumed abandoned and are paid to the Colorado State Treasurer.[41] For leasing purposes, Colorado expressly provides for a trustee to be appointed by either the district court or a probate court administering the lands which include the unclaimed minerals. After the court enters an order appointing a trustee, whose authority extends to entering into oil and gas leases, the trustee negotiates and executes the lease. Bonuses and revenues attributable to the trust interest are payable to the trustee until such time as the property is claimed or is determined to be abandoned and is delivered to the state.[42]

Revenues from producing, unclaimed minerals in Wyoming attributable to an owner who is not known, or cannot be located, must be paid into an escrow account in a federally insured bank or savings and loan institution in Wyoming. Responsibility then shifts to the escrow agent for a three year period before turning the funds over to the State Treasurer as unclaimed.[43] Thereafter, the funds are deemed to be abandoned and subject to the custody of the state. There are other conditions contained in the statute that may apply in certain circumstances so the statute should be reviewed in full before any reliance on it is made by the DOA.

What appears unclear from the Wyoming code is how an unclaimed mineral interest is leased for oil and gas purposes. While the interest can clearly be force pooled into a spacing unit, many oil companies would not want to drill if the unclaimed interest comprises a significant portion of the drillsite acreage such that an oil company's economic threshold for drilling cannot be met. The author surmises that where the interest has been placed in escrow, the escrow agent may be able to sign an oil and gas lease in such circumstances. If a DOA is confronted with this particular situation in Wyoming, whether the unclaimed interest is in escrow or not, it would be prudent to consult a Wyoming oil and gas attorney on the matter.

Under the Montana Uniform Unclaimed Property Act, a period of five years with no claim presumes abandonment. The *definitions section* of the Act specifically addresses minerals and mineral proceeds. During this five year period the property is to be under the accountability of a "holder".[44] Once the five

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[40] Disposition of unclaimed assets.
   a. Colorado – Probate Code and Unclaimed Property Act, Colorado Revised Statutes §15-12-914
   b. Wyoming – Payment for production under Wyoming Statutes Annotated Sec. 30-5-301 et. Seq.
   c. Montana – Payment of royalties under Montana Code Annotated §82-10-104 et. Seq.
   d. North Dakota – Uniform Unclaimed Property Act , North Dakota Century Code §47-30.1 et. Seq.

[41] Colorado Revised Statutes §38-13-103

[42] Colorado Revised Statutes §38-43-101

[43] Wyoming Statutes Annotated §34-24-117

[44] "*holder* means a person obligated to hold for the account of, or deliver or pay to the owner, property that is subject to this part" Montana Code Anntated §70-9-802

years has elapsed, the property is presumed abandoned; revenues from an abandoned mineral interest must be delivered to the Montana Department of Revenue.

Montana also provides for judicial creation of a trust through the district court of the county in which the tract is located. Action to have a trust created may be brought by "any person who owns an interest in minerals underlying a tract of land" in which the unleased minerals are also located. It is assumed that this would include an oil company who owned leases in the same tract. Either the clerk of court or, if the clerk of court declines to act as trustee, the department of revenue is appointed by the court as trustee and also authorized to execute and deliver an oil and gas lease, ratification, division order, or any other related document on the terms and conditions as the court may approve. Again, upon a determination of abandoned status, the assets of the trust would then be delivered to the state.[45]

We have already seen how abandoned minerals are handled under the North Dakota Abandoned Mineral Statute. North Dakota makes it clear that it wants to avoid taking title to unclaimed property if there is any way that can be achieved. The preference is clearly for the surface owner to take title rather than the state. If the requisite amount of time has not elapsed to permit a surface owner to perfect a claim of abandonment, the state statutes provide for appointment of a trustee to administer an unclaimed mineral interest while the clock runs its course.

When the person's whereabouts "…cannot be reasonably ascertained"[46] the district court of the county in which the mineral interest is located can be petitioned to declare a trust in favor of a missing mineral owner. The matter can be brought to the district court by another mineral owner in the tract, or a party who owns a leasehold or royalty interest in the tract of land – such as an oil company. Once the district court is satisfied that diligent efforts to locate the missing party have been properly undertaken and the formation of the trust is in the best interests of the absentee owner, the district court will appoint the county treasurer to act as trustee. Powers granted to the treasurer include executing an oil and gas lease, ratification, division order or any related document on conditions that the district court approves. The trustee is authorized to receive any revenues generated by property held in the trust; but such property and its revenues are subject to the right of the surface owner to claim the minerals under the Abandoned Mineral Statute and also subject to the state laws governing abandoned property.

Absent the appointment of a trustee as discussed above, revenues resulting from production in North Dakota (referred to as "mineral proceeds") that cannot be paid due to unknown or unlocated owners, fall under the statutory Uniform Unclaimed Property Act.[47] The time period during which such revenues must be held is three years, after which the proceeds are classified as abandoned. When presumed abandoned, those proceeds must be both reported and turned over to the North Dakota administrator of the state Abandoned Property Office.

[45] Montana Code Annotated §82-1-302
[46] North Dakota Century Code §38-13.1-01
[47] North Dakota Century Code §47-30.1

In the absence of a court-appointed trustee, North Dakota and Montana – unlike Wyoming and Colorado – do not provide an unclaimed property service where either a governmental body or a third party escrow agent is designated as the holder of the property until abandonment is officially determined. Both Montana and North Dakota leave the responsibility for managing proceeds during the statutory redemption period to the party issuing the proceeds – in the case of royalty payments, the oil company.

Before we leave this section it is important for the DOA to note that each state has its own specific reporting requirements and deadlines determining when information and revenues are to be delivered. Some contain fairly stiff penalties for failure to comply. Montana expressly requires an annual report be provided by the *holder* of the property on November 1 of each year, covering the twelve months from July 1 of the preceding year to July 1 of the report year for all abandoned property.[48] The statute provides directions on what information is to be contained in the report. It is assumed that if an oil company is the "holder" under the definition of the Montana statute, by virtue of placing such revenues in a suspense fund, the oil company is responsible for this reporting requirement. It should be noted that the statute also provides for a penalty of a $1000 per day for each day the report is not timely filed.

If oversight for dealing with these payment issues falls to the Division Order group, a copy of the reporting requirements should be obtained for the state in which the revenues have been generated and used as a check list for administration of the properties. The actual conversion of these unclaimed properties and funds to state use and ownership after appropriate time periods have elapsed is referred to as escheat.

Escheat – When the State Takes Title

Generally "escheat" signifies a reversion of property to the state in the absence of an individual competent to inherit or claim title. The word "escheat," merely indicates the preferable right of the state to an estate *left vacant* without anyone in existence able to make claim therefore.[49]

For real property interests, both mineral and surface, there is a clear preference to avoid determining that the interest has been left vacant. The laws governing intestate succession and abandoned minerals are attempts to find someone other than the state to take title. Even in the event of a mineral owner who can't be located, the next step would be to find a family member of that mineral owner who can inherit on the presumption that the record mineral owner can't be found because he or she is no longer living. If there is no "taker" or family line with a person still living and competent to inherit the interest then, and only then, will the interest pass to the state.

As we have seen in North Dakota, the state has gone one step further by enacting a statute to deal with "an estate left vacant" by providing a means whereby the current surface owner can pursue a court

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[48] Montana Code Annotated §70-9-802 & 803 & 808
[49] Danks v. Herrmann, 94 Colo. 546, 31 P.2d 912 (1934)

determination that the mineral interests are in fact abandoned and thus become the property of that surface owner. [50]

It is common practice in the Rocky Mountain States to require court determinations that the mineral interests are abandoned under the terms of the relevant state statute before a declaration that the interests are escheated to the state is issued. It should also be noted that some states make distinctions for potential claimants whose last known domicile was a state other than the state where the abandoned interest is located recognizing the possibility that the last known state of domicile may also have a claim on the escheated property.[51]

All of the code citations provided in the footnotes under the section on unclaimed property services will refer the reader to the various states' statutes on escheat. Since this is a matter involving court determination it is generally unlikely to involve the DOA. However the DOA may be the most likely person to bring the unclaimed revenues and their associated mineral interests to the attention of the legal department at such time as the statutory periods for *holding and reporting* the revenues is about to elapse. The DOA should be aware that this final step is available when all other attempts to establish ownership have been unsuccessful.

IV. Paying the Right Amount: The Minerals are Firmly in Hand but We're Just Not Sure What We Have

In this section, we will discuss the Duhig rule, intent clauses, and stipulations of interest. All create opportunities to unmistakably define interests when there is a question as to what someone really owns − or to create such further confusion that one despairs at ever attaining clarity. And finally, we'll touch on the known, locatable but unleased mineral owner, who still has to be paid.

The Duhig Rule

The Duhig rule is an objective test traditionally applied by courts to resolve confusion over ambiguous conveyances concerning ownership of mineral interests.

Generally the Duhig rule is applied in situations where a party making a conveyance of a mineral interest owns only part of the mineral estate, while the remainder of the mineral interest is held by one or more other parties. In a simple example, Alice owns the surface of a tract of land and half the minerals. Charlie owns the remaining half of the minerals by virtue of a mineral conveyance to Charlie from Alice five years earlier. Yesterday Alice conveyed the land to Betty, "reserving 50% of the minerals". Since Alice doesn't own sufficient interest to both reserve 50% of the minerals to herself and convey 50% of the minerals to Betty, what did Alice really convey? And what does Betty think she got? In applying the Duhig rule, Alice would be left with nothing and Betty would receive 50% of the minerals plus the surface. This interpretation may be what Alice intended or Alice may have intended to convey only the

[50] North Dakota Century Code §38-18.1 et. seq
[51] Wyoming Statutes Annotated §34-24-117

surface to Betty and keep her mineral interest to herself. According to the Duhig rule, Alice is left without any mineral interest.

The Duhig rule says that Betty has the right to interpret the document as conveying to her the surface plus 50% of the minerals --- recognizing that Alice is reserving 50% of the minerals herself. The justification for the Duhig rule is that the deed on its face claims to convey the full mineral interest, less Alice's 50% reservation. Therefore, the grant of a 50% mineral interest must be satisfied if possible. Betty would receive the 50% mineral interest bargained for, while Alice's reservation merely protected the interest previously conveyed to Charlie. Alice would retain nothing. The burden is placed on Alice as the grantor to correctly state her intentions in the conveyancing document. Betty is presumed to be unaware of the 50% mineral interest already owned by Charlie.

While most producing states have adopted the Duhig rule in some fashion, its application tends to vary from state to state depending on certain factors. For our discussion, the Duhig rule has been adopted in North Dakota, Wyoming, and Colorado.

The North Dakota Mineral Title Standards adopts the Duhig rule with the following language: "Where full effect cannot be given both to the interest conveyed in the granting clause of a warranty deed and to the interest reserved therein because of a previous outstanding interest in a third party, priority will be given to the interest conveyed in the granting clause rather than to the interest reserved until full effect is given to the interest conveyed."[52]

North Dakota Title Standards also recognizes that when a deed contains language stating the conveyance is "subject to prior reservations" the Duhig rule would not apply and the grantor effectively reserves the interest he claims.[53] In the Alice and Betty example, if Alice had made the following statement in her warranty deed: "…reserving to the grantor (Alice) 50% of all the minerals, and also reserving all prior mineral reservations of record (i.e., Charlie)…" Alice would have retained her mineral interest and Betty would receive only the surface. The language that reserves *prior reservations of record* places Betty on notice that there are other mineral reservations and she needs to review the documents of record before she knows whether any minerals are coming to her.

Generally, the Duhig rule is only applied in conjunction with a warranty deed. However some states, including North Dakota, have found that a warranty clause is not necessary for the Duhig rule to be applied if the deed is claiming to convey a definite interest in the property.[54] [55] [56]

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52 North Dakota Mineral Title Standards §3-07

53 North Dakota Mineral Title Standards §17-06

54 Kuntz, *the Law of Oil and Gas*, section 14.5.

55 The North Dakota Supreme Court found that "The key question is, not what the grantor purported to retain for himself, but what he purported to give the grantee. If he undertook to convey half the minerals and had the power to do so, he should be held to his undertaking." Miller v. Kloeckner, 600 N.W. 2d 885 (N.D. 1999).

56 However, the North Dakota Supreme Court has also refused to follow Duhig when the grantee had actual notice of the outstanding mineral interest. Gilbertson v. Charlson, 301 N.W. 2d 144 (N.D. 1981).

Courts in Colorado have been reluctant to specifically apply the Duhig rule. The Colorado Supreme Court has expressed reservations about the logic of the Duhig rule, but has not rejected its use outright.[57] In one case, the Colorado Supreme Court overturned a lower court decision with a holding by the Supreme Court that is consistent with a Duhig analysis – even though the Supreme Court said they were not relying on Duhig in that case. The Supreme Court relied on the unambiguous terms of the deed and found that the grantor's reservation was invalid. In that case, the lower court found that the warranty clause in the deed, which excepts "any and all other items and agreements of record," put the grantee on notice of prior reservations. The Supreme Court, however, found that since the actual interest conveyed by the deed was within the power of the grantor to convey, the grantee's knowledge of a prior reservation did not diminish the interest conveyed by the granting clause of the deed. [58]

Wyoming generally applies the Duhig rule; however, there is a case in which the Wyoming Supreme Court refused to apply it in a situation involving a co-tenant.[59]

Montana has not adopted the Duhig rule. However, case law in Montana indicates that courts there follow a legal doctrine called *estoppel by deed* which forms the basis of the Duhig rule as it has been adopted in other states.

Essentially, in these four states the Duhig rule, or some variation of the concept, will apply in most instances. As we've seen however, it is uncertain how courts in Colorado and Wyoming may choose to modify it or apply the rule in the future. Widely cited legal periodicals[60] have raised questions as to the logic and fairness of the Duhig rule so there may be further erosions on the application of the Duhig rule as time passes. Because of the uncertainty involved with the application of the Duhig rule, clarity in drafting language for documents or curative that clarifies uncertain language should be used to avoid confusion and remove any question as to intent of the party conveying the property interest.

The reason the Duhig rule discussion is important for the DOA is that the rule provides a very good example of why it is important to follow the TO attorney's recommendations on curing title. It is often out of circumstances created by the Duhig rule that the attorney makes specific recommendations on how to cure title to make certain that conflicting claims are properly resolved.

Intent Clauses

Intent clauses are often included in a deed in order to clear up any confusion that may be caused by reading the granting clause alone. For example, "Alice hereby grants to Betty all right title and interest in and to the described lands and reserves a 50% mineral interest in herself." As we saw in the

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[57] O'Brien v. Village Land Co., 794 P.2d 246 (Colo. 1990)

[58] O'Brien v. Village Land Co., 794 P.2d 246, 249-251 (Colo. 1990).

[59] Gilstrap v. June Eisele Warren Trust, 106 P.3d 858 (Wyo. 2005)

[60] William Ellis, *Rethinking the Duhig Doctrine,* 28 Rocky Mtn.Min.L.Inst. 947 (1982).

discussion under the Duhig Rule, Alice may have created a problem for herself with this language. One way to avoid this uncertainty is for Alice to include an *intent clause* stating specifically what she means by the language in the granting clause. If Alice had added the following statement: "Alice specifically intends to reserve 50% of the minerals to herself, in addition to any previously conveyed or reserved mineral interest" she might have protected her interest. It would have been even better if Alice had said something like "Alice intends to convey only the surface to Betty and no mineral interests are conveyed by this deed".

Where possible, an intent clause should be read with the granting clause. It is important to note that the intent clause will take precedence over the granting language in some circumstances. This means that if there is an ambiguity between the granting clause and the intent clause, a court is most likely going to follow the intent clause on the grounds that Alice added that language to make a clear statement as to her intent.

One common example of a granting clause and an intent clause in agreement is where the granting clause in a mineral deed is expressed as "80/160th mineral interest" and the deed goes on to state that "it is the intent of the grantor to convey 80 net mineral acres." This language provides a clear expression of the grantor's intent as long as the lands described actually contain 160 acres.

A problem is created if the land contains more or less than 160 acres. It's understand that the fraction 80/160ths can be read to mean 80 net acres out of 160 gross acres, it can also be read as 50% interest in the lands described. Using the Alice and Betty example again, if the land being conveyed contains 156.5 acres[61] then multiplying 156.5 by 50% should mean that Alice is conveying Betty 78.25 acres and retaining 78.25 acres for herself. But if Alice has also included an intent clause that says "Alice intends to convey 80.00 acres to Betty" Alice has given Betty 80 acres and is left with 76.5 acres for herself. Hopefully that's what Alice wanted.

The inclusion of intent clauses in a document is part of the actual drafting of the document and intent clauses can be found in all states. It should be noted that document drafters in North Dakota in particular have a predilection for using intent clauses. Properly drafted intent clauses can be useful for curing some types of title ambiguities.

Stipulations of Interest, Declarations of Interest and Quiet Title

What happens when there are a number of parties that have conveyed property back and forth in a series of individual transactions ultimately creating complete confusion in the title? What happens if a number of parties own interests along either side of a river and the river shifts its course? These are just two examples of situations in which a stipulation of interest or a declaration of interest may be used to clear-up any questions as to who owns what.

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[61] For example: Lots 1 [39.00 ac] and 2 [39.25 ac], S½NE¼

Declarations of interest can be helpful when everyone involved is in agreement on what the various parties own but documents of record are ambiguous on that question. As long as one possible interpretation of the ambiguous language is consistent with the understanding of the parties, the declaration of interest clarifies the parties' intent for the benefit of third parties. So, going back to Alice, Betty and Charlie -- if an oil company wants to drill on the tract in which these three people have an interest and Alice reserved "50% of the mineral plus all prior reservations" in her original conveyance to Betty, the three parties can sign a recordable document declaring that their interests are: Alice - 50% of the minerals, Charlie - 50% of the minerals and Betty – the surface. Since an interpretation of the documents of record support that declaration, any confusion as to each party's interest should be eliminated.

This won't work though if there is no way to interpret the various documents of record to support what everyone in the group believes they have. As long as everyone in the group is in agreement – and the operative words here are "EVERYONE in the group" -- all parties can execute a recordable stipulation of interest containing language of grant and cross conveyance.

> *NOW THEREFORE, we, the below named parties, do hereby agree that all the oil, gas and other minerals underlying the above described lands are owned by the following parties to this agreement in the proportions set forth below:*
>
> ***THE PARTIES HERETO DO GRANT, QUIT CLAIM AND CONVEY UNTO THEMSELVES AND TO EACH OTHER** such interest as necessary to create the undivided interest set opposite the name of each of said owners in and to the interest herein (emphasis added).*[62]

These documents can be used for curative purposes in any of the four states we're discussing but it is absolutely imperative that if the interests in the record cannot be reasonably interpreted to achieve the understanding of the parties as to what they own, a stipulation with words of grant and cross conveyance, not a declaration, should be used to remedy the problem. A declaration will not get the job done. It cannot be understated that everyone whose interest is in question must execute the stipulation in order for it to be effective. Stipulations executed by only some of the parties are fruitless.[63]

There are two other ways this issue can be resolved. One is to create a corrective deed for every deed in the chain that contributes to the confusion and record them in the proper order to bring about the desired outcome. The second is to file suit to *quiet title*.

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[62] A full example of a stipulation of interest has been included as Appendix F.

[63] It should be noted that a stipulation of interest cannot be used to clarify record title among working interest owners in federal oil and gas leases since the Bureau of Land Management will not recognize conveyances in this form. If working interest owners use a stipulation of interest for cross conveying ownership in federal leases in the county records, the working interest parties will need to file a series of assignments on the approved federal form to achieve the same effect in the BLM records.

We earlier posed the example of parties owning interests along both sides of a river that changes its course. In Colorado, parties on either side of a navigable river are considered to own their property to the centerline of the river. For example, Marcy lives on one side of the Colorado River on a tract of land described by metes and bounds to account for the river and David lives on the opposite side in a similarly described tract. At the time they purchased their properties the centerline of the river divided their properties exactly in half. Last year a survey was done by an oil company for a drillsite location that will involve Marcy's and David's lands. The survey shows that the river has moved the equivalent of ten acres to the west – closer to David's house; and equally further from Marcy's house on the opposite side. Under Colorado law, Marcy has gained ten acres and David has lost ten acres. This is a fairly common occurrence along river banks. The title attorney says "get a stipulation of interest reflecting the new ownership". The chances that David is going to willingly sign the stipulation without an argument are doubtful. If ALL the parties are unwilling to sign a stipulation acknowledging the changes caused by the river – or in the alternative, agree to be treated, for the purpose of oil and gas revenue calculations, as if the river never moved, the only option is going to be resolution through a quiet title action

Paying the Known, Locatable but Unleased Mineral Owner – the Force Pooling Provisions

One last issue to address in respect to determining *the right interest to be paid* is the known, locatable but unleased mineral owner – that last holdout from the leasing play. Where those interests are not so large as to discourage a company from drilling at all, an oil company can force-pool the interests that are unleased. All four of the states have enacted force pooling statutes that permit an oil operator to "force" an unleased mineral owner into the spacing unit or pool for a well.

<u>Colorado</u>[64] provides that in the absence of voluntary pooling, an "interested party" may apply to the Colorado Oil and Gas Conservation Commission for an order to pool all non-participating interests in the drilling unit for a well. Pooling orders are only entered after proper notice to the parties and a hearing. Like the other three states, Colorado requires that the conditions of the force pooling order shall be just and reasonable and "afford to the owner of each tract or interest in the drilling unit the opportunity to recover or receive, without unnecessary expense, his just and equitable share".[65] It should be noted that the commission will not consider issuing an order over the objection of a non-leased mineral owner, unless the commission is furnished evidence that the mineral owner was provided a "reasonable" offer to lease on terms that are currently prevailing in the area as well as an opportunity to participate that included a written estimate of the mineral owner's share of the drilling and completion cost of the well, the location and objective depth of the well, and the estimated spud date for the well.

The non-consenting mineral owner is entitled to receive her share of production attributable to her interest after the consenting parties have recovered from production[66] (1) 100% of the costs of surface equipment beyond the wellhead connections plus the cost of operating the well commencing with first

[64] Colorado Revised Statutes §34-60-116(6)

[65] Colorado Revised Statutes §34-60-116(7)(b)

[66] Excluding any noncost-bearing obligations (e.g., royalties, etc.)

production and continuing until the operator has recovered such costs; and (2a) 200% of that portion of the costs and expenses of staking, well-site preparation, rights of way, rigging, and drilling operations (broadly defined) minus any cash contributions received by the working interest owners and (2b) 200% of the non-consenting party's portion of the cost of equipment in the well, including wellhead connections.

During the recovery period, the non-consenting mineral owner is entitled to receive a landowner's royalty equal to 12.5% until the consenting owners have recovered from the 87.5% of what would have been the non-consenting owner's proportionate share of production, the costs and penalties described above. Thereafter, the non-consenting owner's royalty interest reverts to a working interest. Also during the cost recovery period, the operator is required to provide the non-consenting party with a monthly statement showing how much the well produced and the extent of costs recovered.

In order to force pool a party who has declined to lease or participate as a working interest owner in a drilling unit in Wyoming,[67] the operator is required to petition the Wyoming Oil and Gas Conservation Commission for a hearing to act on the matter. The proper notices must be sent to the parties that are affected by the outcome of the hearing to allow them to appear at the hearing. If the commission approves the petition for force pooling, an order is issued containing "conditions that are just and reasonable" in the opinion of the commission. The force pooled party is then considered a non-consenting mineral owner.

The non-consenting mineral owner is entitled to receive her share of the production attributable to her interest after the consenting parties have recovered (1) 100% of the non-consenting party's share of the cost of newly acquired surface equipment plus the costs of operations of the well from first production until the end of the penalty recovery period; and (2) "up to 300%" of the portion of the costs and expenses of drilling operations (which are broadly defined) that would have been charged to the non-participating interest owner if she had participated in the drilling of the well.

Unlike Colorado, Montana and North Dakota, Wyoming does not appear to provide for any statutory royalty payment to the non-consenting mineral owner during the cost recovery period.

The Montana[68] statute provides that the Board of Oil and Gas Conservation may, upon the application of an "interested person" who owns an interest in the underlying oil and gas, enter an order pooling all interests in the spacing unit for a well if there has been an unsuccessful, good faith attempt by the applicant to achieve voluntary pooling. Like the other states, Montana requires that the conditions of the order be "just and reasonable" and afford the owner of each tract the opportunity to recover, without unnecessary expense, a "just and equitable share" of the oil or gas produced

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[67] Wyoming Statutes Annotated 1977 §30-5-109(f)-(i)

[68] Montana Statutes Annotated §82-11-202

If an owner refuses to contribute its share of the cost of operations the order will provide for the payment of the costs attributable to the non-consenting party to be recovered from that party's interest in the production, excluding any royalty obligations owed by consenting parties. The Board broadly defines what costs may be recovered and reserves the authority to settle any cost disputes. The order may allow for the consenting parties to receive all production from the well until such parties have recovered all their costs plus: (1) 100% of the non-consenting party's share of the costs of newly acquired surface equipment beyond the wellhead connections (broadly defined) and the costs of operation of the well commencing with first production until the costs have been recovered; and (2a) 200% of the non-consenting party's share of the costs and expenses of preparing the site and drilling the well (broadly defined) after deducting any cash contributions plus (2b) 200% of the costs of equipment in the well including wellhead connections.

During the cost recovery period, the non-consenting owner is entitled to receive a landowner royalty equal to 12.5% of the non-consenting owner's proportionate share of production from the unit.

North Dakota, like the other states provides for forced pooling of unleased mineral interests.[69] In the absence of voluntary pooling, the North Dakota Industrial Conservation Commission can issue an order, following notice to affected parties and a hearing, to force the pooling of all interests in the spacing unit. The application for the hearing can be submitted by an "interested person". Like the other three states, North Dakota requires that the conditions of the order must be "just and reasonable" allowing the owner of each tract to recover, without unnecessary expense, the owner's "just and equitable share".

Any unleased mineral interest that is pooled by virtue of the statute before August 1, 2009 is entitled to a cost-free royalty interest equal to "the acreage-weighted average royalty interest of the leased tracts" within the unit, but in no event less than a 12.5% royalty interest. After July 31, 2009, the unleased mineral owner is entitled to (1) the same cost-free royalty interest as pre-August 1, 2009; or (2) at the operator's election, a cost free royalty interest of 16%.

The difficulty with the North Dakota royalty based on the "acreage weighted average royalty interest of the leased tracts" is that tracts leased after the spud date or post-establishment of production will change the acreage weighted average. This forces the operator into the unhappy prospect of frequently recalculating the unleased mineral owners' statutory royalty every time another oil and gas lease is taken.

The North Dakota statute grants the consenting parties a lien on the share of the production attributable to the non-consenting mineral owner's interest to cover payment of the non-consenting party's share of expenses. Production subject to the lien is to be sold and the proceeds applied to payment of the expenses secured by the lien. In addition, the paying parties are allowed to recover a risk penalty equal to (1) if the non-participating party's interest derives from a lease or contract for development (e.g. a joint operating agreement, etc.), the penalty is 200% of the non-participating

[69] North Dakota Century Code§38-08-08

owner's share of "reasonable actual costs of drilling and completing the well" exclusive of any royalty or overriding royalty; or (2) if the non-participating interest is <u>an unleased mineral interest, the penalty is equal to 50% of</u> "reasonable actual costs of drilling and completing the well" exclusive of any statutory royalty.

The application of the risk penalty in North Dakota is not automatic as to the unleased mineral owner and the operator must petition the NDICC for a hearing on the matter. In order to have the risk penalty applied, the operator must be able to show that it made an unsuccessful, good-faith effort to obtain an oil and gas lease or to have the unleased mineral owner participate in the well. Further, the operator must notify the unleased mineral owner in writing of its intent to file a petition for a hearing so that the mineral owner can object to the operator's petition.

V. Paying on Time: "Gotcha" – The Late Payment Penalties

In <u>Colorado</u>, an oil operator must begin royalty payments to parties entitled to receive them no later than six months after the month in which production was achieved. Thereafter, payments are to be made on a monthly basis no later than sixty days after production for oil and ninety days after production for gas. Interestingly, Colorado does allow for the parties to a lease to enter into an agreement for a different payment schedule than that provided under the Colorado Revised Statutes. [70]

If the operator fails to pay on time under either the statute or the contractual obligation between the parties, the operator is obliged to pay simple interest on the amount that has not been timely paid. Interest is calculated at two times the interest rate set by the Kansas City Federal Reserve Bank on the first day of the year in which payment should have been made.

The non-payment penalty is waived if (1) the mineral owner does not confirm its interest in writing upon a reasonable request by the operator (payor); (2) if there is litigation whose outcome may affect the distribution of payments; (3) if there is reasonable doubt as to the payee's identity or location; or (4) if title to the interest in the proceeds is unclear.

<u>Wyoming</u>[71] payment requirements are the same as Colorado except that Wyoming doesn't make a distinction for gas. It does, however, allow the parties to agree on a different payment schedule through the execution of a valid contract. Unlike Colorado, the Wyoming late payment penalty is a stiff 18% per annum beginning on the date the payment should have been made. Parties seeking remedy for an operator's failure to pay can bring suit in the district court for the county in which the well is located and the prevailing party in the lawsuit is allowed to recover the cost of the court proceedings.

[70] Colorado Revised Statutes §34-60-118.5

[71] Wyoming Statutes Annotated §30-5-301 - §30-5-6305

Of the four states, Montana has the shortest period in which payments must begin. Under Montana statutes[72] the operator has to begin making payments for proceeds from an oil or gas well within 120 days[73] after the initial production is marketed (as opposed to "produced" as used in CO and WY); and monthly thereafter no later than 60 days after production for oil and 90 days after production for gas.

Failure to pay on time results in an assessment of interest at the highest rate of interest authorized under the Montana Code Annotated §31-1-107 but not to exceed: (1) fifteen percent; or (2) an amount that is 6 percentage points above the prime rate.[74]

Montana notes that the payment statutes do not apply when (1) the royalty owner has elected to take its proportionate share of production in kind (Alice is having her oil delivered in barrels to her front porch weekly), or (2) there is a dispute as to the title of the minerals or as to the payee's entitlement to receive royalty payments where the outcome would affect the distribution of the royalties.

Montana mirrors the Wyoming statute in providing for suit in the district court in the event of a dispute and recovery of court costs by the prevailing party.

North Dakota has set their payment requirement at 150 days after the oil or gas is "classified as marketable" or, as to unleased mineral owners, 150 days from the start of production.

North Dakota is somewhat unique because, in addition to a monetary penalty, the North Dakota statute **allows for the cancellation of an oil and gas lease for non-payment of royalties** when the court decides "the equities of the case require cancellation." And, there is legal precedent in North Dakota for an oil and gas lease being cancelled for late payment of royalties[75]. In the absence of cancellation the interest penalty imposed is 18% per annum on the unpaid amount. If this interest is payable to school or university mineral owners, the commissioners of those institutions are allowed to negotiate an interest rate of prime[76] plus six percent as long as the rate does not exceed 18% per annum.

Like the other three states, there are exceptions. In North Dakota, the penalties do not apply where the mineral owner is taking its share of production in kind; where title of the mineral owner is in dispute; or where the operator, having engaged in reasonable inquiry, has failed to locate the mineral owner.

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72 Montana Code Annotated 2009 §82-10-103

73 It should be noted that 120 days does not equate to 4 months since calendar months have an unequal number of days. The DOA will need to count the calendar days to determine when the payment must be made.

74 As set by major New York banks and published in the Wall Street Journal edition three business days prior to the execution of the agreement under which payments became due to the payee.

75 Imperial Oil of North Dakota, Inc. v. Consolidated Crude Oil Co. 851 F.2d 206, 211 (C.A.8(N.D.), 1988), where the Court held "on the basis of this legislative history, the district court concluded that the North Dakota legislature intended to make cancellation available as a remedy for the nonpayment of royalties in appropriate cases even where a damage remedy might have been adequate."

76 As set by the Bank of North Dakota

Any party suing for failure to make royalty payments can bring suit in the district court in the county where the well is located and is entitled to recover court costs, if successful.

Two more points worthy of note: (1)Royalties are to be paid timely, even in the absence of a signed division order, and (2), the North Dakota statute provides that a royalty owner has the right to inspect the production and royalty records of the operator upon notice.[77]

Although the state statutes do not address it, it is assumed that the interest penalties would extend to payment obligations that are triggered by payout (plus any penalty period) for an unleased mineral owner who elected not to participate in the well and who was then force pooled into a drillsite spacing unit. The unleased mineral owner will be entitled to the statutory royalty during payout plus any applicable penalty period, but thereafter would be entitled to receive timely royalty payments as a participating owner.

VI. Trends and Other Potholes to Watch Out For

Directional Drilling: Directional drilling seems to be here to stay[78]. Because it results in such large spacing units, the numbers of leases, working interest and unleased mineral owners involved is generally larger. The new Niobrara play in southeastern Wyoming is being spaced on 640 acres; while the Bakken play in Montana and North Dakota has varied spacing from 640 acres to 1280 acres. The choice of spacing size there seems to be influenced largely by operator preference although the North Dakota Industrial Commission announced at the Bakken Conference in May 2010 that it is predisposed to 1280 acre spacing and issued spacing orders in April 2010 for over 30,000 acres at 1280 acres per drillsite.

Side-by-Side Stand-ups: in the same vein, the North Dakota Industrial Commission approved side-by-side stand-up 1280 acre spacing units for infill drilling for Bakken wells in April 2010. This in essence creates a 2560 acre development unit with three wells allowed in each formation, including one that crosses over the boundary between the original 1280 acre units. Theoretically, the operator could drill 12 wells on one side-by-side stand-up: 3 in each of the upper, middle and lower Bakken formations plus an additional 3 in the Three Forks. DOAs with responsibility for North Dakota properties should be prepared for multiple interest splits among working interest owners who opt-in or opt-out by formation, as well as the complication of uncommon ownership for the wells that cross over the 1280 acre boundaries of the original spacing unit.

Multi-well Drilling Platforms: For those who work in the Piceance Basin in Colorado, multi-well drilling platforms are becoming common. It is possible to drill 22 locations from one platform. One problem that the author foresees with this technology improvement is the increased difficulty for title examiners and operators to confirm HBP status for certain leases. For example, Alice signed an oil and gas lease in

[77] North Dakota Century Code §47-16-39.2

[78] A recent class on drilling trends presented by a Colorado-based petroleum engineer at the author's company postulated that more than 90% of the new wells planned for the Rockies will be directionally drilled, horizontal wells.

2006 covering her mineral interest in 2,580 gross acres spread across five sections of land. In 2008, Oil Company "A" located its multi-well pad and drilled a Wasatch well (160 acre spacing) in Sec. 3: NE¼, in which Alice had an interest. Operator continues to drill fifteen additional Wasatch wells from the Sec. 3 platform. Alice's lease has a pugh clause that went into effect at midnight on September 2, 2009. Your company wants to take a lease on Alice's interest in Sections 4, 7, 8 and 9. Can you do it?

In the "good old days" the leasing broker would have made a surface inspection of the lands in Sections 4, 7, 8 and 9 to locate any evidence of oil and gas development (e.g., road construction, drilling pad, storage tanks, etc.). If evidence existed, the broker would check the well records on the Colorado Oil and Gas Conservation Commission website to identify additional wells. The problem is that the Commission's records are not current and the Commission isn't always diligent about enforcing timely reporting requirements on well operators. So if there is no record at the COGCC that a well has been permitted or reported as active in Sections 4, 7, 8, and 9, the broker still can't verify whether Alice's interests are available for leasing. The fact of the matter is that oil company A has drilled the locations where Alice owns minerals in Sections 4, and 9 but not in 7 and 8. Oil Company "A" has also recorded affidavits of production in the county for all the wells drilled in the county but shows the location of the wells as the pad location, not the bottom hole locations.

In the best of all possible worlds, Oil Company "A" would file an affidavit of production for each bottom hole location, rather than the location of the pad. In addition, the exhibit to the affidavits of production would contain the complete land description for each lease and specifically identify the lands included in the drillsite spacing unit, not just that part of the lease that describes well location. Since the best of all possible worlds doesn't happen with any consistency, the broker has no reliable way to determine if your company can lease any of Alice's interest short of calling Oil Company "A" and revealing your company's interest in Alice's lease or any expired lands. Caveat Emptor!

<u>The Condition of Public Records</u>: With the passage of time, county records are suffering from the ravages of constant and sometimes not so gentle use. Those counties that transferred their records to microfiche, microfilm or aperture cards are experiencing loss of images including whole sections of documents disappearing from the film. As a result, county personnel are becoming more possessive of their records and imposing controls on how they can be used. Access to these records is further hampered by the numbers of oil industry people demanding to use them, especially in highly active counties. The time required to collect document images for abstract creation or title reports is increasing significantly.

<u>Avoiding Late Payment Penalties</u>: Some oil and gas companies that have been unable to obtain division order title opinions in time to meet statutory royalty payment deadlines are opting to begin making royalty payments based on calculations of ownership from the drillsite title opinion or other sources. Typically, these companies send out a letter explaining that they are going to begin making royalty payments in advance of execution of division orders but that royalty calculations are subject to change once the division order title opinion is complete and division orders are issued.

Leasing and Oil and Gas Lease Documents:

- <u>Horizontal Pugh Clauses:</u> Requests from lessors and their attorneys for inclusion of horizontal pugh clauses are becoming more common, especially in highly active areas. In North Dakota there are more than 20 potential producing horizons. Many lessors feel they have been taken advantage of under old producing leases where 1/8th royalties agreed to in the 1960s are now dictating the lessors' returns on new Bakken wells commonly carrying royalties of 3/16ths or greater for other lessors. Brokers are trying hard to negotiate away from such clauses; however, it is only a matter of time before this may become common lease language.
- <u>Lease Extension Options:</u> In an effort to gain time, many oil companies are requesting that oil and gas leases include provisions that allow for optional (at the lessee's pleasure) extensions of an oil and gas lease. This can potentially extend the life of a lease with a 2 or 3 year term to 4 or 5 years. Many of the option clauses don't contain identification of what will be paid as the extension bonus, they just mention that there will be one. Leaving this important element out of the language can force the oil company into bargaining for more bonus money at the time the option is exercised than they ever intended to pay. Probably the most important thing to note is, simply paying the extension bonus will perfect the deal between the oil company and the lessor but it <u>does not provide notice</u> to the public that the extension has been exercised. It is essential that the oil company file an affidavit of extension in the county where the lands are located. Failing to do so may force the oil company to defend its title to the extended lease if oil company #2, who assumes that the extension was not exercised, takes a new lease from the lessor. As long as the lessor doesn't alert oil company #2 that the old lease was extended, oil company #2 may be able to claim prior right to the lease under the race or race / notice provisions of the recording statutes. It remains to be seen whether the presence of the option language in the first lease constitutes sufficient notice to cut-off oil company #2's claim. Even if the oil company with the lease extension wins, money will have been expended to defend its rights when the whole matter could easily have been avoided by proper filing.
- <u>Rights of First Refusal</u>: As an alternative to extension options, some oil companies are requesting rights of first refusal language be included in the oil and gas lease. This language places a burden on the lessor to notify the oil company if a third party offers to lease or top lease their minerals. The oil company then has a period in which to match the offer and take the new lease from the lessor. Many attorneys are fighting inclusion of this language on the grounds that it places an unnecessary burden on the lessor. It also places an administrative burden on the lessee to track subsequent leasing activity in the public records.
- <u>Sliding Scale Royalties:</u> So far, this is limited to North Dakota. There are attorneys who are insisting on the insertion of sliding scale royalty provisions into leases, whereby the negotiated lease royalty is only applicable to the minimum allowable size of spacing unit previously approved by the state for the target formation. If the operator receives spacing greater than the previously approved minimum, the royalty is increased by a stated percentage. For example if the operator is drilling a Bakken well, the negotiated lease royalty will be based on 640 acre spacing (the minimum size permitted by the NDICC for a Bakken well); however if the operator drills on a 1280 acre spaced unit, the royalty will increase by a factor of "x" (e.g., 1.35%). This

would mean that a negotiated royalty of 3/16ths would increase to 25.3% if the operator drills a 1280 acre spaced well. The justification for this is that by increasing the size of the spaced unit the operator is reducing the participation factor of the lessor's interest which is offset by the increased royalty.

- Division Orders: In some instances, we are beginning to see lessors wanting to include provisions in their lease language that releases them from any obligation to sign division orders. These requests have occurred in both Wyoming and North Dakota. It is notable that a number of the state statutes make provision for the signing of division orders in their payment requirements statutes, permitting the oil company to avoid the late payment penalty if division orders are not signed (North Dakota excepted). However, it should be noted that some statutes include a provision for a private payment schedule to be negotiated between the mineral owner and the oil company. It is not clear whether these states would recognize a similar private right to override the statutory provisions concerning division orders.
- Non-standard Oil and Gas Leases: It is becoming increasingly common to have lessors demand to use their own oil and gas leases or a lease prepared by their attorneys. Generally, the requests are more commonly coming from professionals who have purchased minerals and not from the typical lessor however that is beginning to change. The DOA needs to be aware that such leases may contain provisions that are very different from what the DOA has dealt with in the past.[79]
- Attorney Exhibits: another trend that is gaining ground in Colorado, Wyoming and North Dakota is the inclusion in the lease of an addendum containing additional language drafted by the attorney for the lessor. Today, about 40% of all oil and gas leases in North Dakota and Wyoming are negotiated with an attorney representing the lessor rather than the lessor, herself. This additional language can cover all kinds of items from water testing to surface use. The DOA needs to be familiar with any such modifications to the lease language.

There is one other item in regard to attorney involvement that bears mention. Recently one law firm in Cheyenne, WY began contacting mineral owners who had signed oil and gas leases but not yet received bonus payment by virtue of the title exam period provided for in the bonus draft. The attorneys informed the lessors that the signed oil and gas leases were not valid until the bonus consideration was paid. If the lessors would turn the leases over to the attorneys, the law firm would negotiate better terms for them with another oil company. This approach certainly raises some questions in regard to ethical practices; however, the attorneys are technically correct. The counter argument would be that delayed payment to allow for title examination has been a standard practice in the industry for decades and as such is defensible. Oil companies that were on the receiving end of this creative, if questionable, approach are fighting the issue. Nonetheless, some companies have elected to take defensive action by having the lessor sign a letter agreement, with a stated consideration of $5.00 paid immediately, that permits the lessee to pay the lease bonus on completion of title.

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[79] A copy of a lessor lease form is included in the appendix.

VII. Dead Men Don't Tell Tales – They also Don't Convey Minerals.

Back to my opening comment on the ingenuity of people in devising creative ways to confound us all -- Henry Smith (names have been changed to protect the not-so-innocent) owned a 1/3 mineral interest under a couple of tracts of land. He disappears from the public record in the 1950s. In the 1960s, Oscar Dewey Smith, as "Executor of the Estate of Henry Smith" deeds the land to Wilber and Aubree Smith, without evidence of probate. Over time, they continue to lease and act as if they own the minerals. Somewhere along the line, an attorney must have advised the oil company to obtain protective leases from the purported heirs of Henry, being the children and grandchildren of Henry's parents, as it "appears" Henry died without descendants. The oil company has also leased Wilbur and Aubree.

The Division Order Title Opinion basically says "go figure out what happened with Henry's estate". A minimal amount of research reveals that Henry was married to Mabel and she predeceased him. No information on any children could be found in the county records. However, a small notation on an Ancrestry.com page indicates that Henry was married before Mable to a woman named Olive. Further research confirms that that Henry and Olive were married, divorced and had a daughter, Betsy. More digging reveals that Henry and Mabel, his second wife, also had a daughter, Laura, who died before both of her parents. Even though Betsy is also deceased at the time of the research, her death was recent -- well after Henry's death. Intestate succession says that Henry's estate should go to Betsy and her heirs.

When this information is provided to the oil company, they relay the information to Aubree; Wilbur has since passed away. Aubree thinks she owns everything and to prove it, she sends the oil company a "Quiet (sic) Claim Deed" from Henry to herself, which she signs. It's then explained to her that Henry, being long since deceased, is no longer capable of signing a deed giving away his property.

Not to be thwarted, Aubree files a quiet title action … and prevails.

Abstract Order - Checklist

Items in blue text need to be verified with attorney before the abstract is ordered

Ordered by: **Order Date:**

To be prepared by:

Examining Attorney / Law Firm:

Date Required:

Land Description:	State:	County:
	Twp:	Rng:
	Sec:	Description:
	Sec:	Description:
	Sec:	Description:

Abstract Formatting

☐ Hardcopy, bound for legal sized documents (for attorney)

☐ In electronic format on disc (for attorney)

☐ Copy of electronic format on disc (for company)

☐ A photographic image of all indices used at the clerk's office or abstract company where records are examined

☐ A legible copy of all documents recorded or filed against the subject lands from the first document recorded to present, excluding the following:

- ☐ Exclude fully released mortgages less than 50 years old
- ☐ Exclude all mortgages greater than 50 years old
- ☐ Exclude all fully released oil and gas leases
- ☐ Exclude process documents related to mortgage foreclosures
- ☐ Exclude process documents related to tax sales
- ☐ Exclude full exhibits attached to any recorded documents, but include relevant pages

Additional Inclusions

☐ Include examination of files for corporate name changes and mergers for companies appearing in the title chain

- ☐ From the county clerk's files
- ☐ From the secretary of state records for the following states:
  - ___ Delaware
  - ___ State where company doing business
  - ___ State where corporate headquarters located
  - ___ Other ____

- [ ] Include name searches in the District Court records for all names in the chain of title
- [ ] Include examination of tax assessor's records for status of property taxes for the preceding 5 years
- [ ] Plat of the lands
- [ ] Table of contents for all documents included in the abstract
    - [ ] Paginated for the documents in the abstract
    - [ ] In chronological order from earliest to most recent by date of recording
    - [ ] Showing the following
        - [ ] Type of Document
        - [ ] Book, Page and Reception Number
        - [ ] Grantor
        - [ ] Grantee
        - [ ] Annotation as to any documents shown in the index, but missing from the records
        - [ ] Annotation as to location in Table of Contents where document is "released," "partially released," or "satisfied"
- [ ] Other
    - [ ] Include a statement of location of records search by entity (e.g. Clerk, Assessor, etc.) including the date and time of day the last indexed document was imaged
    - [ ] Include a statement of the month and date the last document was indexed
    - [ ] Include an Affidavit of Record Title Examination signed by the person responsible for creating the abstract
    - [ ] Include a list of all names that were searched in the District Court records and a statement as to any limitations on the search (e.g. records which were not accessible, etc.)
    - [ ] Statement of disclaimers
    - [ ] Statement of exclusions

Additions for Federal Lands

- [ ] A legible copy of <u>all</u> documents recorded or filed against the subject lands from the first document recorded to present
    - [ ] From the county where the lands are located (see instructions above)
    - [ ] From the Bureau of Land Management Lease Files
        - [ ] In order as documents appear in the file
        - [ ] Include all correspondence
    - [ ] From the Bureau of Land Management Unit Files
- [ ] Other:
    - [ ] Prepare abstract for county records in separate document from Federal abstract
    - [ ] Protocols given above for table of contents and other documentation to be followed for all abstracts

An Excerpt from
'Curing Title Defects' by Richard Bate and Robert Hill
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Effects of Act

The intended effect of all of the marketable title acts is to extinguish all interests arising prior to the root of title not preserved by the filing of notices after the recording date of the root of title, so as to permit title examination only from the root of title forward. The acts fail to accomplish this purpose because they are subject to too many exceptions. The acts do, however, extinguish some interests and sometimes result in transfers of title.

The acts vest title in the last grantee or grantees who trace their title back to the root of title, as it was conveyed by the root of title, subject to all interests arising out of the root of title, all previous interests preserved by subsequently filed notices, all previous interests specifically identified in instruments in the chain of title out of the root of title, all interests excepted from the coverage of the acts, and the rights of adverse possessors who were in possession after the recording of the root of title.

What, however, is the root of title? In a simple title chain it is not too difficult to identify. It is the conveyance in the chain of title of the apparent current owner which one finds by tracing the chain backward for the statutory period, usually forty years, and as much farther back as it takes to find such a conveyance. This is the root of title and the interest of the current owner consists of the interest conveyed by it less any subsequently reserved or carved out interests. The first thing to notice is that the root of title changes as time passes. The second thing to notice is that any instrument of record during the statutory period which purports to divest the interest chained from the root of title interrupts the process and the act has no effect. In other words, if it is not possible to trace back forty plus years without finding an instrument "purporting to divest such claimant of said interest" the act does not apply and you can ignore it.

The act does not define "with nothing appearing of record purporting to divest such claimant of such interest," but it presumably would include an instrument from and to strangers to the protected chain purporting to convey some or all of the claimed interest. It may not, however, include everything encompassed within the definition of "title transaction" which is not limited to instruments of record. The term "records" is itself broadly defined to include all public records. It appears, therefore, that both for the purpose of connecting the claimant's chain and for the purpose of determining whether anything appears of record divesting his or her interest, all public records, and not just those of record with the recorder's office, must be searched. The difficulties in doing this with respect to wild instruments can be imagined. If there appears in the unrecorded probate record in the county any wild probate covering the lands under search, it will divest the interest of record and the marketable title act will not apply. Naturally such unrecorded documents will not appear in the abstract.

The act is extremely difficult to apply to parallel chains of title, whether they result from wild instruments or from parallel conveyances of undivided interests. The act can have the effect of protecting the chain emanating from the wild instrument, particularly in those states where possession is not required, and can also have the effect of divesting the interest of a cotenant if there is an over conveyance in any parallel chain.

The Utah and Wyoming acts are unclear as to their effects on unsevered mineral interests. Literally interpreted, it would appear in some cases that they could result in divesting the surface title of an owner, but not his or her mineral interest. This could occur even if there were no deed of severance in the chain of title. Many such divestitures would ultimately be prevented by the fact that the person whose title is divested by the act would meanwhile have acquired title by adverse possession, but this is not record title and such a person would be required to regain his or her record title by a quiet title action. There is also a question as to whether the Wyoming and Utah acts apply to patented mining claims, and, if so, how.

Finally, one might well ask whether any of the acts cover severed mineral interests. There is no clue in the Model Act itself. One might assume at the outset that the Model Act would cover such interests unless, as adopted by a state, a specific exception was inserted, as in Oklahoma, Utah, Wyoming and Kansas.

In summary, at least from the perspective of the mineral title examiner, the acts do not serve their intended purpose. They do extinguish some old claims but they probably create as many problems as they solve and make the task of examining titles, more, rather than less, difficult.

Scope of Title Examination under Act

An optimistic mineral title examiner might conclude that he need no longer examine an abstract back to patent in order to write a title opinion covering lands in a state which has adopted a marketable title act. Assuming that this were true, which it is not, the process would be attended by numerous difficulties.

The first problem is ordering the abstract. One can imagine the following conversation between the optimistic examiner and the abstracter:

E: Would you please prepare a supplemental abstract on Blackacre?

A: Sure, from what date?

E: From the root of title.

A: What's that?

E: (Reads statutory definition)

A: How can I determine that?

E: Just trace back forty years plus as far as you need to go to find the next prior conveyance.

A: Will that be the root of title if there is any later divesting conveyance?

E: (Pause) Well, I guess you'd better send a complete abstract.

The optimistic examiner has made his first startling discovery. You can't identify the root of title without examining the title.

When the abstract arrives, the optimistic examiner still believes he can save some time so he begins examining the abstract backwards (beginning with the latest entries). He has some difficulty doing this but manages to work his way back thirty years, at which point he finds a conveyance out to a grantee who does not subsequently appear in the more recent chain. He then finds that the apparent current owner claims through a tax deed recorded thirty-five years previously. He then concludes that the marketable title act does not apply and he must continue his examination back to patent.

When the optimistic examiner has finished and looks at his title chain, he can't decipher it and he has already spent twice as much time as if he had simply examined the title from the beginning in the usual manner. He concludes that from now on he will ignore the marketable title act.

Our formerly optimistic title examiner has made a fateful decision. You can't ignore the marketable title act just because it doesn't help. It can change the result you get with traditional examination methods. This is particularly true when long periods of time have elapsed without recorded conveyances. An extreme example will suffice to illustrate the problem.

Suppose your examination shows that A owns record title through a deed to him in 1940 and there are no further conveyances in his or her chain. Further suppose that in 1941 B granted a mortgage covering a large ranch, and, by mistake, A's land was included in the description in this mortgage. Suppose the mortgage was foreclosed and C holds under the sheriff's deed all of the land described in the mortgage.

Normally you would have ignored the wild mortgage and shown title in A, but unless A has been in continuous possession, a fact not shown of record, his or her title has been divested by the marketable title act and is now owned of record by C.

The mineral title examiner who is examining title to lands in a state having a marketable title act must prepare his or her title chain in the usual manner and then review his or her chain to determine whether the act applies. Thus the act adds to the work involved, rather than decreasing it as was intended. The act also makes reliance on grantor-grantee searches perilous because wild instruments are not found by this method and they cannot be disregarded under the marketable title act.

Source: "Mineral Title Examination III," Paper 10A (Rocky Mtn. Mineral Law Foundation (1992).

Estates, Probates and Intestates
By Jeff Silver
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When an individual dies, all of their property goes into their estate, the disposition of which is usually determined by a Will. However, it is not uncommon for a person to die without a Will, in which case the distribution of their estate is determined by the laws of intestate succession in place at the time of their death. In either case, the official distribution of an estate is known as Probate. If the decedent had a Will, probate proves this Will to be authentic or valid in a court of law, a process that yields an officially certified copy of said Will. If the person died intestate, then the distribution of their estate is determined according to state law. If an estate is unprobated, it simply means the distribution has not been validated by a court, regardless of whether or not the decedent had a Will. Unprobated estates can present a problem for the Division Order Analyst, as they lead to a cloud on the title to property once owned by the deceased. Luckily, this is a problem with several potential solutions.

The simplest remedy would be to locate the deceased's Will and have it probated in the proper jurisdiction - usually the state and county in which the property is located. This can usually be accomplished by contacting relatives of the deceased to inquire if a Will does indeed exist. If a Will has been probated in a jurisdiction other than where real property is located, a copy needs to be obtained and probated by the state and county in which the lands are located. Simply recording the previously probated Will in the appropriate county will not suffice; the Will must be probated by a court that has jurisdiction over the interest. This also applies to an estate that has been probated in a foreign country. The document(s) which allowed the estate to be initially probated (usually a Will) in a foreign country need to be obtained and then those documents need to be certified by a state court. Typically, however, the existence of an unprobated estate indicates that the deceased possessed no Will, which begs the question: how do we determine the disposition of real property and ultimately treat an estate when there is no Will?

When someone dies without a Will, the distribution of their estate is determined by the laws of intestate succession in effect at the time of death in the state in which the real property is located. Many states follow the Uniform Probate Code, meaning the laws of intestate succession are often consistent from one state to the next. However, these laws have changed over time, so it is not uncommon for there to be some differences among states. For example, intestacy law in Montana states that the division of property is entirely to the spouse - so long as the parents and the descendents of the deceased (if they are not also descendents of the surviving spouse) are all deceased. In Wyoming, however, a one-half interest goes to the surviving spouse and the remainder is to be split evenly amongst surviving children (if applicable). One should seek the advice of an attorney licensed in that state for advice on the correct interpretation of the laws of intestate succession.

An intestate estate needs to be probated as well, meaning a court must determine who the decedent's heirs are and how the property should be divided amongst them. If an estate without a Will was probated in another jurisdiction, a similar probate should be opened in the jurisdiction in which the real property is located.

If there is a Will, the heirs or devisees of an estate have an ownership interest in the property the moment the property owner dies. If there has been no probate and the decedent did not leave a Will, there needs to be a procedure for developing, documenting and distributing their estate. First and foremost, this involves documenting this ownership interest, which can and should be done by filing a Death Certificate and recording an Affidavit of Death and Heirship. The Death Certificate should be from the state in which the decedent died and filed of record in the county where the interest is located, and can usually be obtained by contacting relatives of the deceased, or the local government if it is known where they last resided. In addition, it is almost always necessary to file an inheritance or relationship document, usually by obtaining a signed statement alleging a relationship. This is often referred to as a "Proof of Death and Heirship." It is best to obtain this from an uninterested third party, though depending on the circumstances this is not always possible. This document should provide as much specific information as possible involving the deceased, their date of death, information on any known living spouse, and information regarding all children, both alive and deceased. Most recent contact information is also desired. This form should be notarized and recorded in the county where the interest is located.

The ultimate goal of an Affidavit of Heirship is to establish a relationship between the purported heirs and the deceased which - under state intestacy laws - awards the individual a share in the distribution of the deceased's property. Because a Will is not always present and other recorded documents may not be of any help in revealing the heirs of an estate, following the procedures listed above will be beneficial in determining the disposition of an unprobated estate. However, while an Affidavit of Death and Heirship generally provides enough certainty of title to pay and Oil & Gas Lease bonuses, it is not sufficient to secure title for payment of royalties. Only probate or another court Determination of Heirship will create true marketable title in the heirs or devisees of the deceased.

Intestate Descent of Property the Northern Rocky Region

Colorado Prior to July 1, 1974

Surviving spouse and no children
All to surviving spouse

Surviving spouse and children, or descendants of deceased children
One-half to spouse
One-half to surviving children and descendants of children
Example: 3 children
Surviving Son: one-third of one-half
Surviving Daughter: one-third of one-half
Deceased Son/Daughter: one-third of one-half divided equally among descendants

No surviving spouse
Equally divided among children - living and deceased
Deceased child's share passes to his or her descendants

No surviving spouse, no children, no descendants of deceased children
Decedent's father and mother, equally
No father, all to mother
No mother, all to father

No surviving spouse, children, or descendant(s) of deceased children, father or mother
Divided equally amongst brothers and sisters, with descendant(s) of deceased siblings sharing equally in deceased sibling share

None of the above survive
Grandfather, grandmother, uncles, aunts, descendant(s)

None of the Above
Nearest lineal ancestors and their descendant(s)

Colorado from July 1, 1974 to Present

Share for Surviving Spouse

No descendant(s), and no surviving parent(s)
All to surviving spouse

Children of deceased are also children of surviving spouse, and surviving spouse has no other children
All to surviving spouse

No descendant children, but surviving parent(s) of deceased
First $200,0000.00
Three-quarters of any balance of intestate estate

Surviving children of spouse, but not of deceased
First $150,000.00
One-half of any balance of intestate estate

Surviving children of decedent are not descendants of surviving spouse, and surviving children of spouse are not children of deceased
First $150,000.00
One-half of any balance of intestate estate

Children of deceased are not descendants of surviving spouse, and 1 or more such children are minors
One-half of intestate estate

Share for Heirs other than Surviving Spouse

No surviving children
Designated beneficiary if Agreement recorded

Surviving children
One-half to designated beneficiary (if applicable)
One-half to Surviving Children

Surviving descendant(s) - grandchildren, etc.
To descendant(s), per capita at each generation

No surviving descendant(s)
Parent(s)s of Deceased Equally, or to Surviving parent(s)

No Surviving descendant(s) or surviving parent(s)
Surviving descendant(s) of the parent(s) of Deceased, or either of them per capita at each generation

None of above
Surviving grandparent(s), in equal Shares

None of the above
Surviving descendant(s) of deceased's grandparent(s)s per capita at each generation

None of the above, and birth child(ren) file claim within 90 days[1]
Surviving birth child(ren) per capita at each generation

None of the above, and birth parent(s) file claim within 90 days
Birth parent(s) equally if surviving, or to the surviving birth parent(s)

Intestate Descent of Property in the Northern Rocky Region

Wyoming

Spue, no surviving children children or descendant(s) of any deceased children

All to surviving spouse

Spouse and children

One-half to surviving spouse

One-half to surviving children and/or descendant(s) of any deceased children, in equal shares

Deceased child's share split equally amongst descendant(s)

No surviving spouse

To surviving children and/or descendant(s) of any deceased children, in equal shares

Deceased child's share split equally amongst descendant(s)

No surviving spouse, children, or descendant(s) of children

To surviving parent(s) and/or sibling(s), and the descendant(s) of deceased siblings in equal parts

Deceased sibling(s) share split equally amongst descendant(s)

None of the above

To surviving grandparent(s), aunts, uncles and their descendant(s)

Descendant(s) taking their parents' share in equal parts

NOTE: Wyoming (1985), Montana (1993) and North Dakota (1973) do not specifically address whether there are statutes that apply before a specific date and others after that date. It should be noted that there were major repeals or adjustments made to the rules for intestate succession in those states in the years noted. The general rule is that a dead person cannot own property therefore the law recognizes the creation of an unmarketable interest in property in the heirs- to-be-determined upon the death of a mineral owner without an LWT. The rules of intestate succession at the time of the decedent's death will apply.

Intestate Descent of Property in the Northern Rocky Region

Montana

Share for Surviving Spouse

No surviving children or surviving parent(s) of the decedent; or all of surviving descendant(s) of decedent are also descendant(s) of surviving spouse
- All to surviving spouse

Surviving parent(s), but no surviving children or descendant(s) of deceased children
- First $200,000, plus three-quarters of the balance of decedent's estate.

Surviving descendant(s) are also descendant(s) of surviving spouse, and surviving spouse also has one or more surviving descendant(s) who are not descendant(s) of the decedent.
- First $150,000, plus one-half of the balance of decedent's estate

Surviving descendant(s) are not descendant(s) of surviving spouse
- First $100,000, plus one-half of the balance decedent's estate

Share for Heirs Other Than Surviving Spouse

Decedent's descendant(s) by representation
- Any part of the estate not passing to the decedent's surviving spouse or entire estate if no surviving spouse

Surviving parent(s), but no surviving children or descendant(s) of deceased children
- Any part of the estate not passing to the decedent's surviving spouse or entire estate if no surviving spouse

No surviving descendant(s) or parent(s)
- To descendant(s) of decedent's parents, any part of the estate not passing to the decedent's surviving spouse, or entire estate if no surviving spouse

No surviving descendant(s) or parent(s), or descendant(s) of the decedent's parent(s), but surviving grandparent(s) or descendant(s) of grandparents
- Any part of the estate not passing to the decedent's surviving spouse or entire estate if no surviving spouse, distributed in the following manner: one-half to decedent's paternal grandparents, equally if both surviving, or descendant(s) of the decedent's paternal grandparents if either or both are deceased, in equal shares, and one-half to decedent's maternal grandparent(s) in the same manner

No surviving grandparent(s) or descendant(s) of a grandparent on paternal side, and surviving grandparent(s) or descendant(s) of grandparent on maternal side, or vice-versa
- Any part of the estate not passing to the decedent's surviving spouse or entire estate if no surviving spouse, to decedent's relatives on the other side in the same manner as the first half

No surviving descendant, grandparent, or descendant of a grandparent
- To the person(s) of the closest degree of kinship to the decedent
  - Shared equally if person(s) with same degree of kinship, claiming through same ancestor
  - If more than one person with same degree of kinship, claiming through different ancestors, those claiming through nearest ancestor receive to the exclusion of those claiming through a more remote ancestor

North Dakota

Share for Surviving Spouse

No descendant(s) or surviving parent(s)
- All to surviving spouse

Surviving descendant(s) are also descendant(s) of surviving spouse
- All to surviving spouse

Surviving parent(s), but no surviving children or descendant(s) of deceased children
- First $300,000, plus three-quarters of the balance of the decedent's estate

All surviving descendant(s) are also descendant(s) of surviving spouse, and surviving spouse has one or more surviving descendant(s) who are not descendant(s) of the decedent
- $225,000, plus one-half of the balance of the decedent's estate

One of more of decedent's surviving descendant(s) are not descendant(s) of surviving spouse
- First $150,000, plus one-half of the balance of decedent's estate

Share for Heirs Other than Surviving Spouse

Decedent's descendant(s) by representation
- Any part of the estate not passing to the decedent's surviving spouse or entire estate if no surviving spouse

Surviving parent(s), but no surviving children or descendant(s) of deceased children
- Any part of the estate not passing to the decedent's surviving spouse or entire estate if no surviving spouse

No surviving descendant(s) or parent(s)
- To descendant(s) of decedent's parents, any part of the estate not passing to the decedent's surviving spouse, or entire estate if no surviving spouse

None of the above, but surviving grandparent(s) or descendant(s) of grandparents on both maternal and paternal sides
- Any part of the estate not passing to the decedent's surviving spouse or entire estate if no surviving spouse, distributed in the following manner: one-half to decedent's paternal grandparents, equally if both surviving, or descendant(s) of the decedent's paternal grandparents if either or both are deceased, in equal shares, and one-half to decedent's maternal grandparent(s) in the same manner

None of the above, but surviving grandparent(s) or descendant(s) of grandparent(s) on the paternal but not maternal side, or vice-versa
- Any part of the estate not passing to the decedent's surviving spouse or entire estate if no surviving spouse, distributed in the following manner: one-half to decedent's paternal grandparents, equally if both surviving, or descendant(s) of the decedent's paternal grandparents if either or both are deceased, in equal shares, and one-half to decedent's maternal grandparent(s) in the same manner

None of the above, and one or more deceased spouses who have one or more surviving descendant(s)
- Estate is divided into as many equal shares as there are deceased spouses, with each share passing to deceased spouse's descendant(s) by representation

For Recording Purposes Only

Statement of Claim
Mineral Interest

IN ACCORDANCE WITH §28-18.1-04 NDCC, NOTICE IS HEREBY GIVEN, that the undersigned have, own and claim to be the owners of an undivided interest in and to the oil, gas, coal, clay, gravel, uranium and all other minerals of any kind and nature, unless otherwise noted, underlying the following described lands in Williams County, North Dakota, to-wit:

<u>Township 153 North, Range 98 West</u>
Section 3: SW¼SW¼, SE¼SW¼

FURTHER, that the undersigned desire to preserve such interest as reflected in the office of the Recorder of said county and do not intend to abandon the same. This Statement of Claim may be executed in any number of counterparts, each of which shall be considered an original for all purposes.

EXECUTED effective as of the ______ of June 2010 by the undersigned, individually and as one of the surviving heirs of _________________________, deceased.

____

(Claimant's Name)
(Claimant's Address)

(Add Notary)

Stipulation of Interest

WHEREAS, __________________ is the owner of record of those lands described as follows, to-wit:

WHEREAS, uncertainty exists with respect to the interest that each of the below named parties owns in the oil, gas and other minerals underlying the above described lands, and

WHEREAS, the undersigned desire to resolve such uncertainty;

NOW THEREFORE, we, the below named parties, do hereby agree that all the oil, gas and other minerals underlying the above described lands are owned by the following parties to this agreement in the proportions set forth below:

OWNERS	**MINERAL INTEREST**
ABC (address)	25.000000%
DEF (address)	42.565000%
XYZ (address)	32.435000%
	100.000000%

The parties hereto do grant, quit claim and convey unto themselves and to each other such interest as necessary to create the undivided interest set opposite the name of each of said owners in and to the interest herein.

Each such interest is subject to all valid and subsisting oil, gas and mineral leases pertaining to the adjacent land (if any) now of record in said County and State and such leases are hereby ratified, confirmed and adopted as if the described lands had been included therein at the time of execution.

No warranty of title is made by any party hereto and in the event that title to any interest described herein should fail, in whole or in part, the balance shall be owned by each of the said parties in the proportions above stated.

The provisions hereof shall be binding upon and inure to the benefit of each party hereto, their heirs, representatives, successors and assigns.

IN WITNESS WHEREOF, we the undersigned, execute this Stipulation of Interest effective the 4th day of April, 2005. This Stipulation of Interest may be executed in any number of counterparts, no one of which needs to be executed by all parties, and shall be binding upon all parties who have executed such counterpart with the same force and effect as if all parties had signed the same document.

ABC

____
Signature Date

DEF

____
123, as Personal Representative for the Estate of DEF Date

XYZ

____
Signature Date

(INCLUDE NOTARIES FOR EACH)

For Lessee's Use Only:	Lease #:
	Prospect #:

OIL AND GAS LEASE

AGREEMENT, Made and entered into the **_____** day of **_________________, 2009** by and between **_______________________, ____________________________,** whose post office address is ____, hereinafter called Lessor (whether one or more) and________________________ whose post office address is _____________________________ hereinafter called Lessee.

WITNESSETH, That Lessor, for and in consideration of ten and more dollars ($10.00 and more) in hand paid, receipt of which is hereby acknowledged, and of the agreements of Lessee hereinafter set forth, hereby grants, demises, leases and lets exclusively unto Lessee the lands described below ("Lease lands") for the purpose of investigating, prospecting, exploring (by geophysical and other methods), drilling, operating for and producing oil or gas, or both (as defined below), together with the right to construct and maintain pipelines, telephone and electric lines, tanks, ponds, roadways, plants, equipment, and structures thereon to produce, save and take care of said oil and gas (which right shall include specifically a right-of-way and easement for ingress to and egress from said lands by Lessee, or its assignees, agents or permittees, necessary to or associated with the construction and maintenance of such pipelines, telephone and electric lines, tanks, ponds, roadways, plants, equipment, and structures on said lands to produce, save and take care of the oil and gas), and the exclusive right to inject air; gas, water, brine and other fluids from any source into the subsurface strata, and any and all other rights and privileges necessary, incident to, or convenient for the economical operation of said land, alone or conjointly with neighboring land, for the production, saving and taking care of oil and gas and the injection of air, gas, water, brine, and other fluids into the subsurface strata, said lands being situated in the County of _________________, State of _________________, described as follows, to-wit:

Township North, Range West, P.M.
Section 8:

and containing ___________ acres more or less.

1. Lease Lands Include: In addition to the land described above, Lessor hereby grants, leases and lets exclusively unto Lessee, to the same extent as if specifically described, lands which are owned or claimed by Lessor by one of the following reasons:
    a. all lands and rights acquired or retained by Lessor by avulsion, accretion, reliction or otherwise as the result of a change in the boundaries or centerline of any river or stream traversing or adjoining the lands described above;
    b. all riparian lands and rights which are or may be incident, appurtenant, related or attributed to Lessor In any lake, stream or river traversing or adjoining the lands described above by virtue of Lessor's ownership of the land described above;
    c. all lands included in any road, easement or right-of-way traversing or adjoining the lands described above which are or may be incident, appurtenant, related or attributed to Lessor by virtue of Lessor's ownership of the land described above; and
    d. all strips or tracts of land adjacent or contiguous to the lands described above owned or acquired by Lessor through adverse possession or other similar statutes of the state In which the lands are located.
2. Oil and Gas Defined: The term oil as used in this Lease shall be interpreted to include any liquid hydrocarbon substances which occur naturally in the earth, including drip gasoline or other natural condensate recovered from gas without resort to a manufacturing process. The term gas as used in this Lease shall be interpreted to include any substance, either combustible or noncombustible, which is produced in a natural state from the earth and which maintains a gaseous or rarified state at ordinary temperature and pressure conditions, including but not limited to helium, nitrogen, carbon dioxide, hydrogen sulphide, casinghead gas and sulphur. For purposes of this Lease, coal bed methane is not included in the term "gas" as used herein.
3. Term: Subject to the other provisions herein contained, this Lease shall remain in effect for **three (3) years** from the date hereof (hereinafter called the "primary term") and as long thereafter as oil and gas, or either of them, is produced from the Lease lands or drilling operations are continuously prosecuted as provided herein. Unless otherwise defined by applicable state statute, for purposes of this Lease, "drilling operations" shall include operations for the drilling of a new

well and operations for the reworking, deepening or plugging back of a well or hole or other operations conducted in an effort to establish, resume or re-establish production of oil and gas; drilling operations shall be considered to be "continuously prosecuted" if not more than ninety (90) days shall elapse between the completion and abandonment of one well or hole and the commencement of drilling operations on another well or hole; drilling operations shall be deemed to be commenced for a new well at such time as Lessee has begun and diligently prosecutes actual drilling with the use of a rig of sufficient size and type to complete the drilling or reworking operations intended.

a. <u>Exceptions and Limitations on Term:</u> At the end of the primary term, this Lease shall terminate as to all Lease lands except:
    1. <u>Lands Producing in Paying Quantities:</u> Those lands included in a governmental spacing unit upon which a well is producing oil or gas in paying quantities. "Spacing unit" as used herein shall mean the amount of acreage assigned to each well for spacing purposes as established by the regulatory authority for the state in which the lands are located. "Paying quantities" as used herein is defined as production under which the income from production exceeds expenses allocated to such production by the operator unless otherwise agreed to in writing by the parties. Notwithstanding the language contained herein, should a well drilled on Lease lands or lands pooled therewith become non-paying, this Lease shall continue in force and effect so long as operator continues to pay royalties on production for a period of up to twenty-four consecutive months or until the well returns to paying status, whichever occurs first.
    2. <u>Continuing Operations:</u>
        a. <u>Drilling Over Expiration</u>: If oil or gas is not being produced from the Lease lands but Lessee is then engaged in drilling operations, this Lease shall continue in force so long as drilling operations are continuously prosecuted; and if production of oil or gas results from any such drilling operations, this Lease shall continue in force so long as oil or gas shall be produced from the Lease lands.
        b. <u>Continuous Drilling:</u> If, after the expiration of the primary term of this Lease, production on the Lease lands should cease for any cause, this Lease shall not terminate if Lessee is then engaged in drilling operations, or within ninety (90) days after each such cessation of production, commences or resumes drilling operations, and this Lease shall remain in force so long as drilling operations are continuously prosecuted, and if production results therefrom, then as long thereafter as oil or gas is produced from the Lease lands.
        c. <u>Shut-in Gas Well</u>: at any time, either before or after the expiration of the primary term of this Lease, there is a well capable of producing gas on Lease lands, or on lands with which Lease lands are pooled but the well is shut-in, whether before or after production therefrom, and this Lease is not being maintained otherwise as provided herein, this Lease shall continue in force and effect as though gas is being produced from Lease lands for a period not to exceed twenty-four consecutive months during the term of the Lease. Lessee shall use reasonable diligence to market the gas capable of being produced from such shut-in well during the shut-in period, but shall be under no obligation to market the gas under terms, conditions or circumstances which, in Lessee's judgment exercised in good faith, are unsatisfactory. When the Lease is continued in force in this manner, Lessee shall pay or tender to the Lessor or Lessor's successors or assigns, an amount equal to $25.00 per year per net mineral acre covered by the Lease. Such payments shall be made on or before the anniversary date of this Lease next ensuing after the date the well is shut-in. Any shut-in royalty payment shall be made by check, mailed or tendered on or before such anniversary date. Lessee's failure to pay or tender, or properly pay or tender, any such sum shall operate to terminate this Lease. Notwithstanding any language to the contrary in this provision, no gas well shall be shut-in for a period longer than thirty-six (36) cumulative months during the life of the Lease.

b. <u>Obligation to Develop</u>: Notwithstanding the any language herein to the contrary concerning holding Lease lands by production beyond the primary term hereof, Lessee shall release, of record with a copy provided to Lessor, all those formations from which oil or gas is not being produced in paying quantities ten (10) years after the effective date of this Lease. The release shall include all non-producing formations located fifty (50) feet above and fifty (50) feet below the perforated zone of a producing well bore(s) or horizontal member(s) of a producing well bore

4. <u>Royalty:</u> subject to the deduction of Lessor's proportionate share of any taxes assessed by a regulatory authority,
    a. <u>Oil:</u> The Lessee shall deliver to the credit of the Lessor as royalty, free of cost, into the tanks or in the pipe line on the Lease lands to which Lessee may connect its wells the equal **twenty (20%)** part of all oil produced and saved from the Lease lands, and Lessor shall be paid therefore at the market price thereof prevailing for oil of like grade and gravity in the field where produced on the date of purchase, or at the price which Lessee receives for the sale of its oil, whichever is greater.

b. Gas: The Lessee shall pay Lessor, as royalty, on gas, including casinghead gas or other gaseous substances, produced from the Lease lands and sold or used off the premises or used in the manufacture of gasoline or other products, **twenty percent (20%)** of the gas sold or used at the rate the Lessee receives for gas it sells, and price paid Lessor shall not be reduced by the costs to process, clean, prepare, transport or treat said gas. In no event shall the price received by Lessor for gas be less than net "0" for the gas sold.

c. Take-or Pay: If Lessee is subject to "take or pay" conditions, and is paid for production or potential production by virtue of this Lease, Lessee shall pay to Lessor from the proceeds Lessee receives the share Lessor is entitled to receive for actual production according to this royalty provision.

5. Paid-up Lease: This is a paid-up lease and all cash consideration first recited above and annual rentals have been paid to Lessor in advance to keep this Lease in full force and effect throughout the primary term. In consideration of the payment of such cash consideration and advance annual rentals, Lessor agrees that Lessee shall not be obligated, except as otherwise provided herein, to commence or continue any operations during the primary term.
   a. Failure to Pay: any sight draft, delayed draft or payment voucher offered for payment of consideration for this Lease MUST be paid before the Lease is valid. Failure to make such payment as originally offered in the initial time period upon which the draft or voucher is to be paid will render this Lease, or any option herein, null and void. There will be no defense for late or non-payment except for one of the following reasons:
      1. Force Majeure as defined in paragraph 11.c. hereof; or
      2. Adjustments for ownership changes resulting from title examination. If title examination by Lessee discloses that Lessor owns more or less interest than that upon which this Lease was originally predicated, Lessee shall have a period of fifteen (15) business days, unless otherwise agreed to in writing by Lessor, to provide Lessor evidence of such discrepancy and issue payment of consideration, which has been adjusted to reflect the actual mineral interest owned by Lessor of record.
   b. Surrender and Release: Lessee may at any time or times during or after the primary term surrender this Lease as to all or any portion of the land described above, and as to any strata or stratum, by delivering to Lessor and by filing of record a release or releases, and be relieved of all obligations thereafter accruing to the acreage surrendered. If this Lease expires under the terms hereof, Lessee shall file a release of lease of record and provide a recorded copy of such release to Lessor no later than sixty (60) days following the date the release becomes effective.
6. Proportionate Reduction: If Lessor owns a lesser interest in the Lease lands than the entire and undivided fee simple estate therein, then the royalties, including shut-in royalty, herein provided shall be paid to Lessor only in the proportion which Lessor's interest bears to the whole and undivided fee. Any interest in production from the Lease lands to which the interest of Lessor may be subject shall be deducted from the royalty herein reserved.
7. Lessee's Rights to "Use" and "Remove": Lessee shall have the right to use free of cost gas and oil produced on said land for its operation thereon. Lessee shall negotiate for rights to use water found on or under the Lease lands from the surface or owner of water of record. Lessee shall have the right at any time to remove all machinery and fixtures placed on said premises, including the right to draw and remove casing.
8. Damages: Lessee shall pay reasonable amounts for damages caused by its operations on said land.
   a. Lessor is not a surface owner: any obligations for the payment of damages, location of operations, burying of pipelines or any other encroachment on the rights of the surface owner shall be negotiated in a separate agreement between Lessee and the surface owner.
   b. Indemnification: Lessee agrees to defend, hold harmless and indemnify Lessor, their heirs, successors and assigns from any and all liability, including costs and attorneys' fees, that Lessor may suffer as a result of losses, claims, demands or judgments against Lessor arising out of any damage, including environmental damages, caused or permitted by the Lessee, its agents, or assigns, or resulting from the non-compliance of Lessee, its agents or assigns with any laws, orders, or rules adopted or promulgated by the state in which the Lease lands are located or by the United States government, or any agency, commission, or board of either of them. This provision does not apply to Lessees of this Lease before first on-ground or underground activities occur.
9. Pooling: Lessee is hereby given the right and power at any time and from time to time as a recurring right, either before or after production, as to all or any part of the Lease land, to pool the leasehold estate and the mineral estate covered by this Lease with other land, lease or leases in the immediate vicinity for the production of oil and gas, or separately for the production of either, when in Lessee's judgment it is necessary or advisable to do so for the prevention of waste and the conservation and optimum ultimate recovery of oil or gas. Such pooling shall be into a spacing unit or units not exceeding in area the acreage required or prescribed by State law, order, rule or regulations for the drilling of one well, or for obtaining the maximum allowable production from one well.
   a. Not to exceed 640 acres: Notwithstanding anything contained herein, the spacing unit shall not exceed 640 acres, whether for a vertical or horizontal oil well.

b. Formation of a Pool: The forming or reforming of any pool shall be accomplished by Lessee executing and filing of record a declaration of such pooling, which declaration shall describe the pool. Any pool may include land upon which a well has heretofore been completed or upon which drilling operations have been commenced. Production, drilling or reworking operations or a well shut-in for any reason anywhere on a pool which includes all or a part of this Lease shall be treated as if it were production, drilling or reworking operations or a well shut-in under this Lease.

c. Lessor's Royalty: The royalties provided under the terms of this Lease shall accrue and be paid to Lessor on pooled substances produced from any spacing unit in the proportion, but only in the proportion, that Lessor's ownership interest in the Lease lands placed in the spacing unit bears to the total acreage in the land placed in such spacing unit. In the event Lessee, or its assigns, obtains a spacing unit that exceeds the stated maximum allowable under this Lease, the royalty provided herein shall be increased immediately by multiplying the Lessor's royalty set forth in paragraph 4 by one and twenty-five one-hundredths percent (1.25%).

d. Lessor's Right to Oppose: Nothing contained herein shall be construed as consent by Lessor to any proposed pooling and the Lessor may testify at any hearing in opposition to any pool or spacing unit.

e. No Unitization: Nothing contained herein shall be deemed to grant Lessee the right to commit the Lease lands to a Federal unit or any other unit containing greater acreage than that prescribed by State law, order, rule or regulations for the drilling of one well.

10. Assignment: If the estate of either party hereto is assigned or sublet, and the privilege of assigning or subletting in whole or in part is expressly allowed, the express and implied covenants hereof shall extend to the sub-Lessees, successors and assigns of the parties.

a. Continuing liability of Lessee: Should Lessee assign any or all of its rights hereunder, both assignor and assignee shall remain subject to the terms of this Lease including, but not limited to, any implied covenants of exploration, development, and protection from drainage until the Lessor is provided a copy of the assignment which shows the mailing address of the assignee; excepting however liability for environmental damage shall not be avoided by assignment.

b. Separate Measuring: No change in Ownership of the land, royalties, or other payments, however accomplished, shall operate to enlarge the obligations or diminish the rights of Lessee or require separate measuring or installation of separate tanks by Lessee.

c. Change of Lessor's ownership: Notwithstanding any actual or constructive knowledge of or notice to Lessee, no change in ownership of said land or of the right to receive royalties or other payments hereunder, or of any interest therein, whether by reason of death, conveyance or any other matter, shall be binding on Lessee (except at Lessee's option in any particular case) until thirty (30) days after Lessee has been furnished written notice thereof, and supporting information sufficient to establish ownership by the party claiming as a result of such change in ownership or interest.

11. Lessee's Covenants: In the event Lessor considers that Lessee has not complied with all its obligations hereunder, either express or implied, Lessor shall notify Lessee in writing, setting out specifically in what respects Lessee has breached this Lease. Lessee shall then have thirty (30) days after receipt of said notice within which to meet or undertake substantial action to meet all or any part of the breaches alleged by Lessor. The service of said notice shall be precedent to the bringing of any action by Lessor on said Lease for any cause, and no such action shall be brought until the lapse of thirty (30) days after service of such notice on Lessee. Neither the service of said notice nor the doing of any acts by Lessee aimed to meet all or any of the alleged breaches shall be deemed an admission or presumption that Lessee has failed to perform all its obligations hereunder.

a. Implied covenants: Nothing in this Lease is intended to relieve the Lessee from any implied covenants or from any obligation to act as a reasonable and prudent operator giving due regard to the interests of Lessor. This includes but is not limited to the covenant to explore and develop the minerals leased.

b. Subject to laws: All express and implied covenants of this Lease shall be subject to all applicable federal and state, county or municipal laws, executive orders, rules and regulations.

c. Force Majeure: Lessee's obligations and covenants hereunder, whether express or implied, shall be suspended at the time or from time to time as compliance with such obligations and covenants is prevented or substantially hindered by or is in material conflict with federal, state, county, or municipal laws, rules, regulations or executive orders asserted as official by or under public authority claiming jurisdiction, or acts of nature, adverse field or weather conditions, wars, strikes, lockouts, riots, or other material conditions not under the control of Lessee, or for which Lessee is prevented by circumstances outside of Lessee's control from taking an alternative and reasonable course of resolution. This Lease shall not be terminated in whole or in part, nor Lessee held liable in damages for failure to comply with any such obligations or covenants if compliance therewith is prevented or substantially hindered by or is in material conflict with any of the foregoing eventualities. The time during which Lessee shall be prevented from conducting drilling or reworking operations during the primary term of this Lease, under the contingencies above stated, shall be added to the primary term of the Lease, if, and only if, Lessee had commenced such operations on the Lease lands prior to the period of force majeure.

12. Warranty: Lessor does not warrant or agree to defend title to the Lease lands excepting as to any party claiming by, through or under Lessor. Lessee assumes the risk of title, lien, cloud or claim and agrees to defend and hold Lessor harmless against any actions arising out of Lessee's assertion of claim to the Lease lands under the terms hereof. Lessor agrees that the Lessee, at its option, shall have the right at any time to pay for Lessor, any mortgage, taxes or other liens existing, levied or assessed on or against the Lease lands in the event of default of payment by Lessor and be subrogated to the rights of the holder thereof, and Lessor hereby agrees that any such payments made by Lessee for the Lessor may be deducted from any amounts of money which may become due the Lessor under the terms of this Lease.
13. Lease Language: Any changes or modifications to the terms hereof must be in a writing signed by both the Lessor and Lessee.
    a. Division Orders: No language in any division order signed by Lessor, their heirs, successors or assigns, subsequent to the effective date of this Lease shall modify or negate any language contained in this Lease.
    b. Conflicts: In the event of any conflict between the terms hereof and the terms of any division order, or other writing entered into by the Lessor concerning the Lease lands, the language of the Lease shall control unless specified otherwise in writing by the Lessor.
14. Homestead: With respect to and for the purpose of this Lease, Lessor, and each of them if there be more than one, hereby releases and waives the right of homestead.
15. Additional Provisions: Within thirty (30) days after completion of a title memo covering the Lease lands, Lessee will provide a copy to Lessor.

IN WITNESS WHEREOF, this instrument is executed as of the date first above written.

____

(type in name of signatory)

(include notary)