COMMON ISSUES IN PREPARATION OF A TITLE OPINION

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Common Issues in Preparation of a Title Opinion

• Title Standards
• Affidavit of Production statutes
• Duhig – Recent ND Supreme Court decisions
• Malloy – Third Party Reservations
• Ownership of Minerals under Railroads/Highway Rights of Way
• Conveyance of Royalty Interests
• Transfer of Mineral Interests by fractional interest and/or mineral acres
• Extension of Overriding Royalty Interests
Title Standards

• Standards and criteria adopted by organization of lawyers

• Generally consensus of majority of lawyers in practice area

• May be accepted as establishing standard of care under which title examiner should operate for a given set of facts
Title Standards

• Do NOT have the force of law
  • Rarely enacted into law
    • South Dakota codified its standards

• BUT, courts have relied upon title standards when addressing matters involving title issues
Title Standards

• Most are general property, NOT mineral specific
• Some states address mineral title issues within regular standards
• North Dakota – separate mineral title standards
Title Standards

- Provide guidance to frequently encountered issues in title examination
- Examiners must be familiar with title standards in their jurisdiction
- Examiners urged to examine statutes or case law upon which standards are based
Affidavit of Production Statutes

• Treatment of:

• Oil and Gas Lease of record
  • Appears expired
  • No release recorded
Affidavit of Production Statutes

• Oil and Gas Leases
  • Primary term – number of years
  • Potential secondary term – by production
  • Extension into secondary term depends on facts which may be outside the chain of title
    • Existence of producing well
Affidavit of Production Statutes

- Title examination
- Three methods
  - (1) Affidavits of Non-Production or Non-Development
    - No production on lands covered by lease – lease expired
  - (2) Mineral owner may record affidavit reciting facts of forfeiture or termination of lease
    - Some states have more formal procedure
      - Lease deemed terminated upon completion of procedure
  - (3) Lease of no effect unless evidence of continuation appears of record
    - Affidavits of Production
Affidavit of Production Statutes

- Affidavits of Production
  - Affidavits recorded to provide evidence a lease is held beyond its primary term through production
  - If lessee fails to record an Affidavit of Production, the lease is no longer constructive notice to third parties beyond its primary term
    - Third party must be innocent purchaser
      - Actual notice
      - Inquiry notice
      - Surface inspection
Affidavit of Production Statutes

• Six states have Affidavit of Production Statutes
  • North Dakota
  • Kansas
  • Nebraska
  • Iowa
  • Colorado
  • South Dakota
Affidavit of Production Statutes

- Title examiner perspective
  - If preparing title opinions in a state with Affidavit of Production Statute
    - Good practice to remind operator to record Affidavit of Production to protect leasehold
Duhig

- ND adopted general rule in 1971 (*Kadrmas v. Savaugeau*)
  - A owns surface and ½ minerals
  - A conveys land to B, reserving ½ mineral interest
- Duhig says:
  - A purports both to *convey* ½ mineral interest and *reserve* ½ mineral interest
  - Because A cannot fulfill *conveyance* of ½, and *reservation* of ½, B gets minerals
  - Focus on what grantor purports to convey, not what grantor purports to reserve
Duhig

• ND specifics
  • Warranty not necessary
    • *Miller v. Kloeckner* (ND Supreme Court – 1999)
      • “a Duhig result may be reached with a limited warranty or with no warranty”
  • Rule does not apply to cotenants
    • *Gilbertson v. Charlson* (ND Supreme Court – 1981)
    • In example above, if A and B are cotenants, B has constructive notice of outstanding mineral interest and Duhig does NOT apply
Duhig

• Duhig
  • Where a grantor conveys in such a manner to include 100% of the minerals, and also reserves 50% of the minerals, the reservation is not valid when the grantor owns only 50% of the minerals
    • Grantor cannot both convey 50% of the minerals AND reserve 50% of the minerals
    • Both the grant and the reservation cannot be given effect
      • Grantor loses because risk of title is on Grantor
Duhig

• Duhig
  • If Grantor does not own enough minerals to satisfy both the grant and the reservation, the grant must be satisfied first because the obligation of the grant is superior to the reservation

• Key
  • Not what the Grantor purported to retain, but what the Grantor purported to give to the grantee
Duhig

• New ND Supreme Court case law
• *Waldock v. Amber Harvest Corp.*
  • (August 2012)

• *Nichols v. Goughnour*
  • (August 2012)

• *Wenco v. EOG Resources, Inc.*
  • (October 2012 – Tuesday)
Duhig

- *Waldock v. Amber Harvest Corp.*

- William Edwardson owned 100% of the surface and 50% mineral interest
  - PR of Edwardson’s estate obtained a court order authorizing the sale of the property to Waldock
Duhig

• *Waldock v. Amber Harvest Corp.*

• Deed
  • “grant, bargain, sell and convey…[unto grantee] …all the right, title, estate and interest, of the said above named decedent, at the time of his death… in and to:
  • The E2SW4, Lots 3, 4, of Section 18, 151-90, “excepting and reserving unto said estate, its successors and assigns, forever, an undivided Twenty-five percent (25%) interest in all of the oil, gas, and other minerals upon, or in said land…”
Duhig

- *Waldock v. Amber Harvest Corp.*
- Court determined Duhig NOT applicable
  - Held
    - Grantee gets 25% mineral interest
    - Grantor (estate) retains 25% mineral interest
- Plain language of Deed grants only all right, title, estate, and interest of decedent at the time of his death
  - No overconveyance
Duhig

- *Nichols v. Goughnour*

- 9 Siblings collectively owned 100% of surface and 50% of oil and gas in tract
  - Each sibling owned:
    - 1/9 surface interest
    - 1/18 oil and gas interest
Duhig

• *Nichols v. Goughnour*

• 8 Siblings execute deeds to 9th Sibling
  • “grant, bargain, sell, and convey...all my undivided one-ninth interest in and to” the tract to Sibling 9
  • Excepting “to the grantors, 25% of all minerals, gas, oil...and 25% of all royalties on account thereof...”
Duhig

• *Nichols v. Goughnour*

• Nichols – Successors to Sibling 9
  • Argued the deeds only reserved ¼ of each grantors’ 1/18 mineral interest
    • Nichols – 7/18 mineral interest
    • Other 8 Siblings – 2/18 mineral interest
Duhig

- **Nichols v. Goughnour**

- Goughnour – Successors to other 8 Siblings
  - Argued the deeds should be read as one conveyance
    - Nichols (Sibling 9) – \( \frac{1}{4} \) mineral interest
    - Goughnour (other 8 Siblings) – \( \frac{1}{4} \) mineral interest
Duhig

- *Nichols v. Goughnour*
- Court
  - 8 Deeds are NOT ambiguous
  - CANNOT be read together as a single transaction
    - Even though executed at relatively same time, part of same transaction…
  - Deeds do not refer to each other
  - Deeds themselves do not indicate they are part of one transaction
Duhig

• *Nichols v. Goughnour*

• Court
  • Each deed clearly conveys each grantor’s 1/9 interest in the land and excepted and reserved a ¼ mineral interest in all minerals under the land
  • Each grantor only owned a 1/18 mineral interest
    • Overconveyance in each deed
Duhig

• *Nichols v. Goughnour*

• Court
  • Discusses *Gilbertson* case
    • *Gilbertson* – *Duhig* does not apply to co-tenants
    • Court said because these were separate deeds, *Gilbertson* cannot apply to collectively reserve a total of ¼ mineral interest in the grantors
    • Rather, each deed reserves ¼ of each grantor’s 1/18 mineral interest
      • Grantors collectively reserve 1/9 mineral interest and conveyed rest to Sibling 9
Duhig

- *Nichols v. Goughnour*
- Court
  - RESULT
    - 8 Siblings get total of 2/18 mineral interest
    - Sibling 9 gets total of 7/18 mineral interest
Duhig

- **Waldock and Nichols**
  - What do Attorneys and Landmen need to know
    - *Waldock* – granting clause seems to take conveyance out of Duhig
      - All grantor’s interest…does not include 100% of minerals and you don’t need Duhig because there is no conflict
    - *Nichols*
      - Seems to extend *Gilbertson* rationale that Duhig not applicable in co-tenancy situation
  - Language of granting clause, reservation, and document VERY important
Duhig

- *Wenco v. EOG Resources, Inc.* (Tuesday)

- 1991 case of *Acoma Oil Corp. v. Wilson* uses Duhig rationale to determine who bears outstanding royalty interests when conveyances are not made subject to outstanding royalty interests
  - Grant must be satisfied first – if Grantor owns enough to bear the burden, Grantor bears – if Grantor does not own enough to bear the burden, Grantee bears its proportionate share
  - *Wenco* re-affirms ND Sup Ct application of Duhig (through *Acoma*) to this situation
Duhig

- *Acoma* – ND Mineral Title Standard 7-05 and 7-05.1

  - If a mineral owner who owns a mineral interest subject to an outstanding royalty interest executes a mineral deed (with a warranty clause) to a party conveying mineral acres or “interests in oil, gas and other minerals in and under” without any reference to the outstanding royalty interest, the retained mineral interest of the mineral owner alone bears the outstanding royalty if the interest is large enough to satisfy the royalty interest
Mineral Reservations to Third Parties - Malloy

• **Stetson v. Nelson** (ND Supreme Court – 1962)
  • Follows “general” rule
  • NO third party reservations

• **Malloy v. Boettcher** (ND Supreme Court – 1983)
  • A reservation can be effective to convey a property interest to a spouse, who does not own an interest in the land prior to the deed, but joins in the execution of the deed, where it is determined to have been the grantor's intent
  • Spouse is not a “stranger” and may acquire an interest through a reservation
Mineral Reservations to Third Parties - Malloy

• How do you cure a “Malloy” defect
  • Probate spouse’s estate
    • Disclaimer from estate of spouse
    • Conveyance from spouse’s estate
  • Stipulation
  • Disclaimer
Mineral Reservations to Third Parties - Malloy

- Title Examiners/Landmen
  - Be on the lookout for Malloy reservations
  - Know the potential impact on title
Ownership of Minerals under Railroad and Highway Rights of Way

• **Highways**
  - Conveyances of highway rights of way generally **DO NOT** convey fluid mineral interests
    - For example – deeds to State of ND for highway purposes even if no mineral reservation
  - Theory - if land would have been taken through condemnation, entity would get only what it needs and thus minerals would not be obtained
  - Deeds to a County for road purposes with no mineral reservations are ambiguous
  - For section line roads, adjacent landowners own the minerals
Ownership of Minerals under Railroad and Highway Rights of Way

• Railroads
  • Charter (Mainline) rights of way grants are typically not recorded
  • 1862 or 1864 Acts, minerals in USA except coal & iron to the railroad – *Northern Pacific* (e.g. Dickinson)
  • 1875 Act – easement only, title to minerals in patentee – *Great Northern* (e.g. Williston)
  • By Deed from landowner – may include all minerals to railroad
    • In older ND Supreme Court case and more recent ND District Court case, the Courts indicated that fee title was conveyed so would include all minerals
Conveyance of Royalty Interests

• Royalty Deeds are often ambiguous as to how much royalty is being conveyed

• Two issues with Royalty Deeds
  • (1) Determine the fractional interest conveyed
  • (2) Determine whether royalty or minerals are being conveyed
Conveyance of Royalty Interests

• Two types of Royalty

  • (1) Fractional Royalty
    • Fraction or percentage of gross production

  • (2) Fraction of Royalty
    • Share of gross production, in the amount of the fraction times the lease royalty
Conveyance of Royalty Interests

• Fractional Royalty

• Created by:
  • “An undivided 1/16th royalty interest”
  • “A 1/4th royalty in all oil, gas and other minerals in and under and hereafter produced”
  • “1% royalty of all the oil and gas produced and saved”
Conveyance of Royalty Interests

• Fraction of Royalty

• Created by:
  • “1/16\textsuperscript{th} of all oil royalty”
  • “one-half interest in all royalties received from any oil and gas leases”
  • “An undivided one-half interest in and to all of the royalty”
Conveyance of Royalty Interests

• Distinguishing between fractional and fraction of can be very difficult

• Difference between the two is significant
  • 1/16 fractional royalty is a fraction of all the production
    • 6.25%
  • 1/16 fraction of royalty on a 1/8 lease is 1/16 x 1/8
    • 0.78125%

• Conveyances are often ambiguous
Conveyance of Royalty Interests

• Does the deed convey royalty or minerals
  • Some courts construe deeds as conveying minerals even though titled “Royalty Deed”

• Some courts have construed the royalty interest conveyed to be reduced by the interest owned by the grantor

• Who bears the burden of royalty, especially if mineral interest is not large enough to bear it
  • Some leases shift the burden to the lessee
Conveyance of Royalty Interests

- Title examiners
  - Must be aware of applicable law in jurisdiction
  - Must identify potential issues involved
  - Any ambiguity must be clarified by corrective deed, stipulation of interest, or quiet title action
Transfer of Mineral Acres by Fractional Interest and/or Mineral Acres

- Mineral Deed conveys 80/160 mineral interest, states lands contain 160 acres
  - But lands contain 158 acres, 80/160 x 158 acres = 79 acres
  - But lands contain 162 acres, 80/160 x 162 acres = 81 acres
- But if also an intent clause of 80 acres, grantee likely receives 80 acres in either scenario, but stipulation of interest needed
Transfer of Mineral Acres by Fractional Interest and/or Mineral Acres

• Section 1 contains 640 acres. Patent states lands contain 620 acres comprised of lots. The difference of 20 acres is due to non-navigable river located in the section

• A executes mineral deed to B conveying an undivided 310/620ths interest in “All of Section 1,” stated to be 620 acres

• Issue whether mineral deed conveyed any interest in 20 acres under the river

• A asserts 310/620ths limited to 620 acres contained in the lots, being 310 mineral acres. B asserts as Section 1 contains 640 acres, acquired 310/620ths interest in all 640 acres, being 320 mineral acres

• North Dakota Supreme Court – grantee acquired the fractional interest in all 640 acres of Section 1
Transfer of Mineral Acres by Fractional Interest and/or Mineral Acres

• Grantee of fractional or percentage mineral interest gains by excess of acreage and loses by shortage of acreage

• Grantee of undivided mineral acres neither gains nor loses by excess or shortage of acreage

• If deed conveys land stated to cover a specific number of acres “more or less,” deed will convey interest in the entire tract even if acreage is incorrect

• If discrepancy between specific description of property conveyed and statement of acreage of that property, the specific description is controlling, e.g. all of Section 1
Extension of Overriding Royalty Interests

- Extension and renewal clauses
  - 2007 Oil and Gas Lease taken by Company A
  - Primary term of 5 years
  - Company A, original lessee, assigns all interest to Company B
  - Company A retains an ORRI which burdens all extensions or renewals of Lease, or new leases within certain time frame
  - If Company B obtains a top lease, lease extension, or new lease in 2012, does Company A’s ORRI apply?
Extension of Overriding Royalty Interests

• Courts seem uniform that no right to extension or renewal applies unless assignment contains such a clause
  • There are exceptions with a few courts imposing a duty of fair dealing

• Related issue
  • What happens when the top lease contains a higher landowner royalty
    • 2007 Lease – 15% LOR
    • 2012 Lease – 18% LOR
  • If ORRI is 20% less burdens, is ORR or WI owner interest diminished by higher LOR?
  • If WI owner was promised NRI of 80%, is ORR owner interest diminished by higher LOR?
Extension of Overriding Royalty Interests

• Title examiners must be aware of the potential

• Failure to comment on potential extension could have serious implications
THANK YOU!

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