OIL AND GAS TITLE LAW
A REVIEW OF FIFTY COMMON PROBLEMS - NORTH DAKOTA

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Acreage Discrepancy

- A discrepancy in acreage quantity in a description, without anything more, does not rise to the level of a title problem.

- When there is a discrepancy in a deed between the specific description of the property conveyed and an expression of the quantity conveyed, the specific description is controlling.

- If a mineral interest is conveyed by a stated fraction or percentage and also by mineral acres, and the two provisions result in a conflict, the land professional must require that the conflict be resolved by a stipulation of interest, a corrected deed or by judicial action.
In North Dakota, persons not claiming ownership through a will may establish their title by proof of the decedent’s ownership and death and their relationship to the decedent, but a court order is necessary to determine title. An affidavit of heirship, alone, is insufficient.
North Dakota is in a minority of states that require that an affidavit of production be recorded to provide constructive notice that an oil and gas lease has been extended into its secondary term by production. Under the affidavit of production statutes, a lease is considered to be of no effect unless the affidavit of production is recorded.

No court decisions have interpreted this statute. However, if a well is on the land, it doesn’t appear that a court would allow a third party to ignore the presence of a producing well.
The habendum clause in an oil and gas lease typically provides that the lease will remain in effect for a certain time (the primary term) and as long thereafter as oil and/or gas is produced from the leasehold.

Courts have allowed temporary periods of cessation of production. When deciding whether a cessation of production is “temporary,” courts have considered period of time cessation has persisted, intent of operator, cause of cessation and diligence of the operator in restoring production.
The common law doctrine of temporary cessation essentially provides that after the expiration of the primary term, a lease may continue in force even if there has been a cessation of production if the period of cessation, in light of all the circumstances, is not for an unreasonable time.

One circumstance which justifies noncancellation occurs when, if prior to exhaustion of the producing formation, production is interrupted for purposes which are mutually advantageous to the lessor and lessee. Such cessation should qualify as a temporary cessation. For example, if production is interrupted in a bona fide attempt to increase or reinstate production from an existing well or wells.
All leases by any city, town or political subdivision that do not come within the small tract exception outlined above must be leased through public offering. Public notice must not be inconsistent with the requirements of the Board of University and School Lands rules and regulations for leasing.
Often when a document is recorded and it is later discovered that it needs to be corrected, frequently, the grantor will, unilaterally, correct and refile the original.

The law indicates that if the correction is minor, the re-recorded instrument may be sufficient. However, in order to give effect to a material alteration of a previously recorded document affecting title to real property, the instrument must be re-executed, re-acknowledged, re-delivered and re-recorded. A grantor cannot unilaterally derogate from a previous grant.
Oil and gas examiners frequently encounter conveyances which specify that the grantor conveys all his interest in a described county, such as “all my interest in Grant County.” Decisions in cases in states deciding the legal effectiveness of such conveyances are mixed, depending on the specificity of the description. Patton and Palomar states that such conveyances are generally held to be effective, if the deed contains sufficient information so that by reference to some document or instrument referred to in the deed, a true and accurate description can be ascertained.

In states in which tract indices are used, the blanket conveyance would not constitute constructive notice to third parties.
The North Dakota “Termination of Mineral Interest” Act is self-executing, meaning that a mineral interest is deemed to be abandoned as a matter of law simply by non-use for the requisite period of time.

If a mineral interest is deemed unused for a period of 20 years, it is deemed to be abandoned unless a statement of claim is recorded containing the name and address of the owner of the mineral interest, a legal description of the land on, or under which, the mineral interest is located as well as the type of mineral interest involved.
The North Dakota “Termination of Mineral Interest” Act recites that a mineral interest is “deemed to be used” during the 20-year period and therefore is not susceptible to vesting in the surface owner if:

1. minerals are produced under the interest, ...
2. (4) the mineral interest was subject to a recorded lease, mortgage, assignment or conveyance,
3. (5) the mineral interest is subject to a recorded order or agreement for pooling or unitization, ...
4. (7) a statement of claim has been recorded within the grace period allowed after enactment of the statute, or
5. (8) the record mineral owner “utilizes the mineral interest in a manner pursuant to, or authorized by, the instrument creating the mineral interest.”
One rule of construction of conveyances is the Duhig rule established in the Texas case of *Duhig v. Peavy-Moore Lumber Co., Inc.* which has been followed in North Dakota with *Sibert v. Kubas*. The *Duhig* rule is applied to conveyances by warranty deed in which the owner of a fractional mineral interest reserves a share of the mineral estate without referencing the outstanding mineral interests.

The North Dakota Supreme Court has ruled that Duhig applies regardless of whether there is a warranty or not in the deed.

- *Miller v. Kloecner, 600 N.W.2d 881 (N.D. 1999).*
North Dakota allows for homestead rights. The homestead of any individual, whether married or unmarried, residing in North Dakota consists of the land upon which the claimant resides and the dwelling house on that land.

Neither spouse may convey or encumber the homestead without the joinder of the other spouse. There is no question that a conveyance, mortgage or lease relating to the homestead is voidable unless executed and acknowledged by both husband and wife. It is also well settled in North Dakota that a husband and wife must execute the same instrument.

Homestead rights do not apply to severed minerals.
The life tenant of a life estate has the right to possession of the property with the remainderman obtaining possession upon the death of the life tenant. Unless the instrument creating a life estate expressly reserves the executive right to lease, a life tenant and remainderman must both execute an oil and gas lease for the lease to be effective.
The North Dakota Industrial Commission regulates the spacing and pooling of wells located in North Dakota.

The North Dakota Industrial Commission also regulates pooling. The need for pooling arises when a given drilling unit is comprised of two or more tracts of a mineral interest. The pooling joins together all tracts and interests in a drilling unit to allow for drilling and share the cost and benefits. This pooling is different from the voluntarily pooling contained in an oil and gas lease.
POOLING (COMPULSORY OR FORCED)/ INDUSTRIAL COMMISSION.

- Risk Penalty:
  - If leasehold (300% of Drilling Costs)
  - If Mineral Owner (150% of Drilling Costs)
If title is acquired by a railroad under an Act of Congress, generally, the railroad acquires only a right-of-way. By the Act of July 2, 1864, Congress conveyed to the Northern Pacific Railroad Company a right-of-way together with fee simple title to 10,697,490 acres in North Dakota. The reservation purporting to exclude and except “all mineral lands should any such be found” in a federal patent to the Northern Pacific Railroad Company issued pursuant to the Act of July 2, 1864 is void.
In most states, a reservation made to a stranger in title is invalid. In Stetson v. Nelson, the North Dakota Supreme Court followed the general rule and held that a reservation to a stranger was ineffective. In reliance upon this decision, many conveyances were drafted without regard to whether the other spouse could acquire an interest by the third party reservation.
In 1983, in Malloy v. Boettcher, the Supreme Court held such a conveyance was effective to reserve a mineral interest in the other granting spouse.

Under Malloy, an exception or reservation can be effective to convey a property interest to a spouse, who does not own an interest in the land prior to the deed, but joins in the execution of the deed, where it is determined to have been the grantor’s intent.
The tax deed would not extinguish the title of a severed mineral owner if the severance occurred prior to the year for which the tax deed proceedings.
Wellbore Assignments

- In examining title, traditional lease assignments convey all or some portion of assignor's leasehold interest in specified leases. However, frequently, an examiner will encounter a “wellbore assignment” where, for example, assignor assigns to assignee all of its interest in the wellbore of the Smith #1 Well.