

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

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It is difficult to quantify the number of potential problems an attorney or landman might encounter when discussing title issues. Nevertheless, fifty is a good number to cover some of the most common and important. Some of these title issues could warrant more in-depth analysis. However, these common issues are presented below in a generalized form to allow an attorney or landman to recognize potential problems in the examination of oil and gas title.

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1. ACKNOWLEDGMENTS AND RECORDING

“The record of any instrument, whether or not entitled to be recorded, shall be deemed valid and sufficient as the legal record thereof and shall constitute notice to all persons of the contents of the instrument as it

appears of record.”¹ “[A] defective acknowledgement or no certificate of acknowledgement at all has no effect on the record of an instrument.”² However, a conveyance of a homestead requires the execution and *acknowledgement* of both the husband and wife.³ The use of the appropriate “short form” acknowledgment, authorized by the Uniform Law on Notarial Acts, within an instrument appearing of record is not a title defect.⁴ The short form acknowledgment for an individual, which can also be used for more than one person, is as follows:

STATE OF NORTH DAKOTA)	
)	ss
COUNTY OF)	

The foregoing instrument was acknowledged before me this [date] by
[name or names of person or persons acknowledging].

Notary Public

(SEAL)

My Commission Expires: _____

2. ACREAGE DISCREPANCY

A discrepancy in acreage quantity in a description, without anything more, does not rise to the level of a title problem.⁵ The phrase “more or less,” when used following a description of a certain quantity of land, does not render the description ambiguous.⁶ The words “more or less” are words of caution and, where other circumstances so indicate, show that a quantity of acreage is not exact.⁷ The quantity of acreage is the least reliable of all elements of description.

Where the described acreage and the purported quantity of acres vary greatly, the description may be ambiguous and indicate a mistake was made when describing the property. In such an event, an inquiry of the parties and a corrected deed may be necessary. However, 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

1. N.D. TITLE STANDARDS § 6-01 (N.D. State Bar Ass’n 2012).

2. *Id.* cmt.

3. N.D. CENT. CODE § 47-18-05 (2013).

4. *See* UNIF. LAW ON NOTARIAL ACTS § 16(2) (2007).

5. *See* Lario Oil & Gas Co. v. EOG Res., Inc., 2013 ND 98, ¶ 8, 832 N.W.2d 49, 52.

6. *Id.* ¶ 10, 832 N.W.2d at 53.

7. *See id.*; *see also* Hild v. Johnson, 2006 ND 217, 723 N.W.2d 389.

description is controlling.⁸ 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.⁹

3. AFFIDAVITS

Many times affidavits are filed of record. Affidavits may be used for the following matters:

1. age, sex, birth, death, or the date of death, relationship, family history, marital status;
2. possession, residence, service in the Armed Forces;
3. names and identities of parties—whether individual, corporate, partnership or trust;
4. identity of officers of corporations, membership of partnerships, joint ventures and other unincorporated associations;
5. history of the organization of corporations, partnerships, joint ventures and trusts;
6. identity of trustees of trusts and their respective terms of service; and
7. conflicts and ambiguities in descriptions of land in recorded instruments.¹⁰

Specifically in North Dakota, affidavits can also be relied upon to determine whether certain property was or was not homestead property and to establish possession of the record titleholder.¹¹ In North Dakota, “[p]ersons 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.”¹² An affidavit of heirship, alone, is insufficient.¹³

When preparing an affidavit, the drafter should ensure the affidavit only states facts—not conclusions of law. When reviewing an affidavit, the affidavit should only be relied upon for information regarding dates of

8. *Lario*, ¶ 11, 832 N.W.2d at 53.

9. N.D. MINERAL TITLE STANDARDS § 3-02 cmt. (N.D. State Bar Ass’n 1989).

10. *See* 1 PATTON AND PALOMAR ON LAND TITLES § 20 (3d ed. 2014).

11. N.D. CENT. CODE § 47-19.1-11 (2013).

12. N.D. TITLE STANDARDS § 12-01 (N.D. State Bar Ass’n 2012).

13. *See id.*

death and identity of the surviving heirs. The value of an affidavit or recital is not reduced if the maker is interested in the title.¹⁴

4. AFFIDAVITS OF POSSESSION

A title examiner routinely requires an affidavit of possession. The affidavit of possession is necessary to assure (1) that the person who executes a lease is still the owner of the property and (2) that a stranger to title who could claim ownership by adverse possession is not occupying the property.¹⁵ If an owner secures title by adverse possession, the time of ownership relates back to the date the stranger first took possession of the property. Adverse possession of the surface is not effective as to severed minerals; however, it is effective as to unsevered minerals.¹⁶

5. AFFIDAVITS OF PRODUCTION

North Dakota is in a minority of states that allow an affidavit of production to be recorded to provide constructive notice that an oil and gas lease has been extended into its secondary term by production.¹⁷ Under the affidavit of production statutes, a lease is considered to be of no effect unless the affidavit of production is recorded.¹⁸ If a lessee fails to record an affidavit of production, under the statute, the oil and gas lease is no longer constructive notice to third parties of possible production that would extend the oil and gas lease.¹⁹ No court decisions have interpreted this statute. However, if a well is on the land, it is doubtful that a court would allow a third party to ignore the presence of a producing well.

6. ATTORNEY-IN-FACT

A power of attorney is a document authorizing an agent or attorney-in-fact to perform certain acts on behalf of the principal.²⁰ A land professional should not accept the authority of anyone who purports to act as attorney-in-fact without reviewing the power of attorney. An attorney-in-fact may execute a lease or deed as the agent for a principal.²¹

14. See OKLA. STAT. tit. 16, § 53 (2008); *Scott v. Lambert*, 132 P. 1145, 1146 (Colo. App. 1913); *Ferguson v. Booth*, 160 S.W. 67, 69 (Tenn. 1913).

15. See S.D. CODIFIED LAWS § 43-30-07 (2013).

16. *Sickler v. Pope*, 326 N.W.2d 86, 93 (N.D. 1982); *Bilby v. Wire*, 77 N.W.2d 882, 889 (N.D. 1956).

17. N.D. CENT. CODE § 47-16-40 (2013).

18. *Id.*

19. *Id.*

20. N.D. CENT. CODE § 30.1-30-01 (2013).

21. N.D. TITLE STANDARDS § 2-14 (N.D. State Bar Ass'n 2012).

The power of attorney for the conveyance of real estate must be filed in the office of the county clerk where the property is located.²²

Powers of attorney are to be strictly construed.²³ An attorney-in-fact may execute an oil and gas lease if the power of attorney expressly or implicitly grants the authority to execute said lease.²⁴ If the power of attorney authorizes the agent to sell the land, but the instrument is silent as to leasing, the general consensus is that the power is not sufficient authority to lease the land.²⁵ A universal power of attorney gives the attorney-in-fact broad powers and is usually given effect. Universal power of attorneys usually state that the attorney-in-fact has all authority that the principal would have but do not expressly authorize the execution of an oil and gas lease.²⁶

It is presumed that a principal was alive, competent, and of legal age when he or she executed the power of attorney.²⁷ The North Dakota Title Standards provide:

If the abstract raises a question as to the revocation or termination of a power of attorney, an affidavit from the attorney in fact stating that at the time of doing an act pursuant to the power, the attorney in fact did not have actual knowledge of revocation or termination of the power by death, disability or incompetence, shall be conclusive proof of the non-revocation or non-termination of the power, unless the power of attorney itself contains a provision for termination by expiration of time or occurrence of an event other than express revocation or change in the principal's capacity.²⁸

Additionally, the Standards provide: "A [lease] of homestead property executed by one spouse, individually, and as attorney-in-fact for the other spouse is sufficient if the power of attorney specifically authorizes the conveyance of homestead property."²⁹

7. BANKRUPTCIES

When examining title, the land professional should determine whether the debtor has filed for bankruptcy under Chapters 7, 11, 12, or 13. The

22. N.D. TITLE STANDARDS § 2-11 (N.D. State Bar Ass'n 2012).

23. 3 AM. JUR. 2D *Agency* § 17 (2015).

24. *See* TEX. PROP. CODE ANN. § 8.10 cmt. (West 2014).

25. *Id.*

26. N.D. TITLE STANDARDS § 2-11 (N.D. State Bar Ass'n 2012).

27. 2 PATTON AND PALOMAR, *supra* note 10, at § 419.

28. N.D. TITLE STANDARDS § 2-12 (N.D. State Bar Ass'n 2012).

29. N.D. TITLE STANDARDS § 2-07 (N.D. State Bar Ass'n 2012).

most commonly filed bankruptcy is Chapter 7.³⁰ In a Chapter 7 bankruptcy, the debtor's property is either (1) retained by the debtor because it is exempt under state law,³¹ (2) retained by the debtor because the bankruptcy trustee abandoned the property,³² or (3) sold under the supervision of the court.³³ If a debtor is an individual, he may claim his homestead as exempt.³⁴ If the debtor claims real property as exempt, parties have a limited time to object to the exemption. If no objection to the claim of exemption is filed, the property is deemed to be exempt and the debtor retains the property subject to pre-petition liens.³⁵ If a bankruptcy proceeding was commenced after October 1, 1979, the examiner should investigate the bankruptcy of the debtor who holds title to real property at the time of filing bankruptcy.³⁶

If the property is scheduled and claimed by the debtor as exempt and the bankruptcy court has not sustained an objection to the claim of exemption, the examiner should review the following:

1. The petition and order for relief;
2. The Schedule of Real Property (Schedule "A") and the Schedule of Exempt Property (Schedule "C") for cases filed on or after August 1, 1991, showing the property was claimed as exempt by the debtor; and
3. The docket sheet showing satisfactory evidence that no objection to such claim of exemption has been filed or if an objection was filed, an order by the bankruptcy court overruling or otherwise resolving such objection.³⁷

If the property is affirmatively abandoned, the examiner should secure:

1. The Petition and Order for relief;
2. The Schedule of Real Property (Schedule "A") showing that the debtor's interest in the property was disclosed;

30. Robertson B. Cohen, *Top Ten Topics in Bankruptcy for the Non-Bankruptcy Attorney*, 37 COLO. LAW. 19, 19 (2008).

31. 11 U.S.C. § 522 (2008).

32. 11 U.S.C. § 554 (2008).

33. 11 U.S.C. § 363 (2008).

34. 11 U.S.C. § 522 (2008).

35. FED. R. BANKR. P. 4003(b).

36. Effective October 1, 1979, the Bankruptcy Act was replaced by the Bankruptcy Code. Bankruptcy Reform Act of 1978, Pub. L. No 95-598, 92 Stat. 2549.

37. If the docket sheet indicates that no objection was timely filed, the property is deemed exempt. See 11 U.S.C. § 522(1) (2006); Taylor v. Freeland & Kronz, 503 U.S. 638 (1992); In re: Larson, No. 12-30913, 2013 WL 4525214 (Bankr. D.N.D Aug. 27, 2013).

3. The notice of intention to abandon the property given by the trustee and satisfactory evidence that no objections to such abandonment have been filed; and
4. If the abandonment is pursuant to a request of a party in interest, the order by the bankruptcy court authorizing or directing such abandonment.³⁸

If the property is sold through the bankruptcy, the examiner should note if the property was sold in the ordinary course of business or if the property was sold free and clear of any liens.³⁹ After securing this information, additional guidance may be required. A judgment lien that has attached to real property “prior to the filing of the bankruptcy petition is not nullified by the discharge of the debt as a personal liability, except as against the homestead” of the debtor.⁴⁰

8. CEMETERIES

The owner of a lot in a cemetery, regardless of the wording of the deed, does not own fee simple title. The owner’s title is analogous to a perpetual easement or license.⁴¹ Ownership of the mineral rights underlying a cemetery depends upon how the cemetery operator acquired title to the tract and what has been done subsequently. If the land was acquired by condemnation, the proceedings should be examined to determine who owns the fee. If the land in question had been devoted to cemetery use by a common-law dedication, only the dedicator needs to execute an oil and gas lease.⁴² If the land was “donated” or “granted” by statutory dedication by plat, the public owns a fee interest, and a lease must be secured from the appropriate public entity.⁴³ If the cemetery operator acquired a fee by

38. If the subject property is not disclosed on the schedule of real property filed in conjunction with the petition, it remains administered property of the estate upon the closing of the case. *See* 11 U.S.C. § 554(d) (2006). In that event, the examiner should require that the bankruptcy proceedings be re-opened in accordance with 11 United States Code section 350(b) so that the property can be scheduled and administered by the bankruptcy court. *See In re Dunning Bros., Co.* 410 B.R. 877, 888 (Bankr. E.D. Cal. 2009) (case reopened to administer unscheduled property seventy-three years after the case was closed).

39. Federal law allows a movant to conduct a sale of estate property free and clear of certain specified interests that may encumber the interest being sold. *See* N.D. TITLE STANDARDS § 16-10 (N.D. State Bar Ass’n 2012).

40. N.D. TITLE STANDARDS § 16-11 (N.D. State Bar Ass’n 2012). The debtor may file a declaration of homestead; such declaration is conclusive proof that the property is homestead, except for any part in excess of the amount of the homestead exemption. N.D. TITLE STANDARDS § 9-04 (N.D. State Bar Ass’n 2012).

41. *Walker v. Ga. Power Co.*, 339 S.E.2d 728, 730 (Ga. App. 1986); *Heiligman v. Chambers*, 338 P.2d 144, 148 (Okla. 1959).

42. *Taylor v. Cont’l S. Corp.*, 280 P.2d 514, 520 (Cal. Dist. Ct. App. 1955).

43. *Langston City v. Guston*, 127 P.2d 197, 208 (Okla. 1942).

conveyance or the commencement of burial, the operator owns the minerals.⁴⁴ If the grantor has retained any reversionary interest, he should also execute or ratify the lease.

There is some question as to the status of title after abandonment of a cemetery. When possible, the safest alternative is to secure an oil and gas lease from the last person to hold fee title prior to a statutory dedication.⁴⁵ It is generally agreed that the surface of a cemetery may not be used for oil and gas operations.⁴⁶

9. CESSATION OF PRODUCTION

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.⁴⁷ Under a strict interpretation of this clause, any interruption in production with respect to the paying quantities, however slight or short, would put an end to the lease. However, courts have rejected such a literal approach.⁴⁸

While examining title, the land professional will often need to determine whether held by production leases are still valid. Courts have allowed temporary periods of cessation of production.⁴⁹ When deciding whether a cessation of production is “temporary,” courts have considered the period of time cessation has persisted, the intent of operator, the cause of cessation, and the diligence of the operator in restoring production.⁵⁰ 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 as long as the period of cessation, in light of all the circumstances, is not for an unreasonable time.⁵¹

North Dakota cases have seemingly adopted the Oklahoma rule of temporary cessation of production. The Oklahoma case of *Barby v. Singer*⁵² sums up the doctrine of temporary cessation of production as follows:

44. *Id.*

45. *See Choctaw & Chickasaw Nations v. Bd. of Cnty. Comm’rs*, 361 F.2d 932 (10th Cir. 1966).

46. *Boggs v. McCasland*, 244 P. 768, 769 (Okla. 1926).

47. *Egeland v. Cont’l Res., Inc.*, 2000 ND 169, ¶ 3, 616 N.W.2d 861, 862.

48. *Stimson v. Tarrant*, 132 F.2d 363, 365 (9th Cir. 1942); *Somont Oil Co. v. A & G Drilling, Inc.*, 49 P.3d 598, 608 (Mont. 2002); *Stewart v. Amerada Hess Corp.*, 604 P.2d 854, 858 (Okla. 1979).

49. *See, e.g., Greenfield v. Thill*, 521 N.W.2d 87, 92 (N.D. 1994); *Feland v. Placid Oil Co.*, 171 N.W.2d 829, 836 (N.D. 1969).

50. *Greenfield*, 521 N.W.2d at 92.

51. *Sorum v. Schwartz*, 344 N.W.2d 73, 76 (N.D. 1984); *Feland*, 171 N.W.2d at 835-36.

52. 648 P.2d 14 (Okla. 1982).

In short, the lease continues in existence so long as interruption of production in paying quantities does not extend for a period longer than reasonable or justifiable in light of all of the circumstances involved. But under no circumstances will cessation of production in paying quantities *ipso facto* deprive the lessee of his extended-term estate. . . . [T]he appropriate time period is not measured in days, weeks or months, but by a time appropriate under all of the facts and circumstances of each case.⁵³

In *Feland v. Placid Oil Co.*,⁵⁴ the North Dakota Supreme Court adopted the general rule laid out in *Barby*. In *Feland*, the lessee shut in production of an oil well for nine months when the salt-water-disposal pit filled to capacity.⁵⁵ The lessor refused to allow the lessee to dig another pit, so the lessee was forced to wait for the salt water to evaporate from the pit before it could bring production back on line.⁵⁶ When the lessor sought to terminate the lease because of the cessation of production, the North Dakota Supreme Court explained:

The lessors have introduced no evidence to demonstrate that the operator did not exercise reasonable diligence, but rely on the fact that the cessation of production, of itself, was sufficient to automatically terminate the lease. It has been said that since there are various justifiable causes for the slowing up, or temporary cessation, of production, it would be harsh and inequitable to automatically terminate a lease in all cases of cessation.⁵⁷

One circumstance that justifies noncancellation of the lease occurs when, prior to exhaustion of the producing formation, production is interrupted for purposes that are mutually advantageous to the lessor and lessee. Such cessation qualifies as a temporary cessation. For example, when production is interrupted in a bona fide attempt to increase or reinstate production from an existing well or wells.⁵⁸

Another category of an allowable period of cessation involves mechanical breakdown. When production ceases due to a mechanical breakdown or operational difficulty, the lessee is given reasonable time under the circumstances to restore production by diligently commencing

53. *Id.* at 16.

54. 171 N.W.2d 829 (N.D. 1969).

55. *Id.* at 831.

56. *Id.*

57. *Id.* at 836 (citations omitted).

58. *See Feland*, 171 N.W.2d at 836.

reworking, drilling operations, or other appropriate operations directed to overcome the difficulty.⁵⁹

During the 1960s, as it became clear that courts would find leases that failed to produce for a reasonable time had expired, oil and gas lessees, in an effort to determine what constitutes a “reasonable time,” started inserting cessation of production clauses in their leases. A representative clause provides:

If after the discovery of oil or gas the production thereof should cease from any cause, this lease shall not be terminated thereby if lessee commences drilling or reworking operations within sixty (60) days thereafter or (if it be within the primary term) commences or resumes the payment or tender of rentals on or before the rental paying date (if any) next ensuing after thirty (30) days following the cessation of production.

Another example provides: If production thereof should cease from any cause, this lease shall not terminate if lessee commences operations for drilling or reworking within sixty days. In accordance with these examples, the cessation of production clause in an oil and gas lease typically requires the lessee to engage in further operations within a specific time period, usually sixty or ninety days.

10. CITY OR COUNTY OWNERSHIP

North Dakota law provides that any city, town, or political subdivision may execute oil and gas leases for certain tracts without the requirement of public offering, provided the tracts are less than the minimum drilling unit under well spacing regulations.⁶⁰ These entities may lease the grounds or land of such political subdivision for a primary term of not more than ten years.⁶¹

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.⁶² Public notice must be consistent with the requirements of the Board of University and School Lands rules and regulations for leasing.⁶³ North Dakota Administrative Code section 85-06-06-03 sets forth the requirements of the Board of University and School Lands and provides in part:

59. *Id.* at 832.

60. N.D. CENT. CODE § 38-09-19 (2013).

61. N.D. CENT. CODE § 38-09-02 (2013).

62. *See* N.D. CENT. CODE § 38-09-19 (2013).

63. N.D. CENT. CODE § 38-09-15 (2013).

Prior to the offering of oil and gas leases for sale, the commissioner shall publish notice of sale in the official newspaper of the county or counties in which lands for lease are located, and in the *Bismarck Tribune*. The notice must be published once each week for two weeks, the last publication being at least ten days prior to the day of the lease sale. The advertisement shall specify the date, time and place of the lease sale⁶⁴

All such leases must be made with a royalty reservation of not less than one-eighth, for a primary term of not less than five years, and must continue in effect as long as oil and gas may be produced in commercial quantities.⁶⁵ Further, the occupancy of the land under a lease may not materially interfere with the purposes for which such lands are used and occupied by the political subdivision, nor may oil and gas wells be drilled or located within one hundred feet of any public building upon any such land.⁶⁶

11. CORPORATIONS

A corporation has the power to purchase, lease, or own oil, gas, and other minerals and oil and gas leases.⁶⁷ The authority of any officer of a corporation, any manager of a limited liability company, or any officer or trustee of a business trust or real estate investment trust to execute and acknowledge a document affecting property may be presumed.⁶⁸ Persons deemed officers of corporations include the president, secretary, treasurer, vice president, or any other officer, however designated, as may be described by the bylaws.⁶⁹ Unless there is a provision in the bylaws to the contrary, the president, secretary, treasurer, or cashier of a loan, trust, or banking corporation has the authority to execute instruments “when authorized so to do by resolution of its board of directors.”⁷⁰ Alternatively, a corporation can appoint an attorney-in-fact to execute specified documents affecting real property.⁷¹ The power of attorney needs to be recorded in the county where the real property is located.⁷²

64. N.D. ADMIN. CODE § 85-06-06-03 (2013).

65. N.D. CENT. CODE § 38-09-18 (2013).

66. N.D. CENT. CODE § 38-09-04 (2013).

67. *See* N.D. CENT. CODE § 47-10-05.1 (2013).

68. *Id.*

69. N.D. CENT. CODE § 10-19.1-37 (2013).

70. N.D. CENT. CODE § 6-08-21 (2013).

71. *See* 2 PATTON AND PALOMAR, *supra* note 10, at § 418.

72. N.D. TITLE STANDARDS § 2-11 (N.D. State Bar Ass’n 2012).

12. CORRECTED, ALTERED, OR RERECORDED INSTRUMENTS

When a document is recorded and it is later discovered that the document needs to be corrected, the grantor will often unilaterally correct and refile the original.⁷³ The law indicates that if the correction is minor, the re-recorded instrument may be sufficient.⁷⁴ 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.⁷⁵ A grantor cannot unilaterally derogate from a previous grant.⁷⁶ A material alteration to an instrument is defined as an alteration that changes the legal effect of the instrument or the rights and liabilities of the parties to the original instrument.⁷⁷ One treatise states:

A grantor who has conveyed by an effective and unambiguous instrument cannot, by executing another instrument, make a substantial change in the name of the grantee, decrease the size of the premises or the extent of the estate granted, impose a condition or limitation upon the interest granted or otherwise derogate from the first grant, even though the latter instrument purports to correct or modify the former.⁷⁸

The grantee must join in such a correction or execute a cross-conveyance. However, the second instrument does not impair marketability dependent upon the effect of the first instrument.⁷⁹ Also, any document affecting title to real property and properly filed or recorded for five years or more in the county in which the real property is located is legal and valid for all purposes, unless the document is void on its face or that document or other documents of record establish that the presumption of good faith in making the document is not applicable.⁸⁰

13. DEPTH LIMITATION

When the minerals or leasehold are owned at different depths, an examiner should note whether the dividing depth is in terms of feet, the

73. 1 PATTON AND PALOMAR, *supra* note 10, at § 83 (“[A]n error in a recorded instrument may be corrected and the title confirmed in the grantee by a subsequent correction instrument that is re-executed by the grantor . . .”).

74. *Id.*

75. *Id.*

76. *Id.*

77. Porter v. Hardy, 88 N.W. 458 (N.D. 1901).

78. 1 PATTON AND PALOMAR, *supra* note 10, at § 83 (quoting LEWIS M. SIMES & CLARENCE B. TAYLOR, MODEL TITLE STANDARDS, No. 6.5 (1960)).

79. *See id.*

80. N.D. CENT. CODE § 1-04-01 (2013).

base of a specific formation, or the stratigraphic equivalent of a formation in a specified well.⁸¹ A Texas court held that the phrase “100 feet below deepest producing interval as obtained in the test well” referred to a vertical depth below the test well and not the subsurface geologic formation that was productive.⁸² The court noted that the parties did not elect to use alternative terms such as formation, horizon, field, reservoir, or stratigraphic layer.⁸³

14. DESCRIPTIONS

For a conveyance to be operative, it is essential that the premises granted and intended to be conveyed is described with sufficient definitiveness and certainty to be located and distinguished from other lands of the same kind.⁸⁴ If the land intended to be conveyed is not identifiable from the words of the deed aided by extrinsic evidence explanatory of the terms used or by reference to another instrument, the deed is inoperative.⁸⁵ In the event the description is insufficient or incorrect by reason of a wrong call, township, or range, a corrected deed or lease should be obtained. In an oil and gas context, most oil and gas title examiners would not consider a conveyance of “two net mineral acres” in a section tract to be void for uncertainty. This is considered a conveyance of an undivided interest in the larger tracts.⁸⁶

Oil and gas examiners frequently encounter conveyances that give no definite description, but specify that the grantor conveys all his interest in a described county or district, such as “all my interest in Grant County.” Cases deciding the legal effectiveness of such conveyances are mixed and depend on the specificity of the description. One treatise 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.”⁸⁷

81. See, e.g., *Minex Res., Inc. v. Morland*, 518 N.W.2d 682 (N.D. 1994) (dealing with an assignment of depths from the surface to one hundred feet below the stratigraphic equivalent of the Mosser 1-26 Well).

82. *EOG Res., Inc. v. Wagner & Brown, Ltd.*, 202 S.W.3d 338, 345 (Tex. App. 2006).

83. *Id.*

84. *Magnusson v. Kaufman*, 65 N.W.2d 289, 290 (N.D. 1954); *Mitchell v. Nicholson*, 3 N.W.2d 83, 85 (N.D. 1942).

85. *Magnusson*, 65 N.W.2d at 290.

86. *Grider v. Wood*, 178 F. 908, 910-11 (8th Cir. 1910).

87. See 1 PALOMAR AND PATTON, *supra* note 10, at § 125; *contra* *Turrentine v. Thompson*, 99 S.W.2d 585, 586 (Ark. 1936) (“The rule in this state as to whether descriptions in deeds are sufficient to convey title is that the description therein must furnish a key by which the land attempted to be conveyed can be definitely located.”); *Maker v. Lazell*, 83 Me. 562, 563 (Me.

These conveyances would, in all likelihood, be considered valid between the parties. However, in states such as North Dakota where tract indices are used, the blanket conveyance would not constitute constructive notice to third parties.⁸⁸

The owner of land adjacent to section lines is the owner of the fee simple title of the surface and minerals in the road subject to the public easement.⁸⁹ A warranty deed conveying a tract of land, less an easement, railroad, highway, or right-of-way, conveys the tract, including the mineral interest, subject to the right-of-way estate.⁹⁰ As a general rule, a conveyance of land bounded by a street or highway carries the fee to the center thereof.⁹¹ If the grantor intends to reserve the minerals under a street or highway, he must clearly express such intention.⁹² The State of North Dakota does not own title to oil, gas, and fluid minerals underlying rights-of-way that the state acquired under eminent domain or purchase.⁹³

15. DIVORCE

If an attorney or land professional encounters a divorce proceeding, he should determine who was awarded the specific property being examined. A judgment in a divorce proceeding that awards real property is effective to pass title to such real property.⁹⁴ Payment of a monetary obligation will create an equitable lien against the real property of the person against whom the property division is awarded.⁹⁵

16. DORMANT MINERAL ACT

The North Dakota “Termination of Mineral Interest” Act is self-executing. This means that a mineral interest is abandoned as a matter of law simply by non-use for the requisite period of time. This is a rejection of the common law concept that non-use alone is insufficient to constitute abandonment.⁹⁶ If a mineral interest is deemed unused for a

1891) (“There is one rule pertaining to the construction of deeds. . . [i]t is the rule that a grantor cannot destroy his own grant, however much he may modify it or load it with conditions . . .”).

88. *In re Cornerstone E & P Co., LP*, 436 B.R. 830, 848 (Bankr. N.D. Tex. 2010) (interpreting Oklahoma law); *Luthi v. Evans*, 576 P.2d 1064, 1070 (Kan. 1978).

89. N.D. TITLE STANDARDS § 3-02 (N.D. State Bar Ass’n 2012).

90. *Royse v. Easter Seals Soc. for Crippled Children & Adults, Inc., of N.D.*, 256 N.W.2d 542, 546 (N.D. 1977).

91. *Welsh v. Monson*, 79 N.W.2d 155, 157 (N.D. 1956); *Bichler v. Ternes*, 248 N.W. 185, 190 (N.D. 1933).

92. *Welsh*, 79 N.W.2d at 157; *Bichler*, 248 N.W. at 190.

93. N.D. CENT. CODE § 24-01-18 (2013).

94. *See generally* *Wacker Oil, Co. v. LoneTree Energy, Inc.*, 459 N.W.2d 381 (N.D. 1990).

95. *Kautzman v. Kautzman*, 2000 ND 190, ¶ 15, 618 N.W.2d 500, 504.

96. N.D. CENT. CODE § 38-18.1-02 (2013).

period of twenty 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, and the type of mineral interest involved.⁹⁷ A person intending to succeed to the ownership of a mineral interest upon its lapse must give notice by publication, or if the address of the owner is known or reasonably determined, notice must be mailed directly to such address.⁹⁸ Title to the abandoned mineral interest vests in the owner of the surface estate in the land under which the mineral interest is located on the date of abandonment.⁹⁹

The North Dakota “Termination of Mineral Interest” Act states that a mineral interest is “deemed to be used” during the twenty-year period and therefore is not susceptible to vesting in the surface owner if (1) minerals are produced under the interest, (2) operations have been conducted for injection, withdrawal, storage, or disposal of water, gas, or other fluids, (3) for solid minerals, there is production from a common vein or seam, (4) the mineral interest was subject to a recorded lease, mortgage, assignment or conveyance, (5) the mineral interest is subject to a recorded order or agreement for pooling or unitization, (6) taxes have been paid on the mineral interest, (7) a statement of claim has been recorded within the grace period allowed after enactment of the statute.¹⁰⁰ Requirement (6) is meaningless because severed mineral interests are not taxed. Practically speaking, the interest is considered to be subject to vesting in the surface owner if there is no evidence of activity of any kind—either in the record or as revealed by the lack of activity on the surface during the twenty-year period. It cannot be definitively said that the “abandoned” mineral interest has vested automatically in the surface owner. Rather, a judicial action is necessary to confirm the passage of title because of the uncertainty of whether the mineral interest has been “used.”¹⁰¹

17. DUHIG RULE

One rule of construction of conveyances is the *Duhig* rule established in the Texas case of *Duhig v. Peavy-Moore Lumber Co., Inc.*,¹⁰² which has

97. N.D. CENT. CODE § 38-18.1-04 (2013).

98. N.D. CENT. CODE § 38-18.1-06(2) (2013).

99. N.D. CENT. CODE § 38-18.1-02 (2013).

100. N.D. CENT. CODE § 38-18.1-03 (2013).

101. The North Dakota Mineral Title Standards require surface owners obtain a quiet title judgment before the interest can be said to have vested. N.D. MINERAL TITLE STANDARDS § 13-01 (N.D. State Bar Ass’n 1989).

102. 144 S.W.2d 878 (Tex. 1940).

been followed in North Dakota with *Sibert v. Kubas*.¹⁰³ 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 effect of the rule is to estop the grantor, by his warranty, from claiming the total fractional share of the mineral estate he reserved in the deed.¹⁰⁴ In *Duhig*, the grantor in a recorded conveyance to Duhig reserved one-half of the minerals.¹⁰⁵ Duhig subsequently, by warranty deed, conveyed the tract to the predecessor in title of Peavy-Moore.¹⁰⁶ After the habendum clause and a general warranty clause, the lease stated: “But it is expressly agreed and stipulated that the grantor herein retains an undivided one-half interest in and to all mineral rights or minerals of whatever description in the land.”¹⁰⁷

The granting clause merely described the tract being conveyed—as if all surface and minerals were being conveyed. Duhig’s heirs later asserted ownership to the one-half minerals reserved.¹⁰⁸ Peavy-Moore took the position that the attempted reservation merely excepted from the warranty the one-half mineral interest previously reserved by Duhig’s grantor.¹⁰⁹ The court pointed out that the description of the tract in the granting clause covered all surface and minerals and that the clause of general warranty referred to “said premises,” meaning the land described in the granting clause.¹¹⁰ If it had not been for the reservation of one-half of the minerals that followed the warranty clause, Duhig would have warranted title to the surface and all of the minerals.¹¹¹ As written, the general warranty extended to the full fee simple title to the land except an undivided one-half interest in the minerals.¹¹² The court applied the after-acquired title doctrine and said that the covenant of warranty operates to estop the grantor and those claiming under him from claiming the one-half mineral interest so reserved.¹¹³

The *Duhig* rule does not say the reservation is not effective; it says the grantor is estopped to assert it by his warranty. The court ruled that the grantor reserved no interest and the one-half interest passed to the grantor.

103. 357 N.W.2d 495, 497 (N.D. 1984).

104. *Id.*

105. *Duhig*, 144 S.W.2d at 879.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 880.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

The *Duhig* rule adds to the other rules of construction. In other words, for a reservation to be valid, it must appear from the instrument that: (1) the grantor intended to, and with appropriate words, expressly reserved an interest unto himself; and (2) the grantee must receive the amount the grantor is warranting. For example, assume that A owns all the surface and three-fourths of the minerals under the southwest quarter. A's predecessor in title retained a one-fourth mineral interest. A conveys a tract to B by warranty deed containing the following language in the habendum clause: To have and to hold unto grantee . . . free and clear of all . . . encumbrances of whatsoever nature; except reserving unto grantor his heirs and assigns a one-half interest in the minerals thereunder.

This example passes the first part of the test for a valid reservation because even though the reservation is in the habendum clause, the grantor expressly reserved one-half of the minerals to himself. Nonetheless, because the grantor does not except the minerals previously conveyed, i.e. "other mineral conveyances of record," he has warranted that the grantee is receiving one-half of the minerals and the grantor is estopped from claiming more than any amount, which leaves one-half of the minerals to the grantee. In this case, A had a three-fourths mineral interest and warranted a one-half mineral interest to B. Therefore, A conveys a one-half mineral interest to B, and A is left with a one-fourth mineral interest. This is a frequent situation and results in A's heirs or assigns claiming one-half, B's heirs or assigns claiming one-half, and A's predecessor in title claiming one-fourth. A stipulation of interest and cross-conveyance is generally required to correct the situation.

The North Dakota Supreme Court has ruled that *Duhig* applies regardless of whether there is a warranty in the deed or not.¹¹⁴ In 2012, the North Dakota Supreme Court decided the case of *Waldock v. Amber Harvest Corp.*¹¹⁵ In *Waldock*, the personal representative of the estate of Edwardson owned all of the surface and a one-half mineral interest.¹¹⁶ The deed conveyed unto the grantee "all right, title, estate and interest of the said above named decedent at the time of his death" in the described premises.¹¹⁷ In the deed, the estate reserved an undivided one-quarter of the oil, gas and other minerals.¹¹⁸ The North Dakota Supreme Court determined that *Duhig* was not applicable because the language of the deed

114. *Miller v. Kloeckner*, 1999 ND 190, ¶ 17, 600 N.W.2d 881, 886.

115. 2012 ND 180, 820 N.W.2d 755.

116. *Id.* ¶ 2, 820 N.W.2d at 757.

117. *Id.*

118. *Id.*

granted only the right, title, and interest of the decedent, but not the land itself.¹¹⁹

18. EASEMENTS

An easement is an interest in land consisting of the right to use or control the land for a specific limited use or purpose.¹²⁰ When examining conveyances described as “easements” or “rights-of-way,” an examiner should examine the words of grant to determine whether the conveyance is an easement or a fee interest. The Oklahoma Supreme Court has set forth what has become known as the “object of the verb” rule in distinguishing deeds from easements.¹²¹ As such, if the object of the granting language is a tract of land instead of an easement, the document may pass fee title to the tract even if the document states that it is for a purpose consistent with an easement.¹²² However, courts are likely to allow extraneous evidence as to the intent of the parties.¹²³ In a situation where this problem exists, the intent of the parties should be determined by either agreement between the parties and subsequent confirming documentation (i.e., quitclaim deeds) or by title adjudication by a court of competent jurisdiction.

19. ESTATE OF NONRESIDENT AND RESIDENT DECEDENT

Where an out-of-state resident owns minerals, the estate of the decedent will need to go through the probate process in order for the heirs or devisees to obtain clear and marketable title.¹²⁴ This process is termed an “ancillary probate.” Failure to conduct an ancillary probate will result in a cloud on the title to the minerals, difficulty in selling such minerals, and possible problems with regard to leasing or the distribution of monies from productive wells on the property. The law of the state governs intestate succession as to real property located in that state.¹²⁵ North Dakota has adopted the Uniform Probate Code.¹²⁶ In North Dakota, all estates must be

119. *Id.* ¶ 13, 820 N.W.2d at 760.

120. *Riverwood Commercial Park v. Standard Oil Co., Inc.*, 2011 ND 95, ¶ 8, 797 N.W.2d 770, 773.

121. *See St. Louis-San Francisco Ry. Co. v. Humphrey*, 446 P.2d 271, 276 (Okla. 1968).

122. *Id.*

123. *See Riverwood*, ¶ 7, 797 N.W.2d at 773.

124. *See Brigham Oil and Gas, L.P. v. Lario Oil & Gas Co.*, 2011 ND 154, ¶ 16, 801 N.W.2d 667, 683.

125. *Eddie v. Eddie*, 79 N.W. 856, 857 (N.D. 1899).

126. *Kirsten Franzen & Bradley Myers, Improving the Law Through Codification: Adoption of the Uniform Trust Code in North Dakota*, 86 N.D. L. REV. 321, 323 (2010).

probated to establish marketable title.¹²⁷ The intestate laws of distributees are summarized as follows:

After January 1, 1996

1. If no surviving children or parent of deceased, then 100 percent is distributed to the surviving spouse.
2. No surviving children but a parent of the deceased survives, then
 - i. Spouse receives first \$200,000, plus 75 percent of remaining estate;
 - ii. Surviving parent receives remaining 25 percent of estate.
3. Surviving children, all of whom are descendants of the surviving spouse, then 100 percent is distributed to the surviving spouse.
4. If there are surviving children who are not descendants of both the decedent and the surviving spouse, then the intestate rules become more complicated and the manner of distribution of the estate depends upon whether there are children who are descendants of both, children who are only descendants of the surviving spouse, or children who are only descendants of the decedent.
5. If the deceased does not leave a surviving spouse, then 100 percent of the estate is distributed to the surviving descendants by representation.¹²⁸

Intestacy laws from July 1, 1975, to August 1, 1995

1. If no surviving children or surviving parent of deceased, then 100 percent is distributed to the surviving spouse.
2. No surviving children but a parent of the deceased survives, then
 - i. Spouse receives first \$50,000, plus 50 percent of remaining estate;
 - ii. Surviving parent receives remaining 50 percent of estate.
3. Surviving children, if all of the children are descendants of the surviving spouse, then

127. See *Indus. Comm'n of N.D. v. McKenzie Cnty. Nat. Bank*, 518 N.W.2d 174, 178 (N.D. 1994) (defining marketable title as title “free from reasonable doubt.”).

128. N.D. CENT. CODE § 30.1-04-03 (2013).

- i. The first \$50,000 to the surviving spouse, plus 50 percent of the remaining estate;
 - ii. The remaining 50 percent of the estate is distributed to the surviving children by representation.
4. Surviving children of the decedent, one or more who are not descendants of the surviving spouse
 - i. 50 percent to the surviving spouse;
 - ii. 50 percent to the descendants of the deceased, by representation.¹²⁹

20. EXECUTIVE RIGHTS

Each element of the mineral estate can be owned, conveyed, reserved, or inherited separately from the other elements.¹³⁰ The executive right is the exclusive power to lease minerals.¹³¹ “The executive right is created when a mineral owner grants or reserves a royalty or non-executive interest in the mineral interests.”¹³² The title examiner should be aware that in North Dakota it is uncertain whether an executive right is a real property right, and thus inheritable, or whether it ceases at the holder’s death.¹³³

21. FEDERAL LEASES

If the federal government owns the property, special laws and regulations apply. These include Bureau of Land Management (“BLM”) form leases. The property cannot be included in a state Industrial Commission drilling and spacing unit.¹³⁴ A communization agreement must be executed by the BLM so as to include the acreage into a unit.¹³⁵ Examination of title will need to be by examination of federal documents located in the Billings, Montana office of the BLM.

22. FRACTIONAL/ACREAGE DESIGNATION

One problem encountered is when a grantor conveys or reserves a fractional interest followed by a designation of a specified number of mineral acres. An example is where the grantor reserves “an undivided 5/32 interest, amounting to an undivided 5 acres interest” in a tract that by

129. N.D. CENT. CODE § 30.1-04-03 (2013).

130. *Lesley v. Veterans Land Bd.*, 352 S.W.2d 479, 480-81 (Tex. 2011).

131. *Id.*

132. N.D. MINERAL TITLE STANDARDS § 5-01 (N.D. State Bar Ass’n 1989).

133. *Id.*

134. *See* 30 U.S.C. § 226 (2006).

135. *Id.*

accretion or being a correction section would allow a 5/32 interest to be greater than five acres. Each deed is interpreted on its own facts and recitations in the deed.¹³⁶ When the two provisions result in a conflict, the title examiner must require that all affected parties resolve the conflict either by stipulation of interest, corrective deed, or quiet title action.¹³⁷ However, “[w]hen 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.”¹³⁸

23. HOMESTEAD/MARITAL PROPERTY

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”¹³⁹ The homestead may not embrace different lots or tracts of land, unless the lots or tracts of land are contiguous.¹⁴⁰ Contiguous “means two or more tracts of real property which share a common point or which would share a common point but for an intervening road or right of way.”¹⁴¹

Neither spouse may convey or encumber the homestead without the joinder of the other spouse.¹⁴² 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.¹⁴³ It is also well settled in North Dakota that a husband and wife must execute the same instrument.¹⁴⁴ Separately executed instruments are voidable.¹⁴⁵ Therefore, it is mandatory that both married spouses execute an oil and gas lease on the same document where one of the spouses owns a surface interest. If the individual is single, the lease should make that recitation. Because it is not possible to determine from the records whether the property is homestead, the husband and wife should execute the same lease or conveyance of real property and recite that they are husband and wife. Homestead rights do

136. See *Nichols v. Goughnour*, 2012 ND 178, ¶ 12, 820 N.W.2d 740, 744.

137. N.D. MINERAL TITLE STANDARDS § 3-02 (N.D. State Bar Ass’n 1989).

138. *Lario Oil & Gas Co. v. EOG Res., Inc.*, 2013 ND 98, ¶ 8, 832 N.W.2d 49, 52 (quoting *Hild v. Johnson*, 2006 ND 217, ¶ 13, 723 N.W.2d 389, 394).

139. N.D. CENT. CODE § 47-18-01 (2013).

140. *Id.*

141. *Id.*

142. N.D. CENT. CODE § 47-18-05 (2013).

143. *Id.*

144. *Id.*

145. *Neset v. Rudman*, 74 N.W.2d 826, 829 (N.D. 1956); *Nichols v. Schutte*, 26 N.W.2d 515, 521 (N.D. 1947).

not apply to severed minerals. If one spouse owns severed minerals, the joinder of the spouse is not necessary for leasing because severed minerals cannot be impressed with the homestead character.¹⁴⁶

24. INDIAN LANDS

There are different types of Indian land in North Dakota. The rules and regulations concerning oil and gas leases are different depending upon whether the Bureau of Indian Affairs holds the land in trust or whether the property is part of an Indian Reservation. Leases on land that is held by the Bureau of Indian Affairs are essentially federal oil and gas leases made on behalf of Indian beneficiaries.

25. INUREMENT

A cotenant may not secure for his own benefit, either by direct purchase or otherwise, a title adverse to his cotenants.¹⁴⁷ A cotenant who purchases property at a sheriff's sale or a tax sale may not increase his own interest in the property to the detriment of his fellow cotenant.¹⁴⁸ Courts have held that cotenant owners of an estate in lands stand in relation to each other in mutual trust and confidence and neither will be permitted to act in hostility to the other in reference to the joint estate; a distinct title acquired by one will ordinarily inure to the benefit of all.¹⁴⁹ The doctrine of inurement protects the severed mineral owner from a defaulting tax owner or a mortgagor; this creates problems for the title examiner.¹⁵⁰ Protection is given almost without qualification where the land is sold at a tax sale and thereafter acquired by the party who had the duty to pay the taxes.¹⁵¹ The courts have held that where one party had the duty to pay the taxes, he cannot acquire title to the property through a tax deed adverse to his fellow cotenants or severed mineral interest owners.¹⁵²

If there is no duty to pay the taxes, there is no prohibition against a cotenant buying the property for his own exclusive benefit.¹⁵³ Mineral owners have no duty to pay ad valorem taxes and therefore can purchase the property free of the claims of other cotenants—whether by direct purchase

146. See N.D. CENT. CODE § 47-18-01 (2013).

147. See *Fettig v. Fettig*, 277 N.W.2d 278, 281 (N.D. 1979).

148. See *Aure v. Mackoff*, 93 N.W.2d 807, 814 (N.D. 1958).

149. See *id.*

150. *Id.*

151. See *Heggen v. Marentette*, 144 N.W.2d 218, 239 (N.D. 1966).

152. *Id.*

153. See *Severson v. Simon*, 110 N.W.2d 289, 290 (N.D. 1961).

at the original sale or through an agent. These issues are expounded upon in a later section.¹⁵⁴

26. JOINT TENANCY

Where two or more persons hold property as joint tenants, title to the property vests equally in those persons during their lifetimes, with sole ownership passing to the survivor at the death of the other joint tenant.¹⁵⁵ Occasionally, a deed will be executed to “A or B” as grantees. In such an event, in an Oklahoma case involving an automobile, it has been held that the parties hold title as joint tenants.¹⁵⁶ The use of the word “or” allows either party to convey or dispose of the property without the joinder of the other party.¹⁵⁷ Without additional case law, one should be leery of relying upon this case in the context of real property. Of course, if the property was the couple’s homestead, it could not be conveyed without joinder of the other spouse.¹⁵⁸

In North Dakota, “[e]very interest created in favor of several persons in their own right is an interest in common, unless acquired by them in partnership for partnership purposes, or unless declared in its creation to be a joint tenancy.”¹⁵⁹ When given the choice of whether to construe a deed to convey a co-tenancy or a joint tenancy, courts will choose co-tenancy unless the words of the deed declare it to be a joint tenancy.¹⁶⁰ If there are two joint tenants, a conveyance by one will typically destroy the joint tenancy.¹⁶¹ If there are three or more joint tenants, the transfer of an interest by one joint tenant severs the right of survivorship as to that interest, creating a tenancy in common between the grantee and other remaining joint tenants.¹⁶² The remaining original joint tenants continue to have right of survivorship as between themselves.¹⁶³

A lease from a single joint tenant to a stranger for a term of years will not sever joint tenancy.¹⁶⁴ “[When] one joint tenant leases her own interest in the common property to another without the consent of the other joint tenant, the lessee succeeds to the rights of the lessor, and is entitled to enjoy

154. See discussion *infra* Part II.45.

155. Jamestown Terminal Elevator, Inc. v. Knopp, 246 N.W.2d 612, 613 (N.D. 1976).

156. Gilles v. Norman Plumbing Sup. Co., 549 P.2d 1351, 1353 (Okla. Civ. App. 1975).

157. *Id.*

158. N.D. CENT. CODE § 47-18-05 (2013).

159. N.D. CENT. CODE § 47-02-08 (2013).

160. Renz v. Renz, 256 N.W.2d 883, 885 (N.D. 1977).

161. Wachter Dev. LLC v. Gomke, 544 N.W.2d 127, 129 (N.D. 1996).

162. Sathoff v. Sutterer, 869 N.E.2d 354, 357 (Ill. App. Ct. 2007).

163. *Id.*

164. Bangen v. Bartelson, 553 N.W.2d 754, 759 (N.D. 1996).

the possession of the property with the other joint tenant just as fully as the lessor would but for the lease.”¹⁶⁵

27. JUDGMENT LIENS

The entry of any judgment affecting the title or possession of real property does not constitute notice of its contents or constructive notice of the judgment until a certified copy of the judgment is recorded in the office of the recorder in the county in which the property is located.¹⁶⁶ Once the judgment is filed, the judgment becomes a lien on all real property of the judgment debtor, except his homestead, in the county where the judgment is docketed.¹⁶⁷ It is the general rule that valid liens, including judgment liens, survive bankruptcy, absent specific avoidance under 11 U.S.C. section 522(f) in bankruptcy, even if the underlying debt obligation that was the basis for the lien is discharged.¹⁶⁸

When securing an oil and gas lease from a judgment-lien debtor, a subordination of the judgment should be secured. A properly filed judgment lien is valid for ten years from the date the judgment is rendered.¹⁶⁹ The lien can be extended for an additional ten years by an execution garnishment and an extension of judgment filed with the county recorder.¹⁷⁰ A judgment lien by a federal agency or as part of a federal program will be valid as a lien for twenty years, with the possibility of extension of an additional twenty years.¹⁷¹

Although North Dakota has not determined the issue, in other states, judgment liens do not attach to leasehold estates of an oil and gas lessee.¹⁷² While judgment liens do not constitute a cloud on the title of the leases, they cannot be totally ignored because prior to a conveyance or transfer of such leasehold interest the judgment creditor could execute and levy on the lessee’s interest.

28. LIFE TENANTS & REMAINDERMEN

The holder of a life estate—a life tenant—has the right to possession of the property, and the remainderman gains possession upon the death of the

165. *Id.*

166. N.D. CENT. CODE § 28-20-11 (2013).

167. *Aberle v. Merkel*, 291 N.W. 913, 916 (N.D. 1940).

168. N.D. CENT. CODE § 28-20-30.1 (2013).

169. N.D. CENT. CODE § 28-20-13 (2013).

170. N.D. CENT. CODE § 28-20-21 (2013).

171. 28 U.S.C. § 3201 (2006).

172. *See generally* *Tarheel Drilling & Equip. Co. v. Valley Steel Prod. Co.*, 330 S.W.2d 717 (Ark. 1960); *Utica Nat. Bank and Trust Co., Tulsa v. Marney*, 661 P.2d 1246 (Kan. 1983).

life tenant.¹⁷³ 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.¹⁷⁴

If the instrument creating the life estate fails to specify how income shall be shared:

1. the life tenant shall be entitled to all rentals;
2. any bonus, royalty and all income derived from actual production constitutes corpus and must therefore be retained for the remainderman; however, the life tenant is entitled to any income (interest) derived from such corpus during the life tenant's life; and
3. the remainderman is not entitled to receive any of the income during the life tenant's life.¹⁷⁵

The "Open Mine Doctrine" states that if a lease was in effect or if a well was producing at the time the life estate was created, the life tenant can use the land for that purpose and is thus entitled to receive all royalties himself.¹⁷⁶ The theory is that the person creating the life estate must have intended that the life tenant benefit from the activities being conducted at the time the life estate was created.¹⁷⁷ A lease alone will open the mine. However, should the lease expire without actual development, the benefit of the open mine doctrine can no longer inure to the life tenant.¹⁷⁸

"To establish termination of a reserved life estate in real property, the fact of death must be established of record together with termination or transfer of any estate tax lien."¹⁷⁹ "The death of a life tenant may be established by the filing of (a) an estate tax clearance, release, or order, (b) a death certificate, or (c) an affidavit."¹⁸⁰ "Life estates created other than by reservations are not subject to estate taxes and therefore require only the establishment of record of the fact of death."¹⁸¹

A court-appointed trustee has the power to grant a mineral lease covering lands subject to any contingent future interest—for example, by way of a remainder, reversion, or a possibility of reverter.¹⁸² If there is an

173. Drees Farming Ass'n v. Thompson, 246 N.W.2d 883, 888 (N.D. 1976).

174. *See id.*

175. Moore v. Vines, 474 S.W.2d 437, 439 (Tex. 1971).

176. *Id.*

177. *Id.*

178. *See id.*

179. N.D. TITLE STANDARDS § 4-03 (N.D. State Bar Ass'n 2012).

180. N.D. TITLE STANDARDS § 4-05 (N.D. State Bar Ass'n 2012).

181. N.D. TITLE STANDARDS § 4-04 (N.D. State Bar Ass'n 2012).

182. N.D. CENT. CODE § 38-10-12 (2013).

existing trust having authority over the lands, such a court-appointed trustee must be the same as the trustee of the existing trust.¹⁸³ A court-appointed trustee has the power to grant a mineral lease covering the interest of any person whose place of residence and whereabouts is unknown and cannot reasonably be ascertained.¹⁸⁴

29. LIMITED LIABILITY COMPANIES

The North Dakota Limited Liability Company Act provides a limited liability company may purchase, acquire, sell, lease, transfer, or otherwise dispose of all or substantially all of its real or personal property and assets in the usual and regular course of business.¹⁸⁵ “Confirmatory deeds, assignments or similar instruments to evidence a sale, lease, transfer or other disposition may be signed and delivered at any time in the name of the transferor by its current managers or authorized agents”¹⁸⁶

30. LIS PENDENS OR NOTICE OF PENDING SUIT

Strictly speaking, *lis pendens* is the doctrine that so long as an action pertaining to a tract is pending, the court has control over the property until final judgment is entered and the disposition of property is bound by that final judgment, regardless of any transaction in the interim.¹⁸⁷ From a title examiner’s viewpoint, the term refers to the notice that must be taken of the fact that the property is under the court’s control and that no interest can be acquired by third persons in the property that is the subject of the action.¹⁸⁸ Once notice of a pending lawsuit has been filed, both subsequent purchasers and all others who acquire interest in, or liens upon, the premises during the pendency of the lawsuit will be bound by constructive notice of the claims of the parties to the suit.¹⁸⁹ Such persons are further bound by any judgment rendered in the action against the party from whom they acquired their lien or interest.¹⁹⁰ A title examiner may disregard a *lis pendens* that has been of record for more than ten years.¹⁹¹

As to title involving leases that are held by production, an examiner should be concerned with any *lis pendens* notice regarding the leasehold.

183. *Id.*

184. N.D. CENT. CODE § 38-13-01 (2013).

185. N.D. CENT. CODE § 10-32-23(4) (2013).

186. N.D. CENT. CODE § 10-32-108(3) (2013).

187. N.D. CENT. CODE § 28-05-07 (2013).

188. *Id.*

189. *Id.*

190. *Id.*

191. N.D. MINERAL TITLE STANDARDS § 9-05 (N.D. State Bar Ass’n 2012).

For example, an examiner should note if the records reflect a suit filed by a lessor against a lessee seeking cancellation of a lease because the well has not been producing in paying quantities. The examiner should examine the court file—even dismissed cases may not end the title problem.

31. MARKETABLE RECORD TITLE ACT

North Dakota has adopted a Marketable Record Title Act, which is codified in Chapter 47-19.1 of the Century Code. Section 47-19.1-01 of the Act provides:

Any person that has an unbroken chain of title to any interest in real estate and that person's immediate or remote grantors under a conveyance or other title transaction that has been of record for a period of twenty years or longer, and is in possession of the interest, is deemed to have a marketable record title to the interest, subject solely to the claims or defects that are not extinguished or barred by the application of this chapter, instruments that have been recorded less than twenty years, and encumbrances of record not barred by the statute of limitations.¹⁹²

The Marketable Record Title Act may be used to cure many title defects if the twenty-year requirement for holding the property under an unbroken chain of title is met. Under a new enacted statute, the Marketable Record Title Act now applies to a holder of a severed mineral interest if the owner can show use of the minerals for the statutory time period and the use is stated in an affidavit of possession.¹⁹³

32. MECHANIC'S AND MATERIALMEN'S LIENS

Mechanic's and materialmen's liens, now statutorily termed construction liens in North Dakota, are charges upon specific property by which the property is made security for the performance of an act.¹⁹⁴ Mechanic's and materialmen's liens provide a means of enforcing the valid claims of suppliers of materials and labor.¹⁹⁵ The liens must be filed and recorded with the county recorder's office within six months of the date the materials or labor are provided.¹⁹⁶

192. N.D. CENT. CODE § 47-19.1-01 (2013).

193. N.D. CENT. CODE § 47-19.1-07 (2013).

194. N.D. CENT. CODE § 35-13-01 (2013).

195. *Id.*

196. N.D. CENT. CODE § 35-13-02 (2013).

They do not attach to royalty interests or previously reserved bona fide interests payable out of the working interests.¹⁹⁷ Any well and pipeline lien may be enforced by civil action in the district court of the county in which the leasehold, pipeline, or some part thereof is situated.¹⁹⁸ Such action must be brought within two years from the time of the filing of the lien statement.¹⁹⁹ As a result, a title examiner may disregard mechanic's and materialman's liens if no suit was filed within two years of the filing of the statement of lien.

33. MINERAL INTERESTS VERSUS ROYALTY INTERESTS

The legal distinction between a mineral interest and a royalty interest is quite clear. However, the distinction between what creates a mineral interest and royalty interest is not. The problems involving the quality of interest granted or reserved generally involve a determination of what the parties intended to do. While checking records—particularly old records—it may be found that parties did not make a distinction between a royalty deed and a mineral deed. Hundreds of recorded instruments are labeled “Royalty Deed.” However, the conveyances are of mineral interests.

A mineral interest possesses all of the instances of mineral ownership, including:

1. The right to explore;
2. The rights of ingress and egress (to enter and leave the land);
3. The right to lease (the so-called “executive right”);
4. The right to the bonus or consideration, the delay rentals, and the royalty;
5. The right of ownership of oil and gas in place (the language used may say “all minerals in and under” or “all minerals in, on, and under” the land); and
6. The right to extract those minerals.²⁰⁰

A royalty interest is a single incident of mineral ownership and includes the right to share in oil and gas when produced or the right to oil and gas after capture.²⁰¹ Normally, the interest is free of the costs of

197. N.D. CENT. CODE § 35-24-01(13) (2013).

198. N.D. CENT. CODE § 35-24-11 (2013).

199. N.D. CENT. CODE § 35-24-14 (2013).

200. *See Acoma Oil Corp. v. Wilson*, 471 N.W.2d. 476, 481 (N.D. 1991).

201. *Id.*

drilling and producing.²⁰² A royalty interest does not include the right of ingress or egress, the rights to lease for oil or gas, the right to share in bonus or rentals, nor the right to explore or drill and develop the production.²⁰³ When examining title, the land professional must always be aware of the distinction between royalty interests and minerals interests. If any ambiguity is found in a document conveying minerals or royalty, the examiner should attempt to determine the intent of the parties and require a stipulation if necessary.²⁰⁴

The most illustrative North Dakota case in this regard is *Hamilton v. Woll*,²⁰⁵ which involved fifteen North Dakota deeds executed in the 1950s by Mr. Hamilton from Oklahoma.²⁰⁶ The deeds used were preprinted “Mineral Deed” forms, but they stated in the blank spaces in typewritten text that they conveyed undivided fractional “Royalty” interests.²⁰⁷ The trial court, in a summary judgment ruling, found the deeds conveyed royalty interests, but the North Dakota Supreme Court reversed.²⁰⁸ The court declared the deeds to be ambiguous and remanded the matter for trial.²⁰⁹ Among several important facts considered was that “Hamilton was from Oklahoma and during the time the [fifteen] deeds were executed it was ‘a matter of common knowledge’ that ‘the word royalty was frequently used in Oklahoma to denote an interest in the mineral rights.’”²¹⁰

34. MORTGAGES

A mortgage does not operate as a conveyance of an estate in land, but it creates a lien securing the payment of a debt.²¹¹ Because a mortgage is a conveyance of an interest in real property, it is subject to the same legal requirements as deeds and other conveyances.²¹² Important clauses in mortgages and deeds of trust include the amount of the indebtedness and the final due date or maturity date. Moreover, a future advance clause allows the mortgagee to extend additional money or proceeds to the mortgagor and attempts to allow the mortgagee to maintain its priority of

202. See *Slawson v. N.D. Indus. Comm’n*, 339 N.W.2d 772, 777 (N.D. 1983).

203. See *Altman v. Blake*, 712 S.W.2d 117, 120 (Tex. 1986).

204. N.D. MINERAL TITLE STANDARDS § 3-01.4 cmt. (N.D. State Bar Ass’n 1989).

205. 2012 ND 238, 823 N.W.2d 754.

206. *Id.* ¶ 2, 823 N.W.2d at 756.

207. *Id.*

208. *Id.* ¶ 5.

209. *Id.* ¶ 14, 823 N.W.2d at 760.

210. *Id.* ¶ 6, 823 N.W.2d at 757 (quoting *Melton v. Sneed*, 109 P.2d 509, 513 (Okla. 1940)) (brackets contained in original omitted).

211. *Aure v. Mackoff*, 93 N.W.2d 807, 811 (N.D. 1958).

212. See N.D. CENT. CODE § 47-10-01 (2013).

lien as against third parties. As a result, mortgages that are properly executed, acknowledged, and recorded are superior in title to deeds or leases that are subsequently recorded.²¹³

In the context of oil and gas interests, the title examiner will typically encounter two types of mortgages: a “mortgage” or a “collateral real estate mortgage.” Collateral real estate mortgages are less common because North Dakota statutes have been amended to allow future advances under either mortgage form.²¹⁴ Under either form, however, a power of sale provision in North Dakota is void under modern mortgage law, and foreclosures must be by judicial action.²¹⁵

Mortgages may be ignored after they have been of record for ten years past the later of the maturity date or the recording date, unless extended.²¹⁶ As to a collateral real estate mortgage, the mortgage expires sixty days after the earlier of (1) the maturity date stated in the mortgage or (2) five years from the date of the recording unless an addendum is recorded extending its effective date.²¹⁷ Mortgages to a federal agency or as part of a federal program (*i.e.*, Federal Land Bank, FHA, etc.) are liens that last for twenty years with the possibility of an extension of an additional twenty years.²¹⁸

35. NAME DISCREPANCY

Persons who are named in an executed conveyance can be considered to be the same as the persons who are named in other documents in a chain of title so long as the named persons in those conveyances have identical names or the variants are: (1) commonly used abbreviations, (2) initials, (3) have identical first or middle names or initials, (4) simple transpositions that produce substantially similar pronunciations, or (5) descriptions of entities such as corporations, companies, or abbreviations or contractions of either.²¹⁹

36. NONPARTICIPATING INTEREST

Where the mineral interest has some, but not all, of the incidents of ownership, classification becomes less certain than for a full mineral interest. Just as a property interest is likened to the proverbial bundle of

213. See N.D. CENT. CODE § 35-03-1.2(3) (2013).

214. See N.D. CENT. CODE § 47-19-19 (2013); *Union Nat. Bank of Oshkosh v. Milburn & Stoddard Co.*, 73 N.W. 527, 529 (N.D. 1897).

215. N.D. CENT. CODE § 35-22-01 (2013).

216. N.D. CENT. CODE § 35-03-14 (2013).

217. N.D. CENT. CODE § 35-03-17 (2013).

218. 28 U.S.C. § 3201(c) (2006).

219. N.D. TITLE STANDARDS §§ 10-01 to 10-04 (N.D. State Bar Ass’n 2012).

sticks—wherein the sticks can be separated—the executive rights or the leasing rights may be separated from the mineral interest itself.²²⁰ In that situation, the ownership of the interest, separate and apart from the executive rights, may be classified as a nonparticipating mineral interest.²²¹ The owner of the executive rights executes an oil and gas lease on behalf of the nonparticipating interest. The owner of the nonparticipating mineral interest enjoys all the other incidents of ownership of a mineral interest, such as the right to receive bonuses, delay rentals, and royalties.²²² Technically speaking, a nonparticipating mineral interest has the right of ingress and egress upon the property to remove the minerals.²²³ Closely related to the nonparticipating mineral interest is the nonparticipating royalty interest. The owner of a nonparticipating royalty interest is entitled to a described fraction of oil and gas produced free of costs.²²⁴

37. PARTNERSHIPS

A general partnership may purchase, own, or lease minerals and oil and gas.²²⁵ One partner can bind the partnership by executing an oil and gas lease for the partnership.²²⁶ General rules governing partnerships are applicable to oil and gas leasing. A limited partnership may conduct any business that a general partnership may conduct.²²⁷ The general partner of the limited partnership may execute an oil and gas lease.²²⁸ “Real property conveyed to a partnership must be conveyed in the partnership name and may be conveyed from the partnership only by a document signed by one or more partners of the partnership, identified as such.”²²⁹ “In the absence of actual knowledge to the contrary, no affirmative proof of the authority of a general partner shall be required; it is presumed that a general partner has proper authority.”²³⁰

220. See *Amoco Oil Corp. v. Wilson*, 471 N.W.2d 476, 481 (N.D. 1991).

221. See Christopher Kulander, *Big Money v. Grand Designs: Revisiting the Executive Right to Lease Oil & Gas Interests*, 42 TEX. TECH L. REV. 33, 41 (2009).

222. See *Amoco Oil*, 471 N.W.2d at 481.

223. See *Drach v. Ely*, 703 P.2d 746, 750 (Kan. 1985).

224. *Slawson v. N.D. Indus. Comm’n*, 339 N.W.2d 772, 777 (N.D. 1983).

225. See N.D. CENT. CODE § 45-13-01(24) (2013).

226. N.D. CENT. CODE § 45-10.2-08 (2013).

227. *N. Augusta Assoc. v. 1815 Exch., Inc.*, 469 S.E.2d 759 (Ga. Ct. App. 1996).

228. See N.D. CENT. CODE § 45-10.2-08 (2013).

229. N.D. TITLE STANDARDS § 13-01 (N.D. State Bar Ass’n 2012).

230. N.D. TITLE STANDARDS § 13-05 (N.D. State Bar Ass’n 2012).

38. PATENTS

In all states, a patent should be examined as to all fee lands. If a patent does not appear to be filed, but there is uncertainty, examiners can check for patents online.²³¹ If the United States of America issued a patent, the minerals were granted prior to July 17, 1914.²³² Prior to March 3, 1909, a federal patent conveying land in North Dakota passed the mineral estate as well as the surface estate.²³³ Various federal patents contain reservations of coal, oil and gas, and other minerals. Under the Act of July 17, 1917, a federal patent reserved the oil and gas.

The following rules apply to patents issued by the State of North Dakota. Prior to March 13, 1939, a state patent or other conveyance of a tract of land transferred the state's mineral estate as well as the surface estate.²³⁴ "From and after March 13, 1939, and prior to February 20, 1941, a reservation of minerals by the state included a 5 percent interest in oil, gas and related hydrocarbons. From and after February 20, 1941, and prior to June 28, 1960, a reservation of minerals by the state was the same except that the percentage was fifty percent."²³⁵ The state's mineral reservation exists whether the conveying instrument expressly sets forth the reservation or not.²³⁶ Any instrument that purports to reserve more than these percentages must be construed to reserve only the statutory percentages.²³⁷ Since June 28, 1960, in any transfer of original grant lands, the state has reserved all minerals, including oil and gas.²³⁸ For non-grant lands from June 28, 1960 to July 1, 1973, the state reserved fifty percent of all oil and gas. From July 1, 1973 to present, the state reserved all interest in oil and gas.²³⁹ It is important to note that the operative date of a conveyance by the state is the date of a contract for deed, if there was one, not the date of a subsequent deed or patent.²⁴⁰

231. BUREAU OF LAND MGMT., *Patent Search*, www.glorerecords.blm.gov/patentsearch.

232. 30 U.S.C. § 123 (2006).

233. N.D. MINERAL TITLE STANDARDS § 2-01 (N.D. State Bar Ass'n 1989).

234. N.D. MINERAL TITLE STANDARDS § 2-02.1 (N.D. State Bar Ass'n 1989).

235. N.D. MINERAL TITLE STANDARDS § 2-02.2 (N.D. State Bar Ass'n 1989).

236. N.D. CENT. CODE § 38-09-01 (2013).

237. *Convis v. State*, 104 N.W.2d 1, 5 (N.D. 1960).

238. N.D. MINERAL TITLE STANDARDS § 2-02.3-01 (N.D. State Bar Ass'n 1989).

239. N.D. MINERAL TITLE STANDARDS §§ 2-02.3-02.1, 2-02.3-02.2 (N.D. State Bar Ass'n 1989).

240. *See generally* Fuller v. Bd. of Univ. & Sch. Lands, 129 N.W. 1029 (N.D. 1911).

39. POOLING & THE INDUSTRIAL COMMISSION

The North Dakota Industrial Commission regulates the spacing and pooling of wells located in North Dakota.²⁴¹ Oil and gas wells must be drilled in accordance with oil and gas conservation regulations.²⁴² These include, most importantly, spacing regulations. Spacing regulations limit the number of wells that may be drilled into an oil or gas reservoir by establishing drilling units, which are also called spacing units.²⁴³ The Industrial Commission establishes the size of each reservoir. Many of the more recent horizontal wells are drilled on a 1280-acre basis.

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.²⁴⁴ The pooling joins together all tracts and interests in a drilling unit to allow for drilling and sharing of costs and benefits.²⁴⁵ This type of pooling is different from the voluntarily pooling contained in oil and gas leases.²⁴⁶

In North Dakota, there can be both voluntary pooling and compulsory pooling. The lessee may voluntarily pool a producing spacing unit by filing a declaration of pooling if all of the oil and gas leases contain broad form pooling clauses.²⁴⁷ All mineral owners and lessees may also agree to voluntarily pool their interests into a spacing unit.²⁴⁸ Any interested owner may file an application for force pooling before the Industrial Commission; such applications may seek the statutory pooling of a spacing unit either before or after production is established.²⁴⁹ The Commission must grant the pooling order if it is established that there are two or more separately owned tracts within a spacing unit or there are separately owned interests in all or a part of the spacing unit.²⁵⁰

A lessee has the right to obtain a force pooling order without the lessor's consent even if the oil and gas lease contains a provision requiring the lessor's consent to pool.²⁵¹ The North Dakota Supreme Court has held that a statutory pooling order authorized an operator to drill a horizontal well without subsurface trespass on any lease within the pooled spacing

241. N.D. CENT. CODE § 38-08-08 (2013).

242. N.D. CENT. CODE § 38-08-16 (2013).

243. N.D. CENT. CODE § 38-08-07 (2013).

244. N.D. CENT. CODE § 38-08-08 (2013).

245. *Id.*

246. *Id.*

247. *Id.*

248. N.D. CENT. CODE § 38-08-07 (2013).

249. *See id.*

250. *Id.*

251. *Egeland v. Cont'l Res., Inc.*, 2000 ND 169, ¶ 13, 616 N.W.2d 861, 866.

unit, despite a lack of consent from a third-party lessee.²⁵² However, the Supreme Court did not address whether a spacing order would have the same effect as a pooling order regarding subsurface trespass issues.

The owner paying for the nonconsenting owner's share of the drilling and operation of a well may recover a risk penalty from the nonconsenting owner for the risk involved in drilling and completing the well. This penalty may only be recovered if the paying owner has made an unsuccessful, good-faith attempt to have the unleased nonparticipating owner execute a lease or to have the leased nonparticipating owner join in and participate in the risk and cost of drilling the well.²⁵³ North Dakota law states:

Before a risk penalty may be imposed, the paying owner must notify the nonparticipating owner with proof of service that the paying owner intends to impose a risk penalty and that the nonparticipating owner may object to the risk penalty by either responding in opposition to the petition for a risk penalty or if no such petition has been filed by filing an application or request for hearing with the Industrial Commission.²⁵⁴

North Dakota law further provides:

If a nonconsenting owner's interest in the spacing unit is derived from a lease or other contract for development, the risk penalty is two-hundred percent of the nonparticipating owner's share of the reasonable actual costs of drilling and completing the well and may be recovered out of, and only out of, production from the pooled spacing unit²⁵⁵

This penalty constitutes three hundred percent of the drilling costs. Additionally:

If a nonparticipating owner's interest in the spacing unit is not subject to a lease or other contract for development, the risk penalty is fifty percent of the nonparticipating owner's share of the reasonable actual costs of drilling and completing the well and may be recovered out of production from the pooled spacing unit.²⁵⁶

This penalty amounts to one hundred and fifty percent of the drilling costs. Where various mineral interests have been combined into a spacing

252. *Cont'l Res., Inc. v. Farrar Oil Co.*, 1997 ND 31, ¶ 17, 559 N.W.2d 841, 846.

253. *Id.*; N.D. ADMIN. CODE 43-02-03-16.3 (2013).

254. N.D. CENT. CODE § 38-08-09.4(3)(c) (2013).

255. N.D. CENT. CODE § 38-08-08 (2013).

256. *Id.*

unit, North Dakota law dictates that operations incident to the drilling of a well upon any portion of a spacing unit covered by a pooling unit must be deemed, for all purposes, the conduct of such operations upon each separately owned tract in the drilling unit. Therefore, production from the unit will continue all oil and gas leases into its secondary term.²⁵⁷

Drilling permits, well locations, and other matters of interest are readily available online.²⁵⁸

40. RAILROAD TITLES

The issue of whether railroads own minerals underlying their strips of property could be the subject of a lengthy paper. However, there are some general rules that can usually be followed. If the railroad acquired its interest by a deed and the deed does not limit the estate granted, but only specifies the purpose of the conveyance, the grant is typically a fee simple interest.²⁵⁹

If title is acquired by a railroad under an Act of Congress, the railroad generally acquires only a right-of-way.²⁶⁰ 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.²⁶¹ 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.²⁶²

A railroad right-of-way granted by the Act of July 2, 1864 reserved, to the United States of America, all minerals except coal and iron that were expressly acquired by the railroads in the patents.²⁶³ Pursuant to the Act of July 2, 1864, the railroad acquired a right-of-way of approximately four hundred feet in width.²⁶⁴ The “Right-of-Way Leasing Act of 1930” gave to the railroad, its successors and assignees, the exclusive right to lease such minerals from the United States.²⁶⁵ Also, pursuant to the general Right-of-Way Act of March 3, 1875, the railroad acquired only an easement in the surface estate.²⁶⁶

257. N.D. CENT. CODE § 38-08-08(1) (2013).

258. N.D. DEP’T OF MINERAL RES., *Oil and Gas*, www.dmr.nd.gov/oilgas/.

259. *See, e.g.*, *C & G, Inc. v. Rule*, 25 P.3d 76 (Idaho 2001); *Schoenberger v. Mo. Pac. R.R. Co.*, 26 P.3d 700 (Kan. App. 2001); *Marland v. Gillespie*, 33 P.2d 207 (Okla. 1934).

260. 43 U.S.C. § 934 (2006); *Great N. Ry. Co. v. United States*, 315 U.S. 262, 277 (1942).

261. N.D. MINERAL TITLE STANDARDS § 2-05.1-01 (N.D. State Bar Ass’n 1989).

262. *Id.*

263. N.D. MINERAL TITLE STANDARDS § 2-05.1-02 (N.D. State Bar Ass’n 1989).

264. *Id. cmt.*

265. *Id.*

266. N.D. MINERAL TITLE STANDARDS § 2-05.2 (N.D. State Bar Ass’n 1989).

41. RESERVATIONS OF MINERAL INTEREST

In a typical chain of title, it is more common than not that a surface or mineral owner will reserve all or a quantum of minerals. The number of reported cases dealing with reservations is numerous. Unfortunately, case law exists to support both sides of every conceivable controversy concerning the construction of a mineral reservation. When the exception or reservation of minerals appears in the granting clause, a title examiner may presume that the exception operates to withhold the reserved minerals from the grant.²⁶⁷ “When the exception or reservation appears elsewhere in the deed, such as following the warranty clause, the title examiner must comment on the reservation clause and require either (1) stipulation of interest, (2) a corrective deed, or (3) judicial interpretation.”²⁶⁸

In most states, a reservation made to a stranger in title is invalid. In *Stetson v. Nelson*,²⁶⁹ the North Dakota Supreme Court followed the general rule and held that a reservation to a stranger was ineffective.²⁷⁰ 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. Then, in the 1983 case of *Malloy v. Boettcher*, the North Dakota Supreme Court held such a conveyance was effective to reserve a mineral interest in the other granting spouse.²⁷¹ The Supreme Court did not make the *Malloy* decision prospective only, and, as a consequence, many deeds in North Dakota during this period were “retroactively” determined to have reserved a mineral interest in a third party, namely the spouse.

Therefore, under *Malloy*, an exception or reservation can be effective to convey a property interest when a spouse who does not own an interest in the land prior to the deed joins in the execution of the deed and it is determined to have been the grantor’s intent. Consequently, “the title examiner is justified in determining that a spouse is not a ‘stranger’ to the conveyance and may acquire a property interest through a reservation.”²⁷² The most common application of the *Malloy* rule occurs where one spouse owns all of the surface and a mineral interest, conveys the surface to a third party reserving a mineral interest “unto the grantors,” and the other spouse joins in the execution deed to properly convey the homestead rights. Title examiners must review all conveyances of surface interests with mineral

267. N.D. MINERAL TITLE STANDARDS § 3-04 (N.D. State Bar Ass’n 1989).

268. *Id.*

269. 118 N.W.2d 685 (N.D. 1962).

270. *Id.* at 688.

271. 334 N.W.2d 8, 10 (N.D. 1983).

272. N.D. MINERAL TITLE STANDARDS § 3-06 (N.D. State Bar Ass’n 1989).

reservations and account for the interest potentially reserved by the joining spouse.

42. RIVERS AND LAKES

In North Dakota, riparian owners adjacent to navigable streams own to the low water mark.²⁷³ The title to the bed remains in the state or certain Indian tribes.²⁷⁴ As to non-navigable streams, the adjacent riparian owners own the oil and gas underlying said stream, each to the middle of the stream.²⁷⁵ If the channel for a stream or river changes as the result of a natural flow, then the private ownership changes with the alterations in the stream.²⁷⁶ Avulsion, which is the sudden change in riparian land, does not change the boundaries of ownership.²⁷⁷ The boundary line remains at the old water line and becomes fixed with the ownership of the old streambed remaining with its former owner.²⁷⁸

The State of North Dakota is the owner of the bed of a navigable body of water.²⁷⁹ In *State v. Mills*,²⁸⁰ the North Dakota Supreme Court held that the state and riparian owners have “correlative rights” in the shore zone—the area between the low and high water mark.²⁸¹ Recently, in *Reep v. State*,²⁸² the North Dakota Supreme Court concluded that the state owns the minerals underneath riverbeds to the high watermark, absent an explicit grant of the minerals contained in the shore zone.²⁸³

The matters of navigability, riparian ownership, avulsion, boundary lines, meander lines, and accretion have been subject to significant litigation in North Dakota. The comments to the North Dakota Mineral Title Standards provide an excellent summary of the applicable law. The comment to North Dakota Mineral Title Standard 7-01.1 provides:

Oil and mineral development in western North Dakota increased the value of subsurface minerals and has made it imperative that a title examiner examine plats and photos, or other evidence to determine whether the property title to which he is examining has

273. N.D. CENT. CODE § 47-01-15 (2013).

274. *See State ex rel. Sprynczynatyk v. Mills*, 523 N.W.2d 537, 540 (N.D. 1994).

275. N.D. CENT. CODE § 47-01-15 (2013).

276. N.D. CENT. CODE § 47-06-07 (2013).

277. *J.P. Furlong Enter., Inc. v. Sun Exploration and Prod. Co.*, 423 N.W.2d 130, 140 (N.D. 1988).

278. *Id.*

279. *Reep v. State*, 2013 ND 154, ¶ 26, 841 N.W.2d 664, 675.

280. 523 N.W.2d 537 (N.D. 1994).

281. *Id.* at 533-34.

282. 2013 ND 154, 841 N.W.2d 664.

283. *Id.* ¶ 1, 841 N.W.2d at 667.

upon it or a portion of it a river, stream or lake and to make a determination of whether the same is navigable or non-navigable . . . absent a legislative determination of navigability, the presumption is in favor of non-navigability. The question of navigability for purposes of title is a federal question to be determined according to federal law and usage. *Ozark-Mahoning Co. v. State*, 37 N.W.2d 488 (N.D. 1949) State title to land underlying a navigable river, stream or lake vests absolutely at the time of its admission to the Union and after admission is governed by state law. *Matter of Ownership of Bed of Devils Lake*, 423 N.W.2d 141 (N.D. 1988). Title to unpatented lands underlying non-navigable waters remained with the United States and thus subject to patent. *Ozark-Mahoning Co. supra*.²⁸⁴

“A deed, non-federal lease, mortgage, or other conveyance generally carries with it accretions adjacent to the acreage specifically described.”²⁸⁵ “Likewise, land gradually washed or eroded away so as to become submerged below low watermark is lost to the riparian owner.”²⁸⁶ “Where a navigable stream or river, for any cause, naturally or unnaturally, abandons its old bed and forms a new bed, the owners of the surface to the old bed and/or the oil, gas and other minerals lost to the new bed take title proportionately in the same nature . . . as they held title to the old bed.”²⁸⁷ In non-navigable rivers or streams, the owners of the bed own to the center.²⁸⁸

43. SHERIFF’S DEEDS

Whenever there is a default under a mortgage, the mortgage can only be foreclosed by judicial action.²⁸⁹ Most state statutes provide a rebuttable presumption that when a document purports to be executed pursuant to a judicial proceeding, the court was acting within its jurisdiction and all steps required for the execution of the title document were taken.²⁹⁰ In North Dakota, the sheriff’s certificate of sale must be recorded in the office of the recorder of the county in which the real property is situated within ten days from the date of sale.²⁹¹ The sheriff’s certificate or a certified copy of the

284. N.D. MINERAL TITLE STANDARDS § 7-01.1 cmt. (N.D. State Bar Ass’n 1989).

285. N.D. MINERAL TITLE STANDARDS § 7-01.2 (N.D. State Bar Ass’n 1989).

286. *Id.*

287. N.D. MINERAL TITLE STANDARDS § 7-01.2-01 (N.D. State Bar Ass’n 1989).

288. *Amoco Oil Co. v. State Highway Dep’t*, 262 N.W.2d 726, 728 (N.D. 1978).

289. N.D. CENT. CODE § 32-19-01 (2013).

290. N.D. CENT. CODE § 28-24-14 (2013); NEB. REV. STAT. § 25-1533 (2007).

291. N.D. CENT. CODE § 28-23-12 (2013).

certificate may be taken as evidence of the facts in the certificate.²⁹² The sheriff's deed is adequate evidence of the legality of the sale and proceedings contained in the certificate until proven to the contrary.²⁹³ The sheriff's deed vests title in the grantee to the premises as vested in the debtor at or after the time when the real property became liable to the satisfaction of the judgment. The sheriff's deed must recite the execution or the substance of the execution, the names of the parties, the amount and date of rendition of the judgment by which the real property was sold, and it must be executed and recorded as a conveyance of real property.²⁹⁴

44. STATE MINERALS

As to minerals and state lands, North Dakota Century Code section 38-09-15 provides:

Before leasing any land or interest therein or any mineral rights reserved therein, the state of North Dakota or any of its departments or agencies shall first give notice in accordance with the rules of the board of university and school lands. The leasing must be held at the time and place specified in the notice, and the notice must contain the information required by the rules of the board of university and school lands and such other information as may be deemed by the state or department or agency thereof to be applicable.²⁹⁵

All minerals owned by the State of North Dakota or any of its agencies are subject to administration of the Board of University and School Lands.²⁹⁶ The regulations governing the Board of University and School Lands are codified in title 85-06-06 of the North Dakota Administrative Code. Some of the key regulations governing oil and gas leasing and oil and gas operations on state-owned lands are as follows:

- a. [S]tate owned lands are leased by the Board of University of School Lands after advertisement and public auction.²⁹⁷
- b. Lease applications are limited to a maximum of 160 contiguous acres.²⁹⁸
- c. Term of the lease is five years. Royalty rate is one-sixth.²⁹⁹

292. *Id.*

293. *Id.*

294. N.D. CENT. CODE § 28-24-14 (2013).

295. N.D. CENT. CODE § 38-09-15 (2013).

296. N.D. CENT. CODE § 15-01-02 (2013).

297. N.D. Bd. of Univ. and Sch. Lands Mineral Leasing Rule, § 85-06-06-03 (2014).

298. N.D. Bd. of Univ. and Sch. Lands Mineral Leasing Rule, § 85-06-06-02 (2014).

- d. The form of lease does not include a pooling or unitization clause. However, the Board is authorized to enter into voluntary pooling agreements.³⁰⁰
- e. All assignments of leases must be submitted to the Board for approval.³⁰¹
- f. Where an archaeological, historical or paleontological resource is known at the time of leasing, the board will include a lease stipulation requiring that, at least 20 days prior to beginning any surface disturbance on the leased premises, the lessee shall notify the state land department. The Board shall then notify the North Dakota Historical Board and, based upon its advice, notify the lessee of the protection requested to preserve the source.³⁰²
- g. All state oil and gas leases are subject to a separate offset well covenant. Section 2 of the Board Policy provides,
If an oil and/or gas well has been drilled and is producing in commercial quantities from mineral land owned by another or from adjacent state-owned mineral land leased at a lesser royalty, which well is within 1,000 feet of the state-owned mineral land, the lessee of the state owned mineral land shall, within 120 days after completion of such well, exercise one of the following options:
 - i. Diligently begin in good faith the drilling of a corresponding offset well on the leased premises, or on lands pooled therewith;
 - ii. Agree with the board to pay compensatory royalty in lieu of the drilling of an offset well;
 - iii. Release the leased acreage to avoid the offset requisites; or
 - iv. Apply to the Commissioner for a waiver of the offset obligation.³⁰³

299. N.D. Bd. of Univ. and Sch. Lands Mineral Leasing Rule, § 85-06-06-05 (2014).

300. N.D. Bd. of Univ. and Sch. Lands Mineral Leasing Rule, § 85-06-06-06 (2014).

301. N.D. Bd. of Univ. and Sch. Lands Mineral Leasing Rule, § 85-06-06-07 (2014).

302. N.D. Bd. of Univ. and Sch. Lands Mineral Leasing Rule, § 85-06-06-12 (2014).

303. N.D. DEP'T OF TRUST LANDS, *Oil and Gas Leasing: Sample Lease Form*, <https://land.nd.gov/Docs/Minerals/leaseform.pdf>.

45. TAX DEED

A tax deed issued pursuant to North Dakota Century Code section 57-28 does not terminate the rights of the previous record owner unless there is: (a) a quiet title judgment; (b) a Marketable Record Title Affidavit pursuant to North Dakota Century Code chapter 47-19.1, which uses the tax deed from the county as a root of title; (c) marketable title is established in a city; or (d) a deed conveying the record owner's interest to the grantee of the tax deed is recorded.³⁰⁴ A valid tax deed clothes the grantee with a new and complete title,³⁰⁵ much like a patent. Therefore, it extinguishes all prior titles subject to the rules of estoppel and inurement as discussed above.³⁰⁶ 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 relate.³⁰⁷

46. TAX LIENS

A state tax lien—including income tax, sales tax, and oil and gas production tax—is effective only from the time the lien of the taxes is indexed in the central notice system in the office of the Secretary of State on and after July 1, 1996.³⁰⁸ After July 31, 1997, the lien attaches as of 8:00 a.m. the day following the day of indexing.³⁰⁹ Prior to July 1, 1996, these state tax liens were effective only from the time the lien for the tax was entered in the index of tax liens kept by the county recorder.³¹⁰ “A federal tax lien is effective only after the time the notice of lien is entered in the index of tax liens kept by the county recorder.”³¹¹

As for real estate taxes, a real estate tax lien recorded in the county is a paramount lien as to all other liens except against the United States and the State of North Dakota.³¹² In North Dakota, when the defaulting owner severs a mineral or royalty interest from the surface while the whole interest in the land is subject to the county's lien for taxes, there is no severance

304. N.D. TITLE STANDARDS § 1-03 (N.D. State Bar Ass'n 2012). The reason for this title standard is that tax titles are considered to be inherently suspect. *See generally* Anderson v. Robertson, 1 N.W.2d 338 (N.D. 1941).

305. Payne v. A.M. Fruh Co., 98 N.W.2d 27, 31 (N.D. 1959).

306. *See* discussion *supra* Part II.25.

307. *See* N.D. CENT. CODE § 57-28-04(4) (2013).

308. *See* N.D. CENT. CODE § 57-38-49 (2013).

309. *Id.*

310. *Id.*

311. N.D. TITLE STANDARDS § 9-07 (State Bar Ass'n N.D. 2012).

312. N.D. CENT. CODE § 57-02-40 (2013).

regarding the county.³¹³ However, the county's lien remains a single lien upon the entire estate in the land, and its title validly founded upon the county's lien is a new and paramount title from which no minerals or royalty may be deemed severed.³¹⁴

47. TERM INTERESTS

As opposed to leasehold interests, term interests may be created from perpetual mineral, royalty, or executive interests.³¹⁵ "Term interests may be referred to as either (a) fixed term interests, which are those created for a definite period of time, or (b) defeasible term or possibility of reverter interests, which are those governed by the occurrence of an event other than the mere passage of time."³¹⁶ While term interests have not been common in North Dakota, one of the most frequent examples of such interests are those created by the Federal Land Bank of Saint Paul. During the period of approximately 1944 through the early 1960s, the Federal Land Bank of Saint Paul reserved fifty percent of the minerals underlying the land it conveyed for a fixed term of twenty-five years.³¹⁷

Fixed-term interests automatically terminate at the expiration of the term. The defeasible-term interest also automatically expires at expiration of the term. However, there may exist both legal questions concerning the construction of the instrument creating the term and factual questions concerning whether or not a contingency defining the term has occurred.³¹⁸ Additionally, numerous other problems may exist regarding defeasible term interests defined in relationship to production, including, among others, the effect of shut-in royalty, the meaning of paying quantities, cessation of production, and the rule against perpetuities on interests created by reservation rather than grant.³¹⁹ In *Greenfield v. Thill*,³²⁰ the North Dakota Supreme Court held that for purposes of determining whether a defeasible term interest in oil and gas rights is terminated, the following should be considered: (1) the cause of cessation, (2) the period of time of cessation, (3) the interest of the operator, and (4) the diligence of the term interest owner.³²¹

313. N.D. MINERAL TITLE STANDARDS § 8-02.1 (N.D. State Bar Ass'n 1989); *see also* *Payne v. A.M. Fruh Co.*, 98 N.W.2d 27 (N.D. 1959).

314. *Id.*

315. N.D. MINERAL TITLE STANDARDS § 4-01 (N.D. State Bar Ass'n 1989).

316. *Id.*

317. *See* *Monson v. Dwyer*, 378 N.W.2d 865 (N.D. 1985).

318. *See* *Greenfield v. Thill*, 521 N.W.2d 87, 89 (N.D. 1994).

319. N.D. MINERAL TITLE STANDARDS § 4-01 cmt. (N.D. State Bar Ass'n 1989).

320. 521 N.W.2d 87 (N.D. 1994).

321. *Id.* at 392.

Conveyances or reservations of mineral interests may be perpetual or may be limited to a lesser term.³²² Term interests are divided into two basic types. The first is a grant or reservation for a fixed term only; the second is a grant or reservation for a fixed term and “as long thereafter as oil or gas is produced” in paying quantities. For a term-mineral deed in its secondary term, production need not be on the land conveyed by the term deed, but may also be from a drilling and spacing unit encompassing the described land in the mineral deed.³²³ Unless there is contrary language in the deed, production from one tract in a deed will also perpetuate production from all tracts.³²⁴ To extend a term deed into its secondary term, there must be actual marketing of the oil and gas during the primary term.³²⁵

48. TRUSTS

The trustee of an express trust has the power to grant, deed, convey, lease, and execute assignments or releases with respect to the real property or interest therein that is subject to the trust.³²⁶ The authority of the trustee of a business trust or real estate trust to execute a document affecting real property may be presumed.³²⁷ Any estate in real property may be acquired and held in the name of an express private trust that is a legal entity.³²⁸ Where real property is so acquired, the trustee shall make any conveyance, assignment, or other transfer of such property in the name of such trust.³²⁹

The words “trustee,” “as trustee” or “agent” following the name of a grantee, without further language actually identifying a trust, are merely descriptive and the person is deemed to be acting in an individual capacity.³³⁰ Therefore, a conveyance by an individual is effective if the individual executes the conveyance individually or as “trustee.”³³¹ A subsequent conveyance by a grantee, whether or not the grantee’s name is followed by words in the subsequent conveyance, vests title in the grantee

322. See *Terry v. Conway Land, Inc.*, 508 So. 2d 401, 404 (Fla. App. 1987); *Peppers Refining Co. v. Barkett*, 256 P.2d 443, 446 (Okla. 1953); *Williams v. Watt*, 668 P.2d 620, 624 (Wyo. 1983).

323. See *Fox v. Feltz*, 697 P.2d 543, 546 (Okla. Civ. App. 1984); *Finley v. Spradley*, 294 S.W.2d 750, 754 (Tex. Civ. App. 1956).

324. *Turner v. McBroom*, 565 P.2d 44, 46 (Okla. 1977).

325. *Sandtana, Inc. v. Wallin Ranch Co.*, 80 P.3d 1224, 1230 (Mont. 2003); *Fransen v. Eckhardt*, 711 P.2d 926, 931 (Okla. 1985); *Gulf Oil Corp. v. Reid*, 337 S.W.2d 267, 272 (Tex. 1960).

326. N.D. CENT. CODE § 59-16-15 (2013).

327. N.D. CENT. CODE § 47-10-26 (2013).

328. See N.D. CENT. CODE § 10-34-07 (2013).

329. *Id.*

330. N.D. TITLE STANDARDS § 10-06 (N.D. State Bar Ass’n 2012).

331. *Id.*; *Petition of Dengler*, 246 N.W.2d 758 (N.D. 1976).

of the subsequent conveyance free of all claims of others. If such a grantee making a subsequent conveyance is an individual and the property conveyed could be subject to the right of homestead, the subsequent conveyance must also be executed by such grantee's spouse or must show that such grantee has no spouse.³³² One issue that has arisen is whether a conveyance by a spouse, as trustee of a revocable trust, must also be executed by the non-executing spouse if the property is the couple's homestead. There is no court decision on this issue.

"A trustee, without authorization by the court, may exercise powers conferred by the terms of the trust"³³³ A trustee has the power to sell, convey, and encumber such real estate unless the deed of conveyance to the trustee specifically restricts such power, including the right to "[e]nter into a lease for any purpose as lessor or lessee, including a lease or other arrangement for exploration and removal of natural resources, with or without the option to purchase or renew, for a period within or extending beyond the duration of the trust."³³⁴ With regard to a "blind" trust:

A conveyance is not void or voidable solely because the grantee in the conveyance is a trust, rather than the trustee of the trust, or is an estate, rather than the personal representative of the estate, if the identity of the grantee is reasonably ascertainable from the conveyance or from other information of public record, or from both.³³⁵

Thus, a conveyance to a trust without identifying the trustee is not void and the trustee's identity may be established by filing an appropriate affidavit.

49. UNRELEASED OIL AND GAS LEASES

North Dakota statutorily requires a lessee to file a release of an expired oil and gas lease.³³⁶ North Dakota Century Code section 47-16-36 provides that a lessee must surrender a lease in writing and place such writing of record within fifteen days after the date of forfeiture or termination when any oil and gas lease terminates or is forfeited.³³⁷ If the lessee fails or neglects to execute and record the surrender within the time provided for, then the owner of the real property may serve a written notice upon the

332. N.D. TITLE STANDARDS § 2-02 (N.D. State Bar Ass'n 2012).

333. N.D. CENT. CODE § 59-16-15 (2013).

334. N.D. CENT. CODE § 59-16-16 (2013).

335. N.D. CENT. CODE § 47-19-42.1 (2013).

336. N.D. CENT. CODE § 47-16-36 (2013).

337. *Id.*

lessee.³³⁸ As a practical matter, though, most lessees do not file a release of expired leases unless requested to do so by another lessee or the mineral owner.

50. WELLBORE ASSIGNMENTS

Generally, traditional lease assignments convey all or some portion of the assignor's leasehold interest in specified leases. However, examiners will frequently encounter "wellbore assignments" where, for example, the assignor assigns to assignee all of its interest in the wellbore of the Smith #1 Well. Such wellbore assignments create confusion as to the interest assigned—particularly if the assignee of the wellbore assignment desires to either deepen or drill horizontal legs in the existing wellbore or if a new well is proposed and the old wellbore is contained within the same spacing unit. Wellbore assignments are often ambiguous and may result in litigation as to what was actually assigned. A well-drafted wellbore assignment states not only the name of the well being assigned and its location, but it also describes whether the wellbore being assigned includes rights in the spacing unit and in the leases. It also includes whether the assignment is limited to certain depths and/or formations.

A Texas case, involved the assignment of leases only insofar as they "cover rights in the wellbore of the King F#2 Well."³³⁹ The court indicated that the rights assigned were confined to the wellbore at the time of the assignment and did not convey any rights in the oil and gas outside of the wellbore or the right to extend the wellbore into other "areas of the lease."³⁴⁰ Thus, when reviewing a wellbore assignment, if all rights are not clearly expressed—particularly the right to drill to deeper depths—then it may be necessary to request a curative assignment be obtained from the parties.³⁴¹

In *Armstrong v. Berco Resources, LLC*,³⁴² the United States District Court for North Dakota considered the issue of a motion for summary judgment as it related to a purported assignment of a wellbore-only interest. The court was faced with the issue of whether the parties assigned a leasehold interest in the subject property or merely an interest in the wellbores described.³⁴³ The court found that a wellbore assignment is an assignment where the rights to a particular wellbore, and not the associated

338. *Id.*

339. *Petro Pro, Ltd. v. Upland Res., Inc.*, 279 S.W.3d 743, 746 (Tex. App. 2007).

340. *Id.* at 753.

341. *See id.*

342. No. 4:10-cv-022, 2012 WL 1493738 (D.N.D. April 27, 2012).

343. *Id.* at *8.

leasehold, are conveyed. At issue was whether an interest assigned to Armstrong was a leasehold interest in the subject property or merely an interest in the wellbores.³⁴⁴ If the interest granted to Armstrong was intended to be a leasehold interest, then Armstrong would own an interest in a new well drilled by the successor of Armstrong's grantor.³⁴⁵ If it was intended to be a wellbore-only interest, then Armstrong had no right to production from the new well.³⁴⁶

The trial court found the Assignment ambiguous and denied motions for summary judgment on the issue of quiet title.³⁴⁷ More specifically, the court found the phrasing "limited to the wellbores, associated equipment and production from the Bakken formation" in the Exhibit "A" to the assignment ambiguous.³⁴⁸ It could mean, the court reasoned, the wellbores, equipment associated with the wellbores, and production from the Bakken formation whether or not associated with the wellbores, or it could mean the wellbores, equipment associated with the wellbores, and production from the Bakken formation associated with the wellbores.³⁴⁹

Further, the reservation of "all interests in the associated leasehold, other than the interest in the Bakken formation conveyed hereunder and associated contracts and easements, including the right to develop and/or drill through the Bakken formation to produce oil and gas from other formations" could be interpreted as either reserving all leasehold interest and granting a wellbore-only interest or as reserving the leasehold outside of the Bakken and granting a leasehold interest in the Bakken.³⁵⁰ After a bench trial, the court declared the initial transaction to be a wellbore assignment only,³⁵¹ and the Eighth Circuit Court of Appeals affirmed.³⁵²

344. *Id.*

345. *Id.*

346. *Id.*

347. *Id.* at *13.

348. *Id.* at *8.

349. *Id.*

350. *Id.*

351. *Id.*

352. *Armstrong v. Berco Res., LLC*, 752 F.3d 716, 718 (8th Cir. 2014).