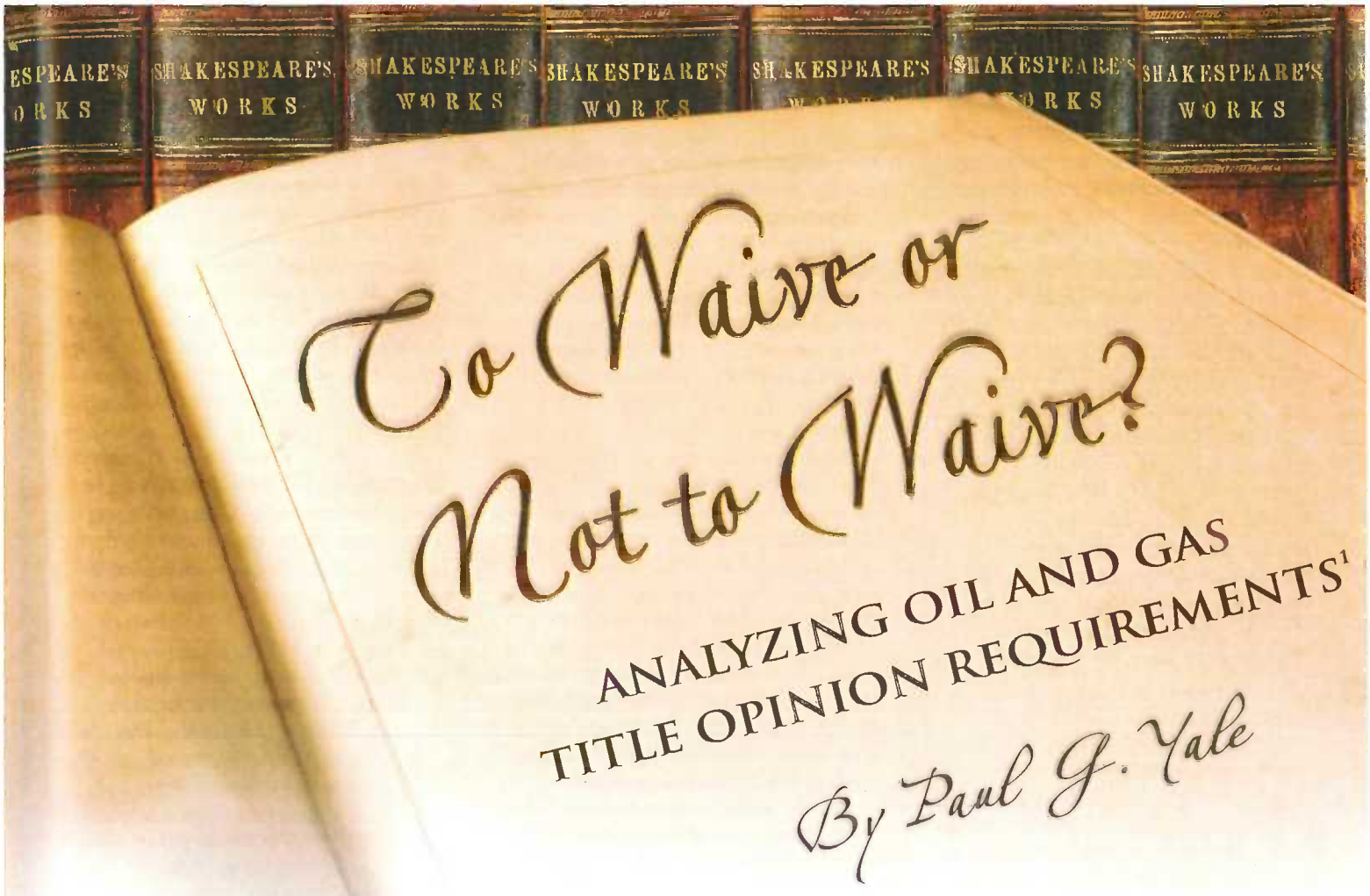

To Waive or Not to Waive?

ANALYZING OIL AND GAS TITLE OPINION REQUIREMENTS[1]

By Paul G. Yale

The primary means of managing oil and gas title risk is by deciding whether to waive or not to waive the requirements found in oil and gas title opinions.

Introduction

The oil and gas industry is inherently risky. Dry holes, blowouts, price collapse, political risks and many other issues constantly plague oil and gas producers. Title risk is still another. The primary means of managing oil and gas title risk is by deciding whether to waive or not to waive the requirements found in oil and gas title opinions. How to go about doing this is the subject matter of this article.

The phrase "to waive, or not to waive" is of course a play on the famous question by Hamlet in Shakespeare's play of the same name, "To be, or not to be … ."[2] Hamlet was contemplating suicide; the question of waiving a title requirement should not be so dire. Nevertheless, like Hamlet, oil and gas lawyers, landmen, division order analysts and other industry professionals who deal with title opinion requirements can get despondent over their subject matter. The number of different issues and possible requirements in a particular chain of title can seem overwhelming. The pressure to waive title requirements in order to avoid standby drilling rig costs is constant and very real. The process of securing title curative can be time consuming and expensive. Balancing title risk against the cost and potential delays of title curative is one of the most challenging tasks oil and gas title professionals must face. On top of this, each title is unique so formulas and pat responses escape us.

Yet, a common approach is possible. To quote Shakespeare again, "though this be madness, yet there is method in it."[3] There are common questions that can be asked, recurring issues that can be raised and similar conclusions that can be reached with regard to almost any title requirement. A method in mitigating the madness, so to speak, is possible. This article will attempt to answer the question of whether "to waive, or not to waive" some of the most common requirements found in oil and gas title opinions.

Why Should Lawyers Care?[4]

Many years ago, as an entry-level landman for Exxon, the author was assigned the task of curing the requirements in a title opinion for an onshore well in California. The rig was moving to location, and one of the title requirements seemed particularly inconvenient. The title opinion was written by an attorney from Los Angeles. The author made the suggestion that the requirement be waived. The lawyer's response was, "Young man, if I thought the requirement was waiveable, I wouldn't have made it in the first place."

On its face the California lawyer's statement seems ridiculous; oil and gas requirements are waived all the time. What the lawyer was probably trying to communicate was that it was not his place to give advice on waivers of title requirements; some lawyers would agree.

After all, the theory behind title examination is that if all the requirements are cured, the risk of title loss passes to the lawyer (or his or her malpractice carrier). If title is not cured, risk of title loss remains with the client. The lawyer navigates in treacherous waters when he or she advises a client on the waiveability of a title requirement. The consequence could be that the risk of title loss may be transferred back to the lawyer, irrespective that the requirement is not cured. On the other hand, clients expect their lawyers to give them advice. So what's a lawyer to do?

Most experienced oil and gas lawyers instinctively find the appropriate balance between giving advice and avoiding assumption of risk of title loss. For those lacking such instinct, one fall back approach is used by the lawyer from California — decline to engage in the question. The problem with that, however, is that clients have varying degrees of familiarity with title issues and often look to their lawyers for advice. This seems particularly true of banks, financial institutions and investors from outside the industry.[5] Further, though it is relatively rare these days for a general counsel or a staff attorney of an oil and gas company to a write a title opinion (instead of referring it to outside counsel), it is common for landmen and division order analysts to seek advice from their in-house attorneys on waiving title requirements.

So the answer to the question "why should lawyers care?" is that familiarity with the issues surrounding waivers of title requirements is useful to both private counsel and in-house lawyers who need to better understand and empathize with their clients' problems. It is the author's experience that clients have little repeat business for lawyers who are overzealous with their title requirements. Malpractice insurers, on the other hand, have little interest in insuring cavalier oil and gas title examiners. Title lawyers do, indeed, navigate in treacherous waters. Being ready to discuss the pros and cons of waiving a title requirement can lead to both better client relations and perhaps more thoughtful requirements in the first instance. Thoughtful discussion does not have to mean retraction. This is an area where a little humility can yield large dividends.

Oil and Gas Title Opinion Requirements in General[6]

Some may recognize the following line from the author's all-time favorite novel, Robert Penn Warren's *All the King's Men:*

> "Man is conceived in sin and born in corruption and he passeth from the stink of the didie to the stench of the shroud. There is always something."

The context was the governor of Louisiana, a Huey Long prototype, asking his aide to find some dirt on the judge. The aide said there was none, to which the governor replied as noted, ending by saying: "There is always something."

There is, likewise, "always something" about oil and gas titles. A perfect title is like the "Holy Grail" — often sought after but never found. What is settled for is marketable title: a title reasonably free from defects and encumbrances. It would be a rare title opinion, however, that did not have requirements. As the novelist reminds us, man is fallen and imperfect, and so are his property titles.

It seems helpful to categorize title requirements into three groups: general requirements, special requirements and formal requirements (also called disclaimers or title limitations). General requirements are the most common. These include requirements for affidavits of use and possession, mortgage subordinations, tax certificates, awareness of easements, review of lease terms and other boilerplate requirements that seem to appear in almost any title opinion.

Special requirements are those requirements that are more unique to a given chain of title and that do not appear as frequently in title opinions as

do the general requirements. Examples would be requiring joinder to a lease of a spouse due to community property and/or homestead laws, securing copies of probate materials, verifying the authority of a successor trustee to convey and so forth.

The last category is formal requirements. Formal requirements are those requirements in title opinions that are necessitated by either inherent or imposed limitations in the title examination process. For example, it is nearly impossible for an examiner to determine from a review of the record whether a deed was forged. Likewise, it would not be possible for an examiner to determine whether a deed was properly delivered, wrongfully indexed or obtained by fraud or whether land was adversely possessed and so forth.[7]

Our colleagues in the real estate law bar have known about formal limitations of title for a long time. It could be argued that the reason the title insurance industry was spawned in the United States in the late 19th century[8] was to protect against title losses brought about by those defects of title that cannot be determined from the record.

The oil and gas industry, in contrast, does not rely on title insurance.[9] Instead, oil and gas title attorneys, or their malpractice carriers, typically provide the requisite assurance of title. This presents a dilemma for title examiners because they can be put on equitable notice of matters outside the record.[10] Examiners, understandably, do not want to insure against matters of which they are unaware. Hence, practically every title opinion has formal requirements which are in effect limitations on the opinion.

Another way to describe formal requirements is that they are the requirements in a title opinion that the client waives automatically.

REQUIREMENT NO. 1: *This opinion does not cover matters of area, conflicts or boundary lines or other such matters which may only be determined from an on the ground inspection of the premises including the source of right of any parties currently in possession.*

The wording of formal requirements varies widely between lawyers as does their length, depending on a lawyer's brevity and aversion to risk.[11]

Limitations in a title opinion are sometimes imposed. For example, a client might instruct the title examiner to limit his or her review of documents from a given point in time forward. It is increasingly common for companies drilling wells in the Barnett Shale, where units can include hundreds of town lots, to instruct their title examiners to limit review of documents to a point in time forward from when the urban subdivisions were platted. This increases title risk significantly but for some companies the risk is justified by an increase in timesavings and a decrease in abstracting and title examination costs. We will examine some of the pros and cons of this type of title risk management later in this article. For now we turn to specific examples of title opinion requirements.

General Requirements

Many title requirements have their genesis in gaps or oversights in the record. Others involve nuances of law or ambiguous drafting. All title requirements have the goal of adding clarity to an otherwise clouded record. General requirements are the most common. Included in this category are affidavits of use and possession, mortgage subordinations, tax certificates, awareness of easements, review of lease terms and other boilerplate requirements that seem to appear in almost any title opinion.

Affidavits of Use and Possession

REQUIREMENT NO. 2: *You should secure Affidavits of Use and Possession from two or more persons personally familiar with the Subject Lands setting forth the nature of possession of the Subject Lands for the past 30 years. The Affidavits should give the names and addresses of such persons and recite the manner in which they are acquainted with the facts surrounding the Subject Lands insofar as they relate to possession, use and occupancy.*

There is perhaps no more ubiquitous requirement in an oil and gas title opinion than that of obtaining an affidavit of use and possession. The point of such a requirement is obvious: Record title can be defeated by an adverse possessor. The requirement serves other purposes as well. An investigation of current and past uses of property prior to drilling is useful in assessing environmental and regulatory risks. It is also useful in determining who the current occupant is for purposes of making peace before the drilling rig arrives and for settling surface damages afterwards. It is likewise useful to know about highway or railroad rights of way, schools, churches, cemeteries, placer and lode mining locations, if any, that may be located on or near a prospective drillsite.

Perhaps an affidavit of use and possession's most useful purpose, however, is for the exact opposite reason. Sometimes adverse possession is the only means of closing early gaps in title that are simply unexplainable due to passage of time. Establishing title through limitations by use of an affidavit of use and possession, while risky,[12] is sometimes the only practical means of curing an ancient title defect.[13]

So, when, if ever, would a client want to waive the requirement to obtain an affidavit of use and possession? At least one commentator has said that the requirement is never waiveable:

> "Opinions vary on whether there is any title requirement which can never be waived. The author believes that there is one — the affidavit of use and occupancy. It simply must be obtained prior to the drilling of each and every well … ."[14]

However, for every rule there are the exceptions. One instance where the requirement to obtain an affidavit of use and possession might be waived is where the state or another public entity owns the minerals. In Texas and most other states the laws of adverse possession do not apply to the sovereign.[15] Another instance might be the scenario where title examination reveals that the minerals were completely severed from the surface many decades ago. It is well established in Texas that adverse possession of the surface is insufficient to acquire title to severed minerals.[16]

A severed surface owner who is concerned about the impact drilling operations will have on his or her property, especially when he or she will derive no economic benefit, might be less than enthusiastic about giving an affidavit of use and possession. In some parts of Texas severed surface owners are more

likely to meet oil company representatives with a shotgun than with a handshake. Neighboring landowners may share similar sentiments. Locating two or more disinterested parties with knowledge of current and past uses of the land and who are willing to cooperate is often easier to discuss in a title requirement than it is to accomplish in the field. Consider the Barnett Shale area in Dallas/Fort Worth where drilling is more and more frequently undertaken in residential subdivisions with rapid turnover of homes. Individuals with more than a few years of personal knowledge of a subdivision simply may not exist.

The quantum of interest and location of the tract at issue is also a factor. Obtaining an affidavit of use and possession covering the 160-acre tract that encompasses the entire drill path of the well is one thing, seeking an affidavit of use and possession for a 0.02-acre tract in a 640-acre unit where the drill path does not traverse the tract is something else.

So, yes, there are occasions when the "unwaiveable" requirement of obtaining an affidavit of use and possession can at least be considered for waiver. Questions to ask are:

(1) Have the minerals been severed from the surface?

(2) Are disinterested individuals available to sign an affidavit?

(3) Is record title either relatively straightforward or curable, or is establishing title by limitations title a necessity?

(4) What is the interest involved — a 160-acre drillsite or a 0.02-acre lease that will be placed in a unit but not drilled upon?

The answer to any of these questions may suggest waiving the requirement as a reasonable business risk.

Before leaving this topic, let us consider another requirement closely related to obtaining an affidavit of use and possession and frequently found in title opinions — that of obtaining a tenant's consent agreement. An example is:

REQUIREMENT NO. 2a: *If the investigation of use and occupancy of the Subject Lands reveals that the lands are occupied by any person other than the current owner, determine by what rights such person is in possession. We recommend that you attempt to secure a Tenant's Consent Agreement from any such person, particularly if their use and occupancy of the land began before the date of your oil and gas lease.*

Tenant's consent agreements are requested for two primary reasons. The first is to ensure that the tenant is not claiming possession of the land adverse to the record title owner. The second reason is to identify the current occupant in order to make peace before the drilling rig arrives and for purposes of settling surface damages.[17]

Once again, this requirement may seem "unwaiveable" at first glance. Yet, what if a tenant refuses to cooperate? This should be no surprise since a tenant has little motivation to cooperate in negotiating a tenant's consent agreement absent an accompanying surface damage payment to which he or she may not be entitled.

Rather than allowing a client to be victimized by a surface owner or tenant who may have unreasonable expectations with respect to receiving damages payments, it is sometimes better to remember that in Texas, at least, a severed mineral estate is generally dominant over the surface estate.[18] Though such rights must be exercised with due regard to the rights of the owner of the surface,[19] this does not mean that an oil company must succumb to blackmail by a surface tenant seeking windfall profits in exchange for a tenant's consent agreement. This is particularly true in cases where the minerals were severed prior to the date of the tenant's lease since it could be argued that the tenant "came to the nuisance." So again, the requirement might better be waived as a business risk.

Before leaving the subject of surface use, a word should be said about easements. In a technical sense, easements and rights of way do not affect land titles; the same can be said for zoning ordinances, land use controls, restrictive covenants and federal/state/county/municipal land use regulations. The latter are typically disclaimed in the formal requirement section of title opinions. Lists of easements and rights of way, on the other hand, are sometimes, but not always, included in title opinions.

The reason easements, rights of way and other such surface encumbrances are sometimes excluded from oil and gas title opinions is fundamentally economic. Clients want to know about the title to oil and gas; surface easements do not directly affect oil and gas title and can often be identified by a site inspection without paying a lawyer additional fees to opine on their status. If a client is in a hurry to receive a title opinion, excluding the surface from the scope of the opinion may be a way to speed completion of the project.

Yet, the consequence of ignoring an easement can be severe irrespective that the mineral estate is generally dominant over the surface estate. An operator would hardly be considered prudent, for example, were it to stake an oil well over an active natural gas pipeline. The state of Texas would likely take strong exception to the staking of a well on the centerline of a state highway despite legal doctrine. For this reason, clients often request that easements be identified in title opinions. If easements are included within the scope of the opinion, the following requirement is typical:

REQUIREMENT NO. 2b: *We call your attention to the easement(s) tabulated. In the event of ingress and egress, care should be exercised not to interfere with the vested rights of others.*

If included, this would appear to be an example of a truly "unwaiveable" title requirement or at least of a requirement that seems more easily cured than ignored.

Subordination of Liens and Mortgages

Vendor's liens, deeds of trust, mortgages and the like fill countless pages of county records in Texas. Collateralization of real property to secure a loan is an ancient practice [20] and placing third parties on notice of prior liens is one of the primary purposes of the recording statute.[21] The consequence of ignoring a prior lien is that an oil and gas lease could become junior to the lien and be extinguished by subsequent foreclosure.[22]

In our current economic climate with mortgage foreclosures at their highest levels nationally since the 1930s, the risk of an oil and gas lease being extinguished by foreclosure has probably never been higher. Even before the current economic downturn, it was very common to see the following requirement in oil and gas title opinions.

REQUIREMENT NO. 3: *Secure a release and/or a subordination of mortgage from the lender of the liens referenced in the Encumbrances section, or alternatively, assume the business risk that the owner will not remain current in his payments and that you will not learn of any delinquency in time to discharge it prior to a foreclosure upon the mineral estate.*

Lienholders have a duty to issue written releases of liens once the underlying debt is paid.[23] To give notice to third parties, a written release must be recorded in the county in which the lien is recorded.[24] If the lien is not released and appears to not be barred by limitations, then a subordination agreement may be called for.[25] A subordination agreement is an agreement modifying lien priorities whereby the superior lienholder voluntarily contracts to be paid after a junior lienholder if the liens are foreclosed or agrees that foreclosure will not extinguish the subsequent interest.[26]

Detailed familiarity with statutes of limitations is not required for a title lawyer to conclude that a vendor's lien taken, say, in the year 1844 when Texas was still a Republic, is not a practical problem, irrespective of whether a release is filed of record or the mortgage subordinated. The reason for this is twofold: (1) because real estate mortgages with maturity dates longer than 30 years are rare and (2) the statute of limitations on a mortgage or deed of trust is four years after maturity of the debt, subject to some limited exceptions governing suspension in the event of death.[27] For these reasons, most title examiners will not make requirement to obtain releases or subordinations of mortgages and liens more than 40 years old on the assumption that any such lien is unenforceable. This concept is captured in *Texas Title Standard*[28] *15.100, Removal of Lien*, which states the following:

> "Subject to exceptions, an examiner may presume that a lien on real property is extinguished upon establishing that the secured debt (1) has been paid or (2) has become unenforceable upon expiration of the applicable limitations period."

What if, however, the examiner is confronted with a current mortgage on a drillsite that appears to be both unreleased and not extinguished by limitations? Would securing a subordination in such a situation be another example of an "unwaiveable" title requirement? The answer is it depends.

First, it should be asked whether the minerals are severed from the surface and if the severance pre-dated the current mortgage. If it did, the oil and gas lease is senior to the mortgage and the problem disappears.[29]

Second, many oil and gas leases contain a subrogation clause (frequently found near the end of a lease within the warranty provisions). The following is typical:

> "Lessor hereby warrants and agrees to defend title to the land herein described, and agrees that Lessee, at its option, may pay and discharge any taxes, mortgages, or other liens existing, levied or assessed on or against the above described lands and, in the event it exercises such

> option, it shall be subrogated to the rights of any holder or holders thereof and in addition to its other rights, may reimburse itself by applying to the discharge of any such mortgage, tax or other lien, any royalty or rentals accruing hereunder."[30]

In essence, the subrogation clause offers the lessee the option to pay and discharge any lien against the land and be subrogated to the rights of the lien holder. There are many practical problems that can arise from attempts to rely on such a subrogation provision. Foremost among these is that it assumes the lessee is continually monitoring local newspapers or other sources of information on foreclosures in the county in which the land is located or otherwise has a means to discover that the lessor is in default.[31] Nevertheless, such subrogation provisions routinely provide the rationale for oil industry landmen and others to waive the requirement of seeking subordinations of mortgages.

Another practical problem with subordination of mortgages is that the time and effort required to obtain them sometimes seems inversely proportionate to the size of the financial institution and the distance it is removed from the lease. Try engaging Deutsche Bank-Hamburg, for example, in a subordination of lease discussion involving an East Texas oil and gas lease. Despite the fact that subordinations of mortgages can be accompanied by assignments of proceeds that can actually enhance the value of collateral, some banks are notorious for their tardy responses to subordination proposals. Others may simply decline to engage in a discussion for fear of diminution in value of their collateral, irrespective of whether such fear is justified.

Additional factors to consider when relying on subrogation clauses in leases include the amount of the outstanding loan balance and the history and current status of payments being made by the owner under the terms of the loan. Still another factor to consider is the drill path of the well. If, for example, your client is drilling in a unit in the Barnett Shale, and the tract for which the subordination is required is nondrill path and a relatively small contributor of

acreage to the unit, the requirement to subordinate may be more trouble than it is worth in terms of business risk.

Still another factor is "worst case scenario" planning. If subordination is not obtained and the oil and gas lease extinguished due to foreclosure, is the operator of the well a good or bad faith trespasser? If a good faith trespasser, it is well established in Texas that the operator can still recover reasonable drilling and completion costs.[32] The author can find no Texas cases holding that an operator in such a situation is a bad faith trespasser, and such a ruling by a court would seem illogical since an operator without notice of a pending foreclosure would presumably be acting in good faith at the time the oil and gas lease was taken.[33] If the tract is nondrillsite and involves a relatively small interest, the time and expense of seeking a subordination of mortgage may outweigh the risk of having to carry an interest.

Mortgages and deeds of trust are only two of the many different types of liens that can be placed upon a property. Judgment liens, mechanic's liens, tax liens, child support liens, mining reclamation liens and many other types of liens may be of record.

Referring back to *Texas Title Standard 15.100* as quoted earlier, the first question to ask in connection with any lien is whether a statute of limitations might bar enforceability. In very general terms, most liens may be ignored if more than 10 years have passed since the maturity date. Federal tax liens, as an example, are generally effective for only 10 years and 30 days after assessment.[34] Abstract of judgment liens are considered dormant if a levy of execution does not issue within 10 years after recording and indexing and every 10 years thereafter.[35] Federal estate tax liens extinguish 10 years after date of death.[36]

Some statutes of limitations are much shorter than 10 years. A suit on a mechanic's lien, as an example, must be filed within the later of one year after the completion, termination or abandonment of the original contract, or two years after the last day for filing the affidavit (one year if a residential project).[37]

Beyond the question of limitations, an analysis of what to do about any of these types of liens is similar to that utilized when considering mortgages or deeds of trust. Subordination of the lien may be a practical impossibility. Yet note that the oil and gas lease subrogation clause quoted earlier applies to "any taxes, mortgages, or other liens existing, levied or assessed on or against the above described lands." Therefore a subrogation clause in an oil and gas lease normally offers the lessee the option to pay and discharge *any* type lien against the land and be subrogated to the rights of the lien holder, not just mortgages and deeds of trust. The lessee often has the right to recoup its contribution from royalty payments. It may be easier to pay the lien and offset it against royalty (if allowed under the terms of the lease) than to seek a subordination.

To summarize, there are circumstances under which waiving the requirement to subordinate an unreleased mortgage or other outstanding lien can make business sense. First, make sure that a severance of the minerals does not predate the surface estate or that the mortgage or other type lien is not unenforceable due to limitations. If either of these is the case, then any associated requirement is "regrettable" (i.e., perhaps the examiner should not have made the requirement to begin with).

Second, ask some questions: (1) Is there a subrogation clause in the underlying oil and gas lease? (2) Is the tract in the drill path? (3) Is the tract small in relationship to the overall unit such that the extinguishment of a lease and subsequent carry would not severely impact the economics of the well? The answers to any of these questions may suggest that the requirement of subordination be waived as an acceptable business risk.

Taxes

All Texas properties subject to ad valorem tax are likewise subject to a lien to secure payment of such tax as of Jan. 1 of each year.[38] Since the government is involved, it should not be surprising that statutes of limitations are much longer than with private sector liens and mortgages. Delinquent ad valorem taxes are not barred by reason of limitations until 20 years after rendering.[39] The tax rendering itself can be revised for up to five years.[40] Furthermore, a tax lien is always prior to all other liens as long as notice of the lien is filed prior to the time the debtor acquires the property.[41] Therefore, a tax lien can be senior to an oil and gas lease. For these reasons, the following requirement is included in practically all oil and gas title opinions:

REQUIREMENT NO. 4: *Either obtain and furnish for examination tax certificates or other substantive evidence demonstrating that all ad valorem taxes assessed against the Subject Lands have been paid when due or, in the alternative, satisfy yourselves to the extent that you deem advisable that there are no delinquent ad valorem taxes affecting any portion of the oil and gas mineral estate.*

As the requirement specifies, the traditional method of determining whether ad valorem taxes are due is by obtaining a tax certificate. This can be tricky. Counties are not required to consolidate collection of taxes in one collector. Texas law allows for multiple taxing units in the same county to render separate statements.[42] However, once the tax certificate is obtained, and if a tax certificate indicates that no taxes are due, the taxing authority is estopped from asserting a claim for back taxes.[43]

So why would the requirement to obtain a tax certificate ever be waived? A tax certificate on a tract of land can usually be obtained for a nominal fee — $10 is not uncommon. Given the risk of losing a producing oil and gas well to a tax foreclosure, this seems like inexpensive insurance.

Despite this, the requirement to obtain a tax certificate is frequently waived — at least in part. First, and at risk of sounding like a broken record, what if the minerals have been severed from the surface, in all or in part? What if any ad valorem tax delinquency is related only to the surface? Remember that in Texas, at least, ad valorem taxes are not assessed on nonproducing minerals.[44] If a total mineral severance under a tract occurred longer ago than the applicable statute of limitations for ad valorem taxes (20 years[45]), and if there has never been any oil and gas production attributable to the tract, then delinquent ad valorem taxes are a nonissue as to a current oil and gas lessee.

Second, the existence of a subrogation clause in an oil and gas lease[46] normally offers the lessee the option to pay and discharge any ad valorem tax liens against the land and to be subrogated to the rights of the lien holder. The lessee often has the right to recoup its contribution from royalty payments.

Last, there may be even more practical reasons for not seeking a tax certificate: Information about past due taxes is available on appraisal district Web sites; the client may have a tax receipt; or a phone call to the appraisal district documented by a handwritten notice may suffice. None of these methods provides the assurance of a tax certificate; but for title curative professionals faced with endless lists of tasks and constant pressure to move forward, any of these methods may be more acceptable if the alternative is to wait for weeks for the appraisal district to issue a certificate.

On the other hand, given the relatively inexpensive cost of obtaining a tax certificate and given the possibility that a title lawyer could have made a mistake in determining the date of mineral severance, not obtaining an ad valorem tax certificate might seem "penny wise, pound foolish."[47] Yet consider the Barnett Shale and similar plays where units can encompass hundreds of individual city lots. The cost and expense of obtaining certificates for each town lot in a unit with hundreds of town lots, even at only $10 per certificate, can be significant. When the time it takes to secure tax certificates and subsequent archiving costs are factored in, reliance on electronic statements in such a situation becomes even more palatable.

Read the Lease

It would be unusual to see an oil and gas title opinion that did not contain the following requirement or something similar.

REQUIREMENT NO. 5: *Review the current oil and gas leases applicable to the Subject Lands to ensure compliance with all terms and conditions.*

This would truly appear to be an "unwaiveable" requirement. An oil and gas lease has long been held in Texas to be a determinable fee and the consequences of not complying with the terms of the lease can include lease termination.[48] A recent case that has drawn much attention from title examiners for other reasons, *Wagner & Brown Ltd. v. Sheppard*,[49] has as its principal subject matter an oil and gas lease that had terminated due to nonpayment of royalty within a specified time. This runs contrary to the normal Texas rule that nonpayment of a lease royalty, though it may give rise to a cause of action for damages, does not cause an oil and gas lease to terminate.[50] The *Sheppard* case is yet another example of the increased risks that have become prevalent due to use of nonstandard, computer generated lease forms.[51]

An oil and gas company would be ill advised were it not to carefully study the leases it plans to drill under prior to commencement of operations. Though it is common for oil and gas title attorneys to include summaries of the lease forms for the convenience of the client, such summaries are invariably accompanied by requirements that mandate a careful reading of the actual lease or leases. In today's busy world this requirement may be all too tempting to waive, particularly when there are multiple leases or when the lease interest involved is very small. Yet, the author cautions that not reading

the lease is tantamount to negligence in the majority of cases. If the client lacks the time or the familiarity to accomplish the task, consider having the title lawyer write a lease maintenance opinion. To reiterate, in the author's view, this is one requirement that should never be waived.

Prior Oil and Gas Leases

REQUIREMENT NO. 6: *You should fully satisfy yourself that the prior unreleased oil, gas and mineral leases outlined in the Encumbrances section of this Opinion have expired by their own terms, or in lieu thereof, you should secure releases of same and file said releases of record in _____ County, Texas.*

One of the most significant title risks attendant to drilling an oil and gas well is that the drillsite may already be under lease to another party. [52] Drilling a well without performing adequate title due diligence to determine if a prior lease is still in effect has been held to be a bad faith trespass, meaning the producer must hand over the well to the owner without any reimbursement of drilling or operational costs.[53] Furthermore, exemplary damages awards are a distinct possibility.[54]

Complicating matters is that Texas is not a state that statutorily requires oil and gas leases to be released of record. The well-known Texas slander of title case, *Kidd v. Hoggett*[55], should give pause to a producer who arbitrarily refuses to release an expired oil and gas lease. Yet oftentimes attempts to secure releases of oil and gas leases end in frustration. What if the lessee is out of business? What if the lease has been assigned to multiple parties who cannot be located? What if the prior lessee must act under strict corporate controls over who can approve and/or execute releases of leases? Obtaining a release of an oil and gas lease in a timely manner is often a practical impossibility.

Traditionally, oil and gas title opinions require an affidavit of nondevelopment (also known as an affidavit of nonproduction) to address the eventuality that prior oil and gas leases may still be in effect. Yet, thanks to modern technology, the requirement to obtain an affidavit of nondevelopment is being waived more and more by title curative professionals. One commentator explains it as follows:

> "I was always somewhat bemused that I would be required to obtain an affidavit of nonproduction in a title opinion. Most times the geoscientist I was working with would know more about the production on a tract than a disinterested third party. Now, with the advent of the Internet, I usually waive that requirement and rely on production Web sites that I can query by legal description to assure myself that there is no production on the tract."[56]

The Texas Railroad Commission Web site[57] has extensive information on producing leases in Texas and may be a quicker and more reliable source of information than an affidavit.

Digression: Title Standards and Curative Acts

We have now reviewed formal title requirements and general title requirements. Before moving on to our last cat-

egory, special title requirements, mention should be made of another category of title requirements. Those would be what the author labels "regrettable" title requirements — those title requirements that perhaps should never have been made in the first instance.

Title examination is not an exact science. Some title examiners are simply more meticulous than others. Yet, even the most meticulous title examiner does not wish his or her requirements to be perceived by the client as absurd. For example, making a requirement in a title opinion that an affidavit of identity be obtained to establish that Mirabeau Bonaparte Lamar[58] is the same person as Mirabeau B. Lamar might be considered excessive.[59]

But who is to determine whether a title requirement is "regrettable" (or "nonegrettable")? Real estate law bars in many states settled this issue beginning in the 1940s and '50s with the development of title standards. A title standard may be described as a statement officially approved by an organization of lawyers that declares the answer to a question or a solution for a problem involved in the process of title examination.[60] Title standards represent a consensus opinion among members of the bar who are experienced examiners on title questions that are susceptible to a consensus view. Title standards are not primary law, but they identify and suggest practical solutions to many of the issues that confront title examiners and include citations to applicable case law and statutory authority.[61]

The Texas Title Standards are contained in the appendix to Title 2 of the Texas Property Code or, for ease of reference, in the pocket part of VTCA Property Code, Vol. 1.[62] The standards have been prepared by the Joint Editorial Board of the Real Estate, Probate, Trust Law Section and the Oil, Gas and Energy Resources Section of the State Bar of Texas.

By definition, title standards do not include statements that involve unsettled areas of law or that would be challenged by the majority of title examiners in practice in a given jurisdiction. Hence, title standards are an excellent starting point from which to research many issues confronting title examiners. Title standards can also help examiners prevent their title requirements from going "out in left field." They can also help those who read and act upon title opinions, such as general counsel or landmen, to recognize a "regrettable" title requirement, which in turn can make the decision to waive the requirement relatively easy.

Admittedly there are no Texas court decisions (at present) defining whether reliance upon a title standard constitutes due care on the part of the title examiner. However, in the author's view a title lawyer would be committing title requirement malpractice, so to speak, were he or she to make a requirement contrary to the title standards without at least identifying the standard and expressing the basis for a differing opinion.[63]

Much the same thing can be said about title lawyers who fail to mention that a particular title issue might be moot due to the application of a statute of limitations. At a minimum, mention should be made of the possibility that limitations might serve as a bar. Otherwise, the title lawyer runs the risk of having his or her client complain that based upon the advice of another, "smarter" lawyer, they have decided to waive the requirement as unnecessary.

Statutes of limitations are especially important to Texas title examiners because Texas lacks both a Marketable Title Act and a Dormant Mineral Act. Under the Model Form Marketable Recordable Title Act, title is supposed to be determined by examining public records from a current date, back 40 years, plus such additional time as is necessary to reach a "root of title."[64] Dormant Mineral Statutes provide for termination of severed mineral interests after prescribed periods of time. Perhaps the most well-known Dormant Mineral statute to Texas lawyers is the one in neighboring Louisiana, which permits "prescriptive liberation" of severed minerals, that is, their return to the surface owner after 10 years of nonuse.[65]

In Texas, lacking such curative statutes, title examiners place heavy emphasis on limitations to cure ancient, and not so ancient, title defects. The end result is not too dissimilar to what occurs in states that have Marketable Title or Dormant Mineral Acts.

A number of statutes of limitations pertaining to Texas land titles have already been discussed. These include the three-, five-, 10- and 25-year statutes of limitations used to establish adverse possession as well as the various statutes of limitations connected with extinguishment of liens and judgments.[66, 67]

Still another statute of limitations important to title examiners is the four-year (sometimes two-year) statute of limitations for technical defects in instruments found in Chapter 16 of the *Texas Civil Practice and Remedies Code*.[68]

This statute applies to title defects such as lack of signature of a proper corporate officer, partner or company officer, manager or member; failure of the record to show a corporate seal; execution of an instrument by a trustee without record of the authority of the trustee or proof of the facts recited in the instrument; failure of the record or instrument to show an acknowledgment or jurat that complies with applicable law; ministerial defect, omission or informality in the certificate of acknowledgement; and other minor title defects and deficiencies.[69]

In addition, the "ancient documents" rule of the common law has been codified in Texas in various statutes.[70] The primary statute examiners rely upon says that a document that has been in existence of record for at least 20 years in a condition that arouses no suspicion and in a place where it is likely to be considered authentic is prima facie evidence of the facts recited.[71] Another such statute frequently utilized by examiners provides that an affidavit of heirship of record more than five years in the county where the decedent resided at time of death is prima facie evidence of facts concerning family history, genealogy, marital status and the identity of heirs.[72] Recitals in such an affidavit, if not controverted by other facts, will support a determination of heirship.[73]

There are many excellent and exhaustive articles on the topic of title standards and curative acts,[74] and the subject is too broad and detailed to be given adequate discussion here. Suffice to say it is critical for title examiners, and their clients, to keep in mind the backdrop of title standards, curative acts and common law rules that any decision "to waive, or not to waive" a title requirement is made against. Much time and resource can be needlessly wasted chasing title defects that are either barred, or could be barred, by statutes of limitations or for which a presumption of accuracy has been created by a deed recital under the "ancient documents" rule.[75]

Another Digression: Requirement Deferral Versus Waiver

Consider the following hypothetical: Your client, an oil company, takes an oil and gas lease. After signing the lease, the lessor dies, apparently without a will, but in any event, no information appears of record concerning the disposition of the estate. The client comes to the lawyer for a title opinion prior to drilling. The requirement is made that the heirs be located. The underlying lease is about to expire, and the client is anxious to move the rig on location immediately. Should an extension of lease be sought in order to buy time to locate the heirs for royalty payment purposes?

Paying for an extension of lease or holding up a rig under these facts is not necessary. The fact that the lessor died without a will and the heirs cannot be located is fundamentally not the lessee's problem. Not being able to identify the heirs of a royalty owner would be grounds for suspension of the lessor's royalty by the lessee.[76]

This hypothetical highlights another fundamental question to ask in connection with almost any title requirement: Is this a requirement that must be cured now, or can it be deferred till later? Requirements that are necessary to cure prior to drilling a well should be distinguished from those that can be deferred until production. This is where land managers and others entrusted with authority within oil and gas companies to waive title requirements earn their salt. There is no reason to pay standby rig time or jeopardize the taking of a lease because of a title requirement that can be deferred to production.[77] Having said that, the time for payment of proceeds[78] can pass by quickly, and it is prudent to determine as early as possible whose responsibility it is to cure the requirement as between the lessee and the lessor. This is not always easy to do, which will be illustrated shortly.

Special Requirements

As requirements become more specialized, the legal and factual issues surrounding them become more focused (and troublesome). Grounds for waiving title requirements become more elusive. Yet waivers are still a possibility.

The different types of special requirements in title opinions are practically unlimited; included are requirements pertaining to interpretation of deeds, legal descriptions, divorce, death, taxes, foreclosure and so on. Space does not allow for discussion of more than a handful of these type requirements. The following examples, in the author's view, are among the most common special requirements found in title opinions:

Life Tenants/Remaindermen

REQUIREMENT NO. 7: *You should obtain a new oil and gas lease joined in by both the life tenant and the remainderman, or alternatively, a ratification of your current and gas lease by the remainderman, and in either case, record same in* _____ *County, Texas.*

It is a fundamental tenet of oil and gas law that absent an agreement otherwise, neither the life tenant nor the remainderman, acting alone, can extract minerals, produce oil and gas, or authorize a lessee to mine or produce hydrocarbons.[79] The pronouncement of two distinguished members of the Texas title bar on the subject is no less true in 2009 than it was when written in 1987, or for that matter, if it had been written a hundred years ago:

> "The owner of a life interest does not have the power to execute an oil and gas lease binding upon the interest of the remainderman in the absence of specific authority in the instrument creating the life estate. The life tenant is liable to the remainderman for waste if he exercises improper use and enjoyment of the corpus of the estate. Likewise, the remainderman has no right to lease since his interest is not possessory. Therefore, in order to obtain an effective oil and gas lease on life estate and remainder interests, it is necessary to obtain leases from both the life tenant and remainderman."[80]

So, when might this requirement ever be waived? The answer is never, unless the oil company is planning on carrying the interest in the well free of cost. In such a case the only question is whether the oil company is a good faith or a bad faith trespasser. The author has found no Texas case directly on point.

A detailed discussion of the law of life tenants and remaindermen, including related topics such as the applicability of the "Open Mine Doctrine"[81] and division of lease benefits[82] is beyond the scope of this article.[83] The author makes the observation that the requirement set forth here calls for joinder or ratification in the same lease by the life tenant and remainderman. It is always preferable, however, for the life tenant and the remainderman to join the same lease rather than enter into separate leases with identical terms. This is due to issues related to division and payment of lease benefits.[84] However, an identi-

cal, separate lease taken from either party will normally suffice for drilling purposes. As long as leases have been taken from both the life tenant and the remaindermen, issues relating to allocation of lease benefits can be deferred to division order time.

Marital Property/Homestead

Another fundamental tenet of oil and gas law (as well as real property and family law) is that at least since the 1967 amendments to Texas marital property statutes, if property is acquired during marriage by a deed naming both spouses as grantees, a subsequent conveyance of the property is ineffective unless it is executed by both spouses.[85] Exceptions may be made in the cases where community property is in one spouse's name or is subject to one spouse's sole management and control; but since the latter is a question of fact, it is very common for title examiners to require joinder by both spouses in oil and gas conveyances.

Another reason to require joinder of both spouses to an oil and gas conveyance is the application of Texas Homestead Laws.[86] If the property conveyed is or may be homestead of married people, whether community property or separate, the examiner should require the joinder of both spouses, unless it is conclusively shown that the property is not, or is no longer, homestead.[87]

So when might such a requirement be waived? As was the case in the instance of joinder of life tenant and remaindermen, the answer is never, unless the oil company is planning on carrying the interest in the well free of cost.

Space does not permit a detailed discussion of all the potential title requirements arising from application of Texas Marital Property Laws. However, one relatively common title requirement is fostered by the following fact situation: Party A and Party B get divorced. The divorce decree awards all community property to Party B, but specific language of divestiture of Party A's community property interest in Blackacre to Party B is not included in the divorce decree. Party A and B go their separate ways. Party B then leases Blackacre to an oil company. The title examiner makes the requirement that a quitclaim of interest — or alternatively, either a ratification or separate lease — be taken from Party A. Party A, being irate after the remarriage of Party B to "the other woman," refuses to cooperate. No quitclaim, ratification or new lease is taken from Party A. An oil well is then completed as a producer, and Party B, relying on the divorce decree, demands full payment of royalty undiluted by any interest in Party A.

What should be done? Can the oil company waive the title requirement and rely on the divorce decree in paying all royalty to Party B? The answer is no — the other spouse's interest should be treated as open until either a quitclaim, ratification or new lease is obtained. The oil company is entitled to place the royalty in suspense or even interplead the funds until Party A and B come to terms.

Why is this? Normally a decree of divorce is sufficient muniment of title in itself. In other words, a court's division of community property amounts to a partition, and its judgment vests title to the real property in the spouse to whom it is awarded.[88] So long as the decree adequately describes the property in question and is clear in its intent to vest the title in the spouse to whom it is awarded, recordation of the decree itself is sufficient to evidence record title in the spouse to whom the tract has been allotted.[89]

In our hypothetical, the title examiner presumably concluded that the decree did not include specific divestiture language or otherwise lacked sufficient clarity to indicate that one spouse had been divested of a community interest in the tract. Therefore the former spouse's interest is considered open and must be dealt with accordingly.[90]

A related requirement in title opinions is that the divorce decree be recorded in the real property records of the county where the subject lands are located irrespective that the divorce decree may be accessible in the family court records of the same county. This is because a divorce decree divesting and awarding community property is a form of judicial partition and is therefore subject to the recording statute.[91] If the transfer on divorce is not reflected in the real estate records, the divested spouse's interest remains exposed to claims of creditors.[92] Given the relatively small degree of effort required, this would appear to be another example of an unwaiveable requirement unless the interest involved is so small as to be nonregrettable.

Wills and Probate

REQUIREMENT NO. 8: *You should obtain copies of all probate proceedings, if any, concerning the Estate of _____ deceased. If no probate proceedings are located, you should obtain affidavits of heirship from two disinterested persons reflecting the date of death, marital history, whether he/she died testate or intestate, who were his/her heirs or devisees and what property was contained in his/her estate at the time of her death. This information should be submitted for examination.*

The purpose of the above requirement should be obvious. The record must reflect how the assets of a decedent's estate were divested. Requirements relating to missing probates are perhaps the most common and frequent special requirements that title examiners will make.

A point to immediately consider in connection with this requirement is the four-year statute of limitations to admit a will to probate.[93] A will not admitted to probate within four years of the death of a decedent is no longer effective; a testator's estate then passes under the Texas laws of intestate succession.[94] It is quite common for people to decide to avoid probate because of the perception that the legal costs are not worth the trouble. This is particularly true when the only heir is the surviving spouse.

If a will was in existence, but not probated within the four-year statutory period, then the examiner might call for the probate of a will as a muniment of title which is a relatively unused, but simple, procedure allowed for under *Texas Probate Code* §89A. Some examiners might call for a full-blown proceeding to declare heirship under Chapter III of the Texas Probate Code. Other examiners might simply call for an affidavit of heirship.

Texas is somewhat unique in that it has a statutory form of affidavit of heirship found at *Texas Probate Code* §52A. As discussed previously in this article, even a nonstatutory form affidavit of heirship that has been of record for five years or more in the deed records in the county where the land is located or where the decedent had his/her domicile or residence at time of death is entitled to be received into evidence in any proceeding to declare heirship or suit involving title to real or personal property.[95]

Affidavits of heirship are very commonly used in Texas and elsewhere because a surprisingly large number of people either cannot afford to have a lawyer write their wills or choose not to do so whether they can afford it or not. As Professor Stanley M. Johanson describes:

> "Although there is no direct statutory authority concerning affidavits of heirship (outside of §52 dealing with the use of affidavits as evidence in lawsuits), the reality is that they often work in practice. Most title companies and oil landmen have traditionally relied upon such affidavits to clear gaps in title (unless there is some reason to suspect the affidavit's authenticity). Texas banks also have relied upon such affidavits, at least outside Texas' larger cities. The longer the affidavit has been on file, the greater the likelihood that it will be relied upon by third parties."[96]

So, even if an examiner were to make a full-blown probate proceeding a requirement in connection with an estate, the option of waiving the requirement and accepting an affidavit of heirship in lieu thereof is not only allowable under the Texas Probate Code, but is also a very common response by oil company land and division order departments.

If, on the other hand, a will is located and four years have not passed, the requirement that the will be probated must be dealt with more seriously. Though an affidavit of heirship might still suffice in such a situation it should not be accepted until after a factual determination that there is no necessity for administration of the estate.

What if the will was probated out of state? Consider the following requirement:

REQUIREMENT NO. 9: *The Examiner notes that the Caddo Parish, La., probate proceedings in the Succession of _____ have not been domesticated in Texas by filing certified and exemplified copies in the County Records of _____County, Texas. Furthermore, an Ancillary Administration of the Estate pursuant to § 95 of the Texas Probate Code should be undertaken. Furthermore, verification from the Internal Revenue Service that Estate Taxes have been paid or are not due should be obtained together with a similar statement from the Texas Comptroller of Public Accounts.*

This requirement addresses the necessity for probating an out-of-state will that has already been probated in another jurisdiction. It also deals with the so-called "three-way certificate" requirement of *Texas Probate Code* § 95. It is not enough just to get certified copies of probate papers from another state — the probate code requires that the judge from the out-of-state court certify that the clerk's certification is genuine and that the out-of-state clerk of court, in turn, certify that the judge is authorized to execute such certificate.

Space does not allow for a detailed discussion of *Texas Probate Code* § 95 in this article, but it is important to note that the ancillary administration envisioned can be validated simply by recording. No order of the court is necessary. In light of this, some title examiners would say that meeting such a requirement should be a "no brainer." After all, obtaining certified and exemplified copies and recording them in county records is not all that troublesome and expensive. If the ancillary administration is uncontested, it should move quickly and the legal costs should be very reasonable. Furthermore, after the foreign probate is administered in Texas, it has the same force and effect as if the original will had been probated by order of the court, subject to contest. Contesting a foreign will admitted to probate in Texas requires that the will be set aside in the foreign jurisdiction (or proof that it was not properly authenticated).[97] So after it is probated, lien creditors would have to first go back to the foreign state to have the will set aside.

The other point raised by the requirement is that estate taxes may be due. Therefore, examiners routinely require that certificates of no estate taxes due be obtained from the Internal Revenue Service and the Texas Comptroller of Accounts at least where 10 years has not passed since the death of the decedent.[98]

So what should be done? Within the author's experience the answer, very frequently, is nothing. The following is illustrative of the train of logic that an oil and gas title curative landman or division order analyst might go through: First, as for the estate tax issue, start with the reality that very few estates are subject to estate tax — because they are too small, because they are "first estates" (estates of the first spouse to die, with the major tax problem postponed until the "second estate") or because legal and tax planning steps have been undertaken to minimize tax impact. State estate tax rules may be different, but they generally follow the federal estate tax scheme in terms of threshold and avoidance.[99]

An examination of the inventory of an estate filed with the foreign probate papers will usually indicate the size of the estate and whether it is close to meeting the federal and state estate tax

thresholds. The inventory of estate should also indicate whether or not there are claims against the estate, and whether or not the necessity for further administration appears likely.

If no necessity for the administration of the estate in Texas appears likely, then the next question might be: Who are the natural heirs? If it appears that the heirs as established in the out-of-state proceeding were the devisees under the will or the heirs under the laws of intestate succession, what is the likelihood of a future will or heirship contest in Texas or anywhere else? Suffice to say that if the interest involved is very small, a common outcome for many oil company land and division order departments is to ignore the issue and move on.

This type of analysis may seem sacrilege to some title examiners. The fact is that just as lawyers differ on points of law, title curative professionals differ on assumption of risk in connection with title requirements. A "title bust" is without doubt a title curative professional's worst nightmare. Yet, just as an oil company is not likely to purchase insurance against a meteor or asteroid hitting its drilling rig, it is not likely to hold up a drilling rig while conducting an ancillary administration of an out-of-state probate if no necessity for administration exists and if the heirs appear to be obvious and accounted for.

It can also be observed in connection with many title defects pertaining to wills and estates that the root cause often relates to the failure of a landowner to provide for the handling of his or her affairs post mortem. At the risk of sounding less than empathetic for people who either cannot afford or otherwise choose not to hire lawyers to help them in planning their estates, when a person who owns an interest in land dies without a will, the record title is automatically clouded. If an oil and gas lease had previously been taken from predecessors in interest, whose job is it to identify the heirs? Whose job is it then to institute probate proceedings (or at least obtain affidavits of heirship)? Whose job is it then to furnish the most up to date ownership and address information and supply appropriate legal documentation for changes in ownership to the lessee's division order department so that the lessee is not at risk for mispayment of royalties? It often comes as a surprise to lessors (and sometimes their lawyers) to learn that in each of these examples it is generally the responsibility of the oil and gas lessor, not the lessee, to initiate steps to address such problems.

Most oil and gas lease forms have a transfer of ownership provision that requires the oil and gas lessor to notify the lessee when a change in ownership occurs and provide appropriate documentation. The absence of a will and/or affidavit of heirship and attending lack of clarity as to who the heirs are would be grounds for suspension of royalty by the lessee, without interest, until the cloud on title is removed.[100]

For this reason, it is not uncommon for large oil and gas producers to have millions of dollars in royalty suspense at any given time, without any obligation to pay the owners interest. As infuriating as this often sounds to landowners and their attorneys, the fundamental obligation of oil and gas companies is to make money for their shareholders in compliance with law. Risking shareholder money by imprudently paying royalties to the wrong person or entity is something that any rational oil company would wish to avoid. Furthermore, oil and gas producers are not legally required to bear the costs associated with an individual's decision to die without a will or for the decision of his or her successors in interest to avoid probate. The notion that oil and gas companies are not fundamentally in the business of helping individuals solve their personal legal problems may not help make them more popular, but it is essential to keep in mind when looking at title defects from their perspective.

This is all further illustration of the principle first discussed in this article that oftentimes responsibility for title curative matters can and should be transferred back to the lessor. Yet, this brings us to what the author will refer to as the "Widows and Orphans Rule." First understand that the "Widows and Orphans Rule" is not a rule of law. The rule, simply put, is that an oil company, and particularly large globally based oil companies, should never suspend royalty payments to widows, orphans or other people for whom juries may be expected to have great empathy. There may be an occasional exception to the rule, but suspending royalty payments because an out-of-state probate proceeding has not been properly domesticated in Texas in connection with the ostensibly vulnerable owner of a small royalty is not likely to be one of them.

Trusts and Powers of Attorney

REQUIREMENT NO. 10: *You should obtain and furnish for examination an affidavit from _____ by which the Trustee confirms that he/she has accepted the appointment as Successor Trustee under the above referenced Trust Agreement and that the Trust is in full force and effect.*

The trust has been called the greatest achievement of English jurisprudence.[101] As one commentator put it, "Though the English do not lay exclusive claim to having discovered God, they do claim to have invented the trust ... ."[102]

There is no doubt that trusts are useful. Their division of title and segregation of assets has facilitated probate and estate tax avoidance for centuries. Trusts can serve the vital function of protecting assets that might otherwise be misspent due to the youthful indiscretions of the idle rich. Trusts serve charitable benefactors[103] by optimizing federal income tax deductions. Fees for setting up trusts have lined the pockets of many a deserving lawyer. For many lawyers and their clients, trusts, as Martha Stewart might phrase it, "are a good thing."

For oil and gas lawyers, on the other hand, trusts are often vexing and annoying. Trust instruments are seldom recorded. Successor trustees regularly pop in and out of the record without accompanying evidence that the successor trustee's accession to office was in accordance with the terms of the trust instruments. Conveyances by revocable trusts are seldom accompanied by certification that the trust has not been revoked. Even when recorded, trust instruments are often silent as to whether or not the trustee is authorized to execute an oil and gas lease.

All of these issues can generate title requirements. Texas, unlike some other states, does not provide a statutory "safe harbor" for trust conveyances (presumption that a trustee's powers have been exercised properly unless the record indicates otherwise[104]). Furthermore, and as highlighted by a recent Houston Court of Appeals decision, Texas courts strictly construe trust instruments.[105] Texas is, simply put, a state where the title standards contemplate that it is necessary for

the examiner to confirm the identity and powers of a trustee and whether the trust was in effect at the time of a trust transaction either by a review of the trust instrument or otherwise.[106]

There is a reason for this. The Texas Trust Code, found at Section 111.001, et seq, of the Texas Property Code enumerates the powers given to a trustee, whether under an inter vivos trust or a testamentary trust. Section 113.012 (a) of the Texas Trust Code sets forth the powers of a trustee with respect to mineral transactions. Many trust instruments and testamentary trusts specifically provide that the trustee shall have all powers enumerated in the Texas Trust Code. Even if such a statement is omitted, the powers enumerated in the Texas Trust Code apply unless the terms of the trust conflict with the terms of the Texas Trust Code.

Therefore (and perhaps bringing to mind Mr. Bumble's comment that "the law is an ass"[107]) in Texas, lacking a statutory "safe harbor," title examiners suffer under the duty to review trust instruments in most cases.[108] The irony is that the review is not for purposes of determining whether the trust instrument affirmatively authorizes a particular conveyance or even if the trustee is given all the powers provided for in the Texas Trust Code, but instead the purpose of the review is to determine if the trust specifically disclaims a power (such as the power to execute an oil and gas lease) or any of the other powers specified in the code. So as the law missed the mark by presuming that Mr. Bumble's wife was under his direction and control, it arguably misses the mark in Texas by presuming that lawyers and their clients routinely draft trust instruments disclaiming powers otherwise granted by the Texas Trust Code.

This fosters significant problems for title examiners, particularly when the conveyance signed by the trustee was made many years ago and the parties involved are either missing or dead. Fortunately the "ancient documents rule" discussed in Section V can help solve the problem if more than 20 years have passed.[109] In *West*, the court held that while not conclusive and subject to rebuttal, the power and authority of a grantor may be presumed from a bare recital.[110] To quote the commentary from the applicable Texas Title Standard:

> "A particularly useful application of the rule is that it permits the examiner to presume the authority of a fiduciary, such as an attorney in fact or a trustee, whose agency is recited in the deed but does not otherwise appear in the record."[111]

An examiner can also find some potential relief in *Texas Civil Practice & Remedies Code § 16.033 (a)(7)*.[112] Under this statute an action to recover property conveyed by an instrument signed by a trustee that is defective due to lack of record authority of the trustee or proof of the facts recited in the instrument must be brought within four years of the date that the instrument was "recorded" if it was recorded before Sept. 1, 2007, or within two years of the date the instrument was "filed for record" if it was after Sept. 1, 2007.[113]

Last, a new statute, *Texas Property Code § 114.086, Certification of Trust*, was passed in 2007 and made effective for trusts *either existing or created* after the effective date of the act (June 16, 2007). The statute permits a person who acts in reliance on a "certification of trust" provided by the trustee and meeting specified requirements to assume without further inquiry the facts contained in the certification.[114] It remains to be seen how often the new "certification of trust" statute will be utilized, but having such an option is without doubt a process improvement for title examiners.

Powers of attorney are another class of instruments that, while useful in their own right, are particularly vexing to title attorneys. Generally, an attorney-in-fact only has the power to perform the acts on behalf of the principle that are described in the power of attorney. In addition, under the common law the powers granted to the attorney-in-fact terminate upon the death or incapacity of the principal.

In 1993 a Texas statute, the Durable Power of Attorney Act, was enacted that allows the powers granted to the attorney-in-fact to survive the incapacity of the principal if the power of attorney specifically provides "this power of attorney shall not terminate on disability of the principal," or similar words expressing that intent.[115]

Prior to the passage of the Durable Power of Attorney Act, a title examiner had to always concern himself or herself over whether or not the power of attorney had been revoked at the time of exercise. This was customarily done by requiring that an affidavit be obtained and recorded verifying that the power was in force and effect at the time of the conveyance. An example of such a requirement is as follows:

REQUIREMENT NO. 11: *You should obtain and furnish for examination an affidavit from _____ by which he/she confirms that the Power of Attorney dated _____ and recorded at _____ was in full force and effect at the time he/she executed the deed dated _____ and recorded at _____ pertaining to the Subject Lands and that he/she was aware of no impediment to his/her exercise of the power.*

Even after passage of the Durable Power of Attorney Act, it is contemplated that the holder of the power will contemporaneously execute an affidavit confirming that the holder has no knowledge of any terminating event.[116]

Powers of attorney, unlike deeds and wills, are to be strictly construed, and authority is limited to the meaning of terms expressed. This is particularly true of special powers of attorney, such as a

power limited to selling land at a foreclosure sale.[117] Under the Texarkana Court of Civil Appeals decision in *Bean* (1935), a general power to "sell" land did not include the power to convey minerals (whether by deed or by lease).[118] As a result, powers of attorney in Texas are required to include the specific authority to execute oil and gas leases except in those cases where they include very broad language such as "to do any and every act, and exercise any and every power that I might, or could do, or exercise through any other person."[119] The holding in *Bean* applies to all powers of attorney executed through Aug. 31, 1997. There is an exception to the *Bean* rule for Durable Powers of Attorney. Effective Sept. 1, 1997, the Durable Power of Attorney Act was amended to specifically authorize the holder to execute oil and gas leases.[120] However, nondurable powers of attorney are not covered.[121]

As was true in the case of trusts, all of this creates title problems for the reason that powers of attorneys, like trust instruments, are often not recorded at the time the instrument was executed, and holders often disappear. Even if the holder is still around, the incentive to furnish a recordable copy of the power or an affidavit that it was in effect at the time of the transaction may no longer be present. For example, try getting Exxon Mobil Corp. to cooperate in furnishing proof that the holder of a power of attorney who executed a 1947 lease amendment for Humble Oil Co. was duly authorized at the time. Once again the "ancient documents rule"[122] may rescue a power of attorney of record for more than 20 years, but it should be cautioned with regard to both trust instruments and powers of attorney that while recitals in ancient documents are admissible as evidence of the facts recited, they are not conclusive proof.[123] Also, *Texas Civil Practice & Remedies Code § 16.033*, which provides for a two- or four-year statute of limitations for technical defects in instruments, does not specifically reference powers of attorney.

On the other hand, if every trust instrument and every power of attorney in a chain of title going back to sovereignty has to be located and reviewed by an examiner, both land and title examination costs might increase significantly. The title standards, the "ancient documents rule," statutes of limitations and the new statute on trust certifications, however, collectively provide considerable leeway to examiners with regard to requiring, or not requiring, that trust instruments and/or powers of attorney be submitted for review.

Other Special Requirements

The number of special requirements in title opinions can be infinite. Not touched upon in any length in this article are requirements pertaining to land descriptions,[124] defective acknowledgements, gaps in title, bankruptcies, foreclosures and many other examples. Space does not allow for further discussion of special title opinion requirements except to say that many of the basic issues insofar as title requirement waivers are concerned remain the same. This suggests that a "checklist" for addressing title requirements may be useful. Before proposing such a "checklist," a discussion of limited title opinions is in order.

Limited Title Opinions

Formal limitations of title were discussed previously in this article. Formal limitations are to be distinguished from a broad category of title opinions referred to as "limited title opinions."

A traditional, unlimited title opinion seeks to cover the chain of title from sovereignty to the present, subject to the disclaimers found in the limitations section. A limited title opinion, on the other hand, intentionally limits its scope to a shorter period of time — for example, a period of time equal to the maximum allowable under the statutes of adverse possession.[125] Alternatively, a limited title opinion may only address one class of ownership, such as the leasehold estate, and may exclude coverage of the surface, mortgages and even royalty interests.

So in a sense, a limited title opinion is a title opinion accompanied by pregrants of authority to waive certain title defects. The question of whether "to waive, or not to waive" title requirements is partially avoided because the scope of the opinion is limited to certain periods of time or classes of instruments.

So, why would a client agree to a limited title opinion? Perhaps the most common form of limited title opinion is one prepared for a lender in connection with the financing for an asset purchase or divestiture. The lender's chief concern is whether the client's net revenue interest is as stated in the loan applica-

Certification

The landmen listed below have applied for Certified Professional Landman (CPL), Registered Professional Landman (RPL) or Registered Landman (RL) status and are published here simply to give AAPL members an opportunity to present objections to certification of the applicant(s). Publication does not represent acceptance or success in passing the CPL, RPL or RL examination. If no objections are presented within 45 days, it will be considered as approval by the membership. Objections must be written and signed and will be treated as confidential. For additional information on procedures, see Voluntary Certification Program in the *Landman's Directory & Guidebook.*

CPL Applicants

No applicants for this period.

RPL Applicants

Michael R. Alonso
Tulsa, OK

Susan Siebold Borgan
Ft. Worth, TX

Kenneth M. Harris
Denver, CO

Douglas M. Pearlman
Denver, CO

Jared W. Rush
Denver, CO

Jeffrey L. Skaare
Dickinson, ND

RL Applicants

Helen H. Brantley
Monroe, LA

Mark A. Chapman
Hoover, AL

Nolan J. Olson
Sheridan, WY

James K. Ramsay
Shreveport, LA

Zerxis N. Satarawala
Bridgeport, WV

Gregory J. Smith
Washington, PA

Kenneth E. Swickard
N. Canton, OH

Terry S. Tollette
Tulsa, OK

Lauren A. Williams
Houston, TX

Toby J. Zastoupil
Dickinson, ND

tion. To whom royalty is paid would be of little concern to a lender since in such a situation, late payment interest on past due royalty is unlikely to substantially impair the value of the collateral. Also, it is possible that division order or even drilling title opinions will be secured at a later date to further mitigate the title risk so there is little reason to delay closing the loan while waiting on a full-blown title opinion.

Another example of use of limited title opinions was referred to earlier in this article when discussing how it is increasingly common for companies drilling shale plays in urban areas (where units can include hundreds of town lots) to instruct their title examiners to limit review of documents to a point in time forward from when the urban subdivisions were platted.[126] This type of limited title examination increases the risk of title loss. How significantly it increases the risk is subject to debate. In an urban area with no history of oil and gas leasing or activity, the chances of a prior mineral severance or an outstanding nonparticipating royalty may seem remote. For the reasons discussed in Section IV.B, prior liens may, in all likelihood, have been extinguished by limitations. If the play is being heavily drilled, the statistical odds of a title defect are diminished.

An analogy can be made to dry holes. No matter how successful an oil and gas play is, an occasional dry hole seems inevitable but is looked upon as a cost of doing business. Similar logic could be used to justify limited title opinions and the occasional title defect or lawsuit they may engender. When the "big picture" is considered, the increased risk of title loss may be acceptable due to increased cycle time and decreased land and title costs.

Putting some forethought into the scope of a title opinion project and considering whether or not limited title opinions will suffice is always good practice. A dialogue up front about "the big picture" can often better serve the client's objectives.

For example, if a law firm is approached to assist a client in determining ownership in a field wide unit, a traditional sovereignty to present title examination might not serve the client's best interest. Even a supplemental opinion covering the period from the origi-

(Continued on page 80)

(Continued from page 39)

nal title opinion to the present may not be the most cost effective approach. A better approach may be to first review the client's internal division orders, paysheets and lease records. This method may prove to be a more reliable indicator of ownership than public records for the reason that royalty owners do not always record changes of ownership in county records. This can be true irrespective of changes of ownership clauses in oil and gas leases.[127] Likewise, farmouts and lease assignments are often not recorded or are pending. An exhaustive search of internal records may be inconvenient for the client, but when dealing with leases that have been long held by production, the time and cost of a thorough internal records review may be far less than the cost of a title opinion based upon a search of the public records — and the results more accurate. If the client is strapped for time and resources, the title lawyer could be invited to do a "stand up" opinion based on the client's internal records followed up by a public record check on an "as needed" basis.

Taking this example a step further, it can be argued that when a lease has been securely held by production for some time with royalty owners readily identified in the client's division order pay sheets or other internal records, there is no need for a title opinion at all. Much the same can be said for title due diligence in connection with many acquisitions and divestitures. Landmen and division order analysts, in general, are well aware of the limits of the traditional title examination process. Oil and gas lawyers should likewise acknowledge the limitations of the title opinion process and be willing to point out opportunities to clients to save title examination costs if the circumstances dictate.

Checklist

We began this article by stating that the goal was to develop a methodical approach that can be applied in determining whether "to waive, or not to waive" some of the most common requirements found in oil and gas title opinions. By now, many of the issues and questions that arise in analyzing oil and gas title opinion requirements have been discussed. The author suggests that a checklist of the most recurring of these issues and questions be referred to, at least as a starting place, when approaching title requirements. Skepticism is justifiable, and the caveat must be made that checklists can never substitute for careful analysis and common sense. Nonetheless, the author's checklist for reviewing oil and gas title opinion requirements is as follows:

1. ***Quantum of interest:*** What is the size of the interest at issue? Does the cost of the curative outweigh the benefit? What is the "worst case scenario?" Would it be more cost effective to simply carry the interest for drilling purposes or pay double royalty? *(See Section IV.A.)*

2. ***Path of the well:*** Is the tract being examined the drillsite, or is it a small lot, perhaps one of hundreds, in a large unit being traversed by a horizontal well? Again, think in terms of a "worst case scenario." If title fails, is the small lot owner likely to drill his or her own well? If not, the rule of capture might mitigate the financial impact of a title loss. *(See Section IV.A.)*

3. ***Mineral severance:*** Does the requirement pertain to both the surface estate and the mineral estate, or is it only one or the other? If the minerals have been severed, and the requirement pertains only to the surface, does it make a difference? *(See Section IV.A.)*

4. ***How much time has passed?*** Would a statute of limitations or a curative act eliminate the title defect? *(See Section V.)*

5. ***Deferral to production:*** Can the requirement be postponed until it is time to pay royalty? *(See Sections VI and VII.C.)*

6. ***Transfer responsibility:*** Should responsibility for curing the requirement be transferred to another person or entity? *(See Sections VI and VII.C.)*

7. ***Widows and Orphans Rule:*** Would enforcement of the requirement lead to undue hardship on someone for whom a jury might be expected to have sympathy? *(See Section VII.C.)*

8. ***Title standards:*** Could the examiner have overlooked, or taken a more conservative position, on a title defect than what is called for by the applicable title standard? If so, the title requirement might be in the "regrettable" category — which includes those title requirements that perhaps should never have been made in the first instance. *(See Section V.)*

9. ***Read and understand the formal limitations section of the opinion:*** Is the opinion "limited," that is, restricted to a certain period of time or class of instruments? If so, the client has likely waived a series of title defects that are not expressly set forth in the opinion. It is important for the client to understand these assumptions of risk and consult with the examiner if they are not acceptable. *(See Sections III. and VIII.)*

10. ***Never waive the requirement in a title opinion that the lease(s) be read and complied with:*** Nothing can be quite as embarrassing for an oil company as authorizing commencement of drilling operations on a lease whose primary term has expired and that is not otherwise held by operations. Detailed coverage of the terms of the lease is typically beyond the scope of a title opinion. The original lease document must be studied and understood by the client. *(See Section IV.D.)*

11. *Consider the big picture:* Before ordering a title opinion, put forethought into whether limiting the scope of the examination can save time and money and/or better serve overall business objectives. If dealing with an already written, limited title opinion, consider the reasons it was limited. Are the reasons still valid? If the opinion was not limited, have circumstances changed? How old is the opinion? Are some of the requirements moot due to passage of time, or might they be waived because the client's objectives have changed? Curing all the remaining requirements in a 20-year-old drilling title opinion following an acquisition may not be necessary. *(See Section VIII.)*

So there it is — the author's "method in mitigating the madness" with regard to title requirements. It might go without saying, but a good rule in connection with this checklist is that if the answer is not obvious, ask. G.K. Chesterton once said, "Do not ever take a fence down unless you know the reason why it was put up."[128] The same could be said of waiving title requirements: Do not waive a title requirement unless the reason for it is understood. If the risk in waiving a requirement is not made obvious by the title opinion itself, oftentimes a simple phone call to the examiner will clarify. Many lawyers will be less guarded and more frank in verbal discussions than they are in writing.

Final Word

Benjamin Disraeli, the 19th century British prime minister once said, "The legal mind chiefly consists in illustrating the obvious, explaining the self-evident and expatiating on the commonplace."[129] An article written on the subject of waiving title requirements runs the risk of such criticism since so much of what has been discussed seems more grounded in common sense than law.

Nonetheless, it is hoped that the approach outlined here may be helpful to lawyers, landmen, division order analysts and others whose jobs require them to decide whether "to waive, or not to waive" an oil and gas title opinion requirement.

A final word of caution is in order. Most title lawyers do not intentionally set out to burden their clients with impractical and overly theoretical title requirements. Given the potentially catastrophic costs of a title failure, it is also easy to understand why many title lawyers lack empathy for clients who waive requirements rather than incur what comparatively speaking seems to be the minor inconvenience of curing the title. Recall the quip by the lawyer from California, "... if the requirement was waiveable, I wouldn't have made it in the first place."

Yet, as has been discussed throughout this article, it is also reasonable for business people or lawyers advising them to consider whether the cost outweighs the benefit of the cure. Weighing those costs and benefits is not an exact science — but in that regard title opinion analysis is no different than the risk management analysis that occurs throughout the rest of the oil industry. Though it is prudent to always consider the consequences of a title bust, title defects do not have to be looked upon as "boogeymen" that are to be eliminated (i.e., cured) irrespective of cost and risk.

So, as we borrowed from Shakespeare in naming this article, we will conclude by hoping that "All's Well That Ends Well"[130] for those who must make the decision to waive, or not to waive oil and gas title requirements. It is axiomatic, however, that reward and risk go hand in hand. If an assumption of title risk based upon principles enunciated in this article leads to a regrettable title loss, the author reminds that no warranty was given but nonetheless expresses his deep regret, in advance. Though not entirely analogous, those who find themselves in such a situation may find comfort in the words expressed by Al Gore Jr. following his loss to George W. Bush in the year 2001 presidential election:

> "Defeat may serve as well as victory to shake the soul and let the glory out."[131]

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This is a revised (shortened) version of an article originally written for the State Bar of Texas 27th Annual Advanced Oil, Gas and Energy Resources Law Course, Houston, Oct. 8-9, 2009

(Bibliography and End Notes continued on following pages.)

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End Notes

[1] *The author gratefully acknowledges the contributions of the following individuals for their thoughtful comments and/or assistance in preparation of this article: Zach Bernard, Elizabeth Pinion, Sherrie Faubion, Jacob Lenington, Julie Clark, John Peissel and Sherry Colburn (Burleson Cooke LLP, Houston); Leona Filis (Sadler Law Firm LLP, Houston); George Snell (The Snell Law Firm, Amarillo, Texas); Scott Lansdown (Exxon Mobil Corp.); and Dr. Gary Richardson (University of Houston College of Technology).*

[2] *William Shakespeare, Hamlet, Act 3, Scene 1, line 55.*

[3] *Id. at Act 2, Scene 2, line 206.*

[4] *The original version of this article was prepared for the State Bar of Texas, hence the question was directed to lawyers. It seems even more obvious that landmen, division order analysts and other industry professionals charged with title curative should care about waiving title requirements. Not having to cure a title requirement can save time and money. Yet title requirements are put in opinions for a reason. The issue is, how much risk is acceptable and is the time and cost involved in curing the requirement worth it?*

[5] *See infra note 9 and accompanying discussion.*

[6] *The focus in this article is strictly on the requirements section of an oil and gas title opinion. This article does not discuss title opinion formats or, for that matter, title opinions in general. There are numerous other published articles on that subject — a number of which are referenced in the bibliography at the end. The author recommends the one by George A. Snell III, "A Model Form Title Opinion Format — Is it Possible? Is it Practical?" Address at Oil Gas and Mineral Law Section Report (December 2000) (transcript available at State Bar of Texas Vol. 25, No. 2).*

[7] *"Let us now consider some further defects that can and do occur in titles and which the most careful and diligent lawyer could not discover from his examination of the abstracts, and should certainly not be held liable for failure to unearth. Here are some of them: 1. Forged deeds, mortgages and wills in the chain of title; 2. Prior*

adverse possession ripened into title, with the land unoccupied at time of examination of title; 3. Deeds and wills made by persons of unsound mind; 4. Deeds and wills executed under duress or undue influence; 5. Simulated sales of the homestead intended merely as a mortgage; 6. Impersonation of the true owner in the signing of documents; 7. Conveyances altered before recording; 8. Deeds delivered after the grantor's death; 9. Deeds made under a power of attorney which as revoked by the death of the principal; 10. Deeds by corporations executed without authority; 11. Deeds by minors; 12. Deeds by persons allegedly single, but actually married; 13. False affidavits of death and heirship; 14. Faulty taking of acknowledgements, particularly of married women, when the homestead is involved; 15. Errors in recording or indexing; 16. Marriage, birth or adoption of children after will made, or discovery of a later will; 17. Omissions from abstract through faulty abstracting (it does happen, though not often)." Frank A. Stamper, A Handbook for Texas Abstractors and Title Men, p. 7 (Texas Land Title Association 1973).

[8] The Texas Legislature passed its first law enabling corporations to be chartered to sell title insurance in 1907. Acts of Texas Legislature of 1907, p. 291.

[9] Financial institutions are sometimes surprised to learn that title insurance is not available in oil and gas transactions and that title opinion requirements must be read and either cured or waived. Another tact used by some lending institutions and even the energy companies who must rely upon them for financing is to cure all title requirements irrespective of cost and/or benefit. This strikes the author as reactionary but is understandable given that so many lending institutions are unaccustomed to dealing with title requirements. This is another reason why nontitle lawyers, and transactional lawyers representing financial institutions in particular, need to understand title requirements and waivers.

[10] "We speak of land titles in the United States as 'record titles' because statutes in each state provide for recordation of muniments of title in public records that may be searched for evidence of who holds title to each parcel of land. Yet the title examiner should not take this to mean that the status of title to a parcel of land may be ascertained solely from an examination of the public records. Whatever may have been the intention of the original sponsors of the recording acts, the equitable doctrine of notice was too strongly entrenched in our system of jurisprudence to be completely supplanted by a statutory rule that would permit title to depend upon a registry." Patton and Palomar, Land Titles, § 671 Matters in Pais — General (Thompson West 3d ed. 2003); see also Westland Oil Dev. Corp. v. Gulf Oil, 673 S.W.2d 903, 73 O&GR 359 (Tex. 1982).

[11] For a longer example, see Snell supra note 6. Too much verbosity in the limitations section of a title opinion can backfire. Clients are increasingly sophisticated, and the author has heard more than one client comment that "you lawyers include so many limitations in your opinions that we question whether we are really getting anything."

[12] See William B. Buford, Adverse Possession in the Texas Oil Patch — A Primer, Address at the Advanced Oil, Gas and Energy Resources Law Course (2008) (transcript at State Bar of Texas).

[13] See Terry W. Hogwood, A Realistic Approach to Identifying and Curing Ancient Title Problems, Address at the 18th Annual Advanced Oil, Gas and Mineral Law Course, Houston (Sept. 21, 2000) (transcript available at State Bar of Texas).

[14] Terry E. Hogwood, Title Examination — Curing Title with Affidavits, Address at the Advanced Oil, Gas and Energy Resources Law Course (2008) (transcript at State Bar of Texas).

[15] Weatherly v. Jackson, 71 S.W.2d 259, 265 (Tex. Comm'n App. 1934).

[16] "It is elementary that minerals in place may be severed from the remainder of the land by appropriate conveyances." Humphreys – Mexia Co. v. Ganmon, 113 Tex. 247, 254 S.W. 296, 299, 29 A.L.R. 607 (1923); Elliott v. Nelson, 251 S.W. 501 (Tex. 1923). However, severance of the mineral estate does not preclude acquisition of title by adverse possession of the minerals provided there are sufficient acts of dominion that would put the owners of the mineral estate on notice. See Blocker v. Davis, 241 S.W.2d 702 (Tex. Civ. App-Fort Worth 1951, writ ref'd n.r.e.); see also Natural Gas Pipeline Co. v. Pool, 124 S.W.3d 188 (Tex. 2003).

[17] The tenant's lease with the landowner may require that damage payments be paid to the landowner, not the tenant. Therefore the oil and gas lessee should approach both the tenant and the actual owner for a release if a damage payment is to be made. This is a topic in itself and beyond the scope of this article.

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[18] *See Harris v. Currie*, 176 S.W.2d 302 (Tex. 1943).

[19] *Getty Oil Co. v. Jones*, 470 S.W.2d 618 (Tex. 1971).

[20] Deeds of trusts and mortgages arguably have their genesis in the Statute of Uses enacted by Henry VIII in 1535 (27 Hen 8, ch. 10), but the practice of uses had been in effect in England for many centuries before. *See* Moynihan and Kurtz, Introduction to the Law of Real Property, (West 3d ed. 2002).

[21] *See generally* Tex. Prop. Code Ann. Ch. 12.

[22] *Flag-Redfern Oil Co. v. Humble Exploration* Co., 744 S.W.2d 6 (Tex. 1987).

[23] *Knox v. Farmer's State Bank*, 7 S.W.2d 918 (Tex. Civ. App.—Eastland 1928, writ ref'd).

[24] Tex. Prop. Code Ann. §§ 11.001, 13.002 (LexisNexis 2009).

[25] *See generally, Flag-Redfern, supra* note 22.

[26] *See Vahlsing Christina Corp. v. First Nat. Bank of Hobbs*, 491 S.W.2d 954 (Tex. Civ. App.–El Paso 1973, writ ref'd n.r.e); *see also* James L. Gosdin, Thomas J. Walthall, Jr. and W. Abigal Ottmers, Texas Real Estate Liens, (Half Moon LLC 2008).

[27] Tex. Civ. Prac. & Rem. Code §§ 16.035, 16.036, 16.062 (LexisNexis 2009).

[28] References to Texas Title Standards means the Title Standards approved by the Joint Editorial Board of The Section of Real Estate, Probate and Trust Law and the Oil and Gas and Energy Resources Section of the State Bar of Texas as they appear in the pocket part of V.T.C.A. Property Code, Volume 1.

[29] The author is unable to locate a specific Texas case illustrating, but see Section IVA *supra*, for a discussion of severed mineral interests.

[30] Taken from lease form appearing in John S. Lowe, West's Texas Forms, § 3.15 (Thomson West 3d ed. 1997).

[31] The author has seen leases with subrogation clauses that require the lessor to provide notice to the lessee of pending foreclosures, but such provisions can easily be ignored by the lessor and are otherwise of little use in stopping a foreclosure.

[32] *See Bender v. Brooks*, 103 Tex. 329, 127 S.W. 168 (1910); *see also* Ernest Smith and Jacqueline Weaver, Texas Law of Oil and Gas, at §7.2, Trespass (LexisNexis 2009).

[33] A different result might apply if the operator took an oil and gas lease and engaged in drilling operations with notice that a foreclosure proceeding was pending. Even then, foreclosure proceedings do not always result in a foreclosure as rights of redemption, workouts or last minute payoffs may intervene.

[34] 26 U.S.C. §§ 6322, 6502, 6503.

[35] This assumes a state of Texas judgment. Different rules apply to federal court judgments — usually dormant after 20 years. *See* 26 U.S.C. § 3201 for judgments entered after May 21, 1981.

[36] 26 U.S.C. § 6324 (a)(1).

[37] Tex. Prop. Code Ann. §§ 53.158, 56.041(a).

[38] Tex. Tax Code Ann. § 32.01.

[39] *Id.* at § 33.05.

[40] *Id.* at §§ 22.21, 1.04 (2).

[41] *U.S. v. McDermott*, 507 U.S. 447, 455 (1993).

[42] Tex. Tax Code Ann. §§ 6.23, 6.26.

[43] *Id.* at § 31.08.

[44] *Union Pac. Resources Co. v. State*, 839 P.2d 356 (Wyo. 1992); *State v. Wynne*, 134 Tex. 455, 465 (1939); Tex. Tax Code Ann. § 23.175.

[45] Tex. Tax Code Ann. § 33.05 *supra* note 38.

[46] *See* discussion *supra* Requirement 3 proceeding.

[47] *See* Robert Burton, Anatomy of Melancholy—Democritus to the Reader, p. 44 (J.W. Moore 6ed. 1850).

[48] 2-3 Williams & Meyers, Oil and Gas Law §334.

[49] *Wagner & Brown Ltd. v. Sheppard*, 282 S.W.3d 419, 421 (Tex. 2008).

[50] *Morris v. First Nat'l Bank*, 249 S.W.2d 269, 279 (Tex. Civ. App.—San Antonio 1952, writ ref'd n.r.e.).

[51] Oil and gas lease forms seem to have evolved in full circle from the nonstandard, hand-written forms of the 19th and early 20th centuries to standard, printed forms such as the famous Producer's 88 and then back again, thanks to modern word processing capabilities, to the nonstandard lease forms that are increasingly used today.

[52] Especially troublesome to identify are the leases held by unit production located miles from the proposed drillsite. Even if the drillsite is not encumbered by another lease, other leases in the unit may subject to prior existing leases.

[53] *Houston Prod. Co. v. Mecom Oil Co.*, 62 S.W.2d 75 (Tex. Comm'n App. 1933, judgm't adopted).

[54] *Mayfield v. DeBenavides*, 693 S.W.2d 500, 506 (Tex. Civ. App.—San Antonio 1985, writ ref'd n.r.e.).

[55] *Kidd v. Hoggett*, 331 S.W.2d 515 (Tex. Civ. App.–San Antonio 1959, writ ref'd n.r.e.).

[56] Alan Morgan, Houston Association of Professional Landmen August 2009 Newsletter, p. 10, monthly "HAPL Enter the Internet Article."

[57] The Railroad Commission of Texas Site (last visited on Aug. 12, 2009) http://webapps.rrc.state.tx.us/PDQ/generalReportAction.do

[58] Second president of the Republic of Texas (1838-1841).

[59] *See* Tex. Title Standards, Tex. Prop. Code, Standard 3.20, Middle Names or Initials.

[60] National Title Examination Standards Resource Center, www.eppersonlaw.com/RealPropertyTitleStandards/NTESRC (quoting Lewis M. Simes and Clarence B. Taylor, Model Title Standards, the University of Michigan Law School (1960)).

[61] See also George A. Snell III, Preparing Oil and Gas Title Opinions — How Title Standards Can Help, Address at the 34th Annual Ernest Smith Oil, Gas and Mineral Law Institute, Houston (April 4, 2008) (transcript available at State Bar of Texas).

[62] See 3A Texas Practice Series, Leopold Land Titles and Examination, pp. 116-228 (Thomson West 2008); see http://west.thomson.com/pdf/texas/PropT2app.pdf; see also link to the same Web site found at Web site of State Bar of Texas Oil, Gas and Mineral Law Section, http://www.oilgas.org.

[63] See Snell supra note 61 for an exhaustive discussion of Texas Title Standards that is beyond the scope of this article.

[64] Annotation, Construction and Effect of Marketable Record Title Statutes, 31 A.L.R. 4th 11, § 9 (1984).

[65] La. Rev. Stat. Ann. § 31:27-71 (LexisNexis 2009).

[66] See Tex. Civ. Prac. & Rem. Code Ann. §§ 16.021-.032. (citing the applicable laws on adverse possession). See also discussion in Section IVA, supra.

[67] See Tex. Civ. Prac. & Rem. Code Ann. §§ 16.035-.051 (pertaining to the four-year statute of limitations for recovery of real property under a real property lien). See also discussion in Section IVB, supra.

[68] See Tex. Civ. Prac. & Rem. Code Ann. § 16.033 (declaring the statute of limitations to be two years for instruments filed of record after June 15, 2007).

[69] Title examiners, however, should exercise caution in relying on the four-year statute of limitations to cure defective acknowledgments. See Comments to Tex. Title Standards, Tex. Prop. Code, Standard 4.20, Defective Acknowledgements.

[70] The "ancient documents" rule says that recitals in an ancient document, such as a deed, are prima facie evidence of the facts recited. Zobel v. Slim, 576 S.W.2d 362, 365 (Tex. 1978). See also note 74 infra.

[71] Tex. R. Evid. 803(16), 901(b)(8).

[72] See Tex. Prob. Code Ann. §52; see discussion supra Special Requirements, Section V.C.

[73] See Gramm v. Coffield, 116 S.W.2d 1089, (Tex. Civ. App.–Austin 1938, writ dism'd); see also Comments to Tex. Title Standards, Tex. Prob. Code, Standard 13.40, Reliance Upon Recitals, for a more detailed discussion.

[74] See Bibliography.

[75] See Walton v. Watchtower Bible & Tract Soc'y of Pa., 2007 Tex. App. LEXIS 180 (Tex. Civ. App.—Waco 2007). The court in Walton expressed the rationale for the ancient documents rule succinctly and eloquently: "Fraud and forgery are unlikely to be perpetuated so patiently, to bear fruit so many years after a document's creation."

[76] Tex. Nat. Res. Code Ann. § 91.402(b)(LexisNexis 2009).

[77] On the other hand, more than one division order analyst had been frustrated by the landman who "dumps" title requirements on the division order department that could have been cured more expeditiously during negotiations of the lease.

[78] See Tex. Nat. Res. Code Ann.§ 91.402(a) (LexisNexis 2009) (stating that periods vary from 120 days from production for a new oil or gas well to 60 days for subsequent oil wells and 90 days for subsequent gas wells).

[79] See Smith and Weaver supra note 32, at §2.3 (B)(1)(a) (citing Kemp v. Hughes, 557 S.W.2d 139 (Tex. Civ. App.—Eastland 1977, no writ)); see also MCZ Inc. v. Smith, 707 S.W.2d 672 (Tex. Civ. App.–Houston [1st District] 1986, writ ref'd n.r.e.).

[80] Tevis Herd and Bill Howard, Selected Title Issues, Address at the 13th Annual Oil, Gas and Mineral Law Institute, Cotton, Bledsoe, Tighe & Dawson, Midland, Texas (March 13, 1987) (transcript available at State Bar of Texas).

[81] See generally, e.g., Youngman v. Shular, 288 S.W.2d 495 (Tex. 1956); see also Moore v. Vines, 474 S.W.2d 437 (Tex. 1971).

[82] See Smith and Weaver supra note 32 at §2.3 (B)(1)(b).

[83] See Herd supra note 80 for a much better discussion.

[84] Id.

[85] See Tex. Title Standards, Tex. Prop. Code, Standard § 14.60; see also commentary with citations to the Tex. Fam. Code.

[86] Tex. Const. Code Ann. Art. XVI §§ 50-52.

[87] See Tex. Title Standards, Tex. Prop. Code, Standard § 14.90; see also commentary with citations to the Tex. Const.

[88] Hailey v. Hailey, 160 Tex. 372, 331 S.W.2d 299 (1960).

[89] See Brinkley v. Brinkley, 381 S.W.2d 725 (Tex. Civ. App.—Houston [1st district] 1964, no writ); see also Tex. Title Standards, Tex. Prob. Code, Standard 14.100 and accompanying commentary.

[90] Wilde v. Murche, 949 S.W.2d 331, 331 (Tex. 1997).

[91] See Tex. Prop. Code Ann. § 12.005. (This may come as a surprise to some divorce lawyers or at least those unaccustomed to dealing with title issues.)

[92] See Prewitt v. United States, 792 F.2d 1353 (5th Cir. 1986).

[93] Tex. Prob. Code Ann. § 73.

[94] Id.

[95] Tex. Prob. Code Ann. § 52.

[96] *See commentary to §52, Johanson's Texas Probate Code Annotated (West, 2009 edition). The commentary goes on further: "Not everyone, however, is enthused about the use of affidavits of heirship. "Due to the fact that amendments to Sections 48 through 56 of the Probate Code which went into effect January 1, 1972 provide for a streamlined Proceeding to Declare Heirship... it would appear that affidavits of heirship...will have very limited use in the future." Bayern, Proceedings to Determine Heirship, 33 Tex. B.J. 133,136 (1975). The fact is, though, that affidavits are still being used, and are still very useful, especially to clear long-standing gaps in title."*

[97] *See Tex. Prob. Code Ann. § 95; see also Tex. Prob. Code Ann. § 100.*

[98] *See supra note 35. Texas estate taxes are subject to a unified credit and are not due in the absence of a federal estate tax liability. Tex. Tax Code Ann. § 211.055.*

[99] *The Taxpayer Relief Act of 1997 increased the unified credit against gift and estate tax so that the amount of assets that can be transmitted tax free peaks at $3.5 million in tax year 2009, up from $600,000 in 1997. Dana Shilling, Lawyer's Desk Book, Estate Planning, § 17.01 (2009 ed.).*

[100] *Tex. Nat. Res. Code Ann. § 91.402(a).*

[101] *Loring, A Trustee's Handbook, p. 1 (Charles E. Rounds Jr. and Charles E. Rounds III eds., 2009 ed.) (quoting Maitland, Selected Essays 129 (1936) quoted in 1 Scott on Trusts §1).*

[102] *Loring, at § 3.51 (quoting 6 T. G. Smith, International Encyclopedia of Comparative Law, at ch. 2, para. 262).*

[103] *Charitable Trusts, of course, also serve charities.*

[104] *See Comments to Tex. Title Standards, Tex. Prop. Code, Standard 9.10*

[105] *See Alpert v. Riley, 274 S.W.3d 277 (Tex. Civ. App—Houston [1st Dist.] 2008, writ denied) (holding that the failure of the trustee to execute an "acknowledged acceptance of trusteeship" due to lack of a notary acknowledgement rendered the successor trustee's acceptance ineffective and furthermore standing for the proposition that where the trust instrument outlines the procedure for appointment of a successor trustee, there can be no estoppel based on the beneficiaries' acquiescence in the assumption of trust duties).*

[106] *See Tex. Title Standards, Tex. Prop.Code, Standard 9.10 (revision pending); see also Oil, Gas and Energy Resources Law Section Report Volume 33, Number 4, June 2009 (transcript available at State Bar of Texas) (proposing a revised Standard 9.10 as follows: "An Examiner must confirm the identity and powers of the trustee and whether the trust was in effect at the time of a trust transaction.").*

[107] *Mr. Bumble's comment after being informed that "the law supposes that your wife acts under your direction." Charles Dickens, OLIVER TWIST (Richard Bentley ed., 1838).*

[108] *As the commentary to the new proposed version of Standard 9.10 points out, see note 105 supra, a new statute in Texas permits a person who acts in reliance on a "certification of trust" provided by the trustee and meeting specified requirements to assume without further inquiry the facts contained in the certification. See Tex. Prop. Code Ann. § 114.086.*

[109] *See Tex. R. Evid. 901(b)(8); see also Comments to Tex. Title Standards, Tex. Prop.Code, Standard 3.40.*

[110] *See West v. Hapgood, 141 Tex. 576, 174 S.W. 2d 963 (1943).*

[111] *Tex. Title Standards, Tex. Prop.Code, Standard 3.40*

[112] *See discussion on Title Standards covered in this article for further examination of this statute and curative acts in general.*

[113] *Paraphrase of Comments to revised Tex. Title Standards, Tex. Prop. Code, Standard 9.10, supra note 72.*

[114] *Id.*

[115] *Tex. Prob. Code Ann. § 481 et seq.*

[116] *See Comments to Tex. Title Standards, Tex. Prop. Code, Standard § 8.20.*

[117] *See Tex. Title Standards, Tex. Prop. Code, Standard § 8.10 and accompanying commentary.*

[118] *Bean v. Bean, 79 S.W.2d 652 (Tex. Civ. App.–Texarkana 1935, writ ref'd).*

[119] *Supra note 117, quoting language from Dockstader v. Brown, 204 S.W. 2nd 352,353 (Tex. Civ. App.—Fort Worth, 1947, writ ref'd n.r.e.).*

[120] *Tex. Prob. Code Ann. § 492.*

[121] *Id.*

[122] *See supra note 70.*

[123] *Bruni v. Vidauuri, 140 Tex. 138, 166 S.W.2d 81 (1942).*

[124] *See new proposed Texas Title Standards 5.10, 5.20 and 5.30 pertaining to land descriptions; see supra note 106.*

[125] *In Texas, generally 25 years. See Buford supra note 11 for discussion.*

[126] *See the section covered in this article on Title Opinions.*

[127] *Address change communications are more likely to be sent directly to the oil company from whom the royalty owner has been receiving his or her check.*

[128] *Quoted by Thomas J. Vesper, Uncle Anthony's Unabridged Analogies; Quotes and Proverbs for Lawyers and Lecturers, p. 553 (Thomson West, 2008).*

[129] *See Vesper, supra note 128, p. 397.*

[130] *From the name of a play by the same name by William Shakespeare (1601).*

[131] *Quoting his father, Sen. Al Gore Sr., who in turn was quoting the English poet and writer, Edward Markham.*