



To Waive or Not to Waive?

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Houston Association of Division Order Analysts – February 21, 2018

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Gray Reed & McGraw



- Over 130 attorneys
- Full-service, commercial law firm
- Offices in Dallas & Houston
- Opened in 1985
- Energy Section ranked in the 2018 *U.S. News & World Report and Best Lawyers'* "Best Law Firms" rankings



Issues Facing Oil & Gas Producers

- Dry holes
- Blowouts
- Price collapse
- Political risks

- **TITLE RISK**

- 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.



It can be overwhelming.

- The number of different issues and possible requirements in a particular chain of title.
- The pressure to avoid standby drilling rig costs.
- The process of securing title curative can be time consuming and expensive.
- Each title is unique so formulas and pat responses escape us.



Is it a lawyer's place to advise on title requirement waivers?



Marketable vs. Defensible Title

**Marketable Title: A record title
that is free from reasonable
doubt ...TTS 2.10**

Examples of unmarketable title:

Title conveyed by Quitclaim deeds.

Title Acquired by Adverse Possession.

Title acquired by accretion or reliction.

**Defensible Title: Something less than marketable; imperfect on record, but possible to defend.
(Schroeder)**

There is always something.



TITLE REQUIREMENTS IN GENERAL

- General requirements
- Special requirements
- Formal requirements

Formal Requirements: An Example

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.

General Requirements: An Example (Requirement No. 1)

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.

Requirement No. 1 Rationale

- Record title can be defeated by an adverse possessor.
- An investigation of current and past uses of property prior to drilling is useful in assessing environmental and regulatory risks.
- It is 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 useful to know about any highway or railroad rights of way, school, churches, cemeteries, placer and lode mining locations that may be located on or near a prospective drillsite.
- It is sometimes the only way of curing an ancient title defect.

When to Waive Requirement No. 1?

- Have the minerals been severed from the surface?
- Are disinterested individuals available to sign an affidavit?
- Is record title either relatively straightforward or curable, or is establishing title by limitations title a necessity?
- 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?

Requirement #2

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.

Requirement #2: Rationale

- To ensure that the tenant is not claiming possession of the land adverse to the record title owner.
- To identify the current occupant in order to make peace before the drilling rig arrives and for purposes of settling surface damages.

Requirement #2: When to Waive

- To avoid allowing a client to be victimized by a surface owner or tenant who may have unreasonable expectations with respect to receiving damages payments.
- To avoid succumbing to blackmail by a surface tenant seeking windfall profits in exchange for a tenant's consent agreement.

Requirement # 3

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.

Requirement # 3: Rationale

- Example: 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.

Requirement #3: When to Waive

- Excluding easements and right of ways may be a way to speed completion of the project since they do not directly affect oil and gas title and can often be identified by a site inspection.

Requirement #4

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 is prior to a foreclosure upon the mineral estate.

Requirement #4: Rationale

- 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.

Requirement #4: When to Waive

- If a severance of the minerals does not predate the surface estate.
- The mortgage or other type lien is not unenforceable due to limitations.
- Questions to consider:
 - Is there a subrogation clause in the underlying oil and gas lease?
 - Is the tract in the drill path?
 - Is the tract small in the relationship to the overall unit such that the extinguishment of a lease and subsequent carry would not severely impact the economics of the well?

Requirement #5

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.

Requirement #5: Rationale

- All Texas properties subject to ad valorem tax are likewise subject to a lien to secure payment of such tax as of Jan. 1 each year.
- Delinquent ad valorem taxes are not barred by reason of limitations until 20 years after rendering.
- The tax rendering itself can be revised for up to five years.
- A tax lien is always prior to all other liens as long as the notice of the lien is filed prior to the time the debtor acquires the property.
- Therefore, a tax lien can be senior to an oil and gas lease.

Requirement #5: When to Waive

- If a total mineral severance under a tract occurred longer ago than the applicable statute of limitations for ad valorem taxes, and if there has never been any oil and gas production attributable to the tract.
- When there's a subrogation clause in a lease, which 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.
- To save time – information about past due taxes is easily accessible and tax certificates are inexpensive.

Requirement #6

Review the current oil and gas leases applicable to the Subject Lands to ensure compliance with all terms and conditions.

Requirement #6: Rationale

- An oil and gas lease has long been held in Texas to be a determinable fee and the consequences for not complying with the terms of the lease can include lease termination.

Requirement #6: When to Waive

NEVER!!!

Requirement #7: Prior Oil and Gas Leases

You should fully satisfy yourself that the prior unreleased oil, gas and mineral leases outlined in the Encumbrances section of the 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.

Requirement #7: Rationale

- 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 handover the well to the owner without any reimbursement of drilling or operation costs.
- Exemplary damages awards are a distinct possibility.

Requirement #7: When to Waive

- When trying to secure an affidavit of nondevelopment is too big of a challenge.
- The TRC website has extensive information on producing leases in Texas and may be a quick and more reliable source of information than an affidavit.

Requirement #8: Life Tenants/Remaindermen

You should obtain a new oil and gas lease joined in by both the life tenant and remaindermen, or alternatively, a ratification of your current oil and gas lease by the remainderman, and in either case, record same in _____ County, Texas.

Requirement #8: Rationale

- Fundamental tenet of oil and gas law:
 1. 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.
 2. Failure to have both the life tenant and the remainderman either join the lease or ratify renders the lease void.

Requirement #8: When to Waive

- Never, unless the oil company is planning on carrying the interest in the well free of cost.

Aside: Marital Property & Homesteads

- At least since 1976 amendments to the Texas Property Code is property is acquired during marriage by a deed naming both spouses as grantees, a subsequent conveyance of property is ineffective unless joined in my both spouses.
- Exception: community property under one spouse's name or subject to sole property and control. But later is a question of fact.

Aside: Marital Property & Homesteads

- Homestead: Texas Homestead Laws require joinder of both spouses, or the conveyance is void. A spouse's separate property can constitute a homestead.
- So when can this be waived? Again, never, unless you want to void your lease and carry the interest free of cost.

Requirement #9: Wills and Probate

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 his/her death. This information should be submitted for examination.

Requirement #9

- Requirements relating to missing probates are perhaps the most common and frequent special requirements that title examiners will make.

Statute of Limitations

- 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.

Affidavit of Heirship

Texas Estates

Code §2003.002

Requirement #9: Waiving

- The option of waiving the requirement and accepting an affidavit of heirship in lieu thereof is not only allowable under the Texas Estates Code, but is also a very common response by oil company land and division order departments, despite option to suspend.
- Aside: One commentor, “Affidavits of Heirship will disappear” **WRONG!**

Requirement #9: Waiving

- If a will is located and four years have not passed, the requirement that the will be probated must be dealt with more seriously.
- But what if the will was probated out of state?...

Requirement #10

The Examiner notes that the Caddo Parish, La, probate proceeding 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.

Requirement #10: Waiving

Why—not your job!

Exception: Widows and Orphans Rule

Requirement #10: Trusts and Powers of Attorney

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.

Trusts can cause headaches for oil and gas lawyers.

- Texas does not provide a statutory “safe harbor” for trust conveyances.
- Texas courts strictly construe trust instruments.
- But Trust Departments don’t want to give them out.
- But now, Trust Certificates. Texas Property Code 114.086.

Powers of attorneys are also 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.
- Under the common law, the powers granted to the attorney-in-fact terminate upon the death or incapacity of the principal.
- Durable Power of Attorney Act, 1993

Requirement #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 and 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.

Requirement #11: When to Waive?

It depends

Limited Title Opinions

A limited title opinion intentionally limits its scope to a shorter period of time or may only address one class of ownership, such as the leasehold estate, and may exclude coverage of the surface, mortgages and even royalty interests.

Limited Title Opinions: Why?

- Most common form of limited title opinion is one prepared for a lender in connection with the financing for an asset purchase or divestiture.
- It is increasingly common for companies to limit review of documents even in connection with drilling opinions. And not just in the Barnett Shale.

Checklist

- ✓ *Quantum of interest*
- ✓ *Path of the well*
- ✓ *Mineral severance*
- ✓ *How much time has passed?*
- ✓ *Deferral to production*
- ✓ *Transfer responsibility*
- ✓ *Widows and Orphans Rule*
- ✓ *Title standards*
- ✓ *Read and understand the formal limitations section of the opinion*
- ✓ *Never waive the requirement in a title opinion that the lease(s) be read and complied with*
- ✓ *Consider the big picture*

Last: No warranty given.

Thank you!



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