# **Rocky Mt. Min. L. Inst. 4-1 2007**

***The Foundation for Natural Resources and Energy Law Annual and Special Institutes (formerly Rocky Mountain Mineral Law Foundation Annual and Special Institutes)*  > *Special Institutes* >  *2007 Sep (Mineral Title Examination)* > *Chapter 4 (FINDING, ACCESSING, RUNNING, AND EXAMINING THE LOCAL RECORDS AND PREPARING THE CHAIN OF TITLE)***

**FINDING, ACCESSING, RUNNING, AND EXAMINING THE LOCAL RECORDS AND PREPARING THE CHAIN OF TITLE**

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George was born in Pampa, Gray County, Texas. He attended Baylor University and Baylor Law School graduating in 1972 with BA and JD degrees.

Since 1972, George has practiced law in Amarillo. He maintained a general practice, including litigation, until 1979. In 1979, George joined an attorney who had been preparing title opinions for ***oil*** and gas purposes since 1966. George also limited his practice to the ***oil*** and gas and real property areas, focusing primarily on the preparation of title opinions for all purposes. George and his former partner, now deceased, have together prepared over 8,000 title opinions.

From 1985 to 1991, he was one of the team of speakers teaching AAPL's Certification Review course. He taught NADOA's Certification Review course from 1993 to 1996. George has spoken at many other industry seminars for landmen, division order analysts and bar associations. Many of his articles have been published in The Landman.

Since 1989, George has served on the Texas Bar's Title Standards Joint Editorial Board. The purpose of title standards is to summarize the law on a real property subject and provide practical solutions to common conveyancing problems. All real estate practitioners, including ***oil*** and gas practitioners, should be familiar with the title standards of any state where they conduct business.

While George is not a member of a firm in the traditional sense, George has put together a network of title lawyers in 16 states who work together for both business and writing purposes. All other 15 lawyers have written articles comparing the ***oil*** and gas law of their state to Texas, using the same format as in the prototype article written in 1989 which compares the ***oil*** and gas law of Oklahoma to Texas.

As a solo practitioner, George has more flexibility in administrative matters than a larger firm. For example, depending upon the volume of work to be done, he answers the phone either "Hard working lawyer's office" or "Hardly working lawyer's office"!

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**I. A PRACTICAL COMPARISON - READING AN ABSTRACT v. STANDING UP IN THE COURTHOUSE**

**A. DEFINITIONS**

**1. Run Sheet - list of instruments, either by date of recording or by date of the instrument, identifying all instruments that affect title to a specific tract.**

**2. Abstract/Title Company Abstract - List of the instruments themselves, may or may not contain a run sheet/index/table of contents, prepared by a state licensed abstract/title company that contains at the end a certificate that the abstract includes all instruments affecting title to the land described.**

**3. "Landman's Abstract" - Abstract prepared by an unlicensed land/brokerage company that purports to include all instruments affecting title to the land described, but without a certificate.**

**4. Tract Index - List of instruments, in the order recorded, that identify a specific tract of land, usually by section, abstract or survey. Tract Indices are maintained by nearly all abstract/title companies and by county clerks in some states.**

**5. Grantor/Grantee Index - List of instruments by last name of the grantor and grantee of each instrument. A reference to the land covered may or may not be included. Some abstract/title companies may maintain a grantor/grantee index, but all counties that do not maintain a tract index maintain a grantor/grantee index.**

**B. EXAMINATION OF ABSTRACT PREPARED BY ABSTRACT/TITLE COMPANY.**

1. The examiner should be able to rely upon the completeness of the instruments contained in the abstract, as certified by the abstractor.

2. This is the most costly option as abstractors charge considerably more per page than a clerk for copies.

3. This may take more planning and lead time because most abstractors do not prepare abstracts quickly.

4. It is becoming more difficult to obtain an abstract in rural counties, and nearly impossible in urban counties.

5. Because of the amount paid for the abstracts, the parties are reluctant to dispose of them, but who has the space to keep them?

**C. EXAMINATION OF A "LANDMAN'S ABSTRACT".**

1. Can be obtained more quickly than an abstract/title company prepared abstract.

2. Is not as complete/thorough because it usually contains only the instruments identified in the abstractor's tract index. In other words, too often there is no corresponding grantor/grantee record check.

3. There is no corresponding certificate as would be attached to the abstract/title company prepared abstract.

4. Because there are frequently important instruments omitted, such as probates, name changes, etc., that are not listed in a tract index, the examiner must wait for the landman to return to the project and submit the missing instruments.

5. Because of title examiner demands, some land companies preparing abstracts are examining the title themselves, running the grantor/grantee indices and even preparing plats of important metes and bounds descriptions.

**D. CONDUCTING A STANDUP EXAMINATION.**

1. The examiner usually relies on a third party prepared run sheet listing the instruments to be examined.

2. Except for this limitation, the examiner controls the process and the examiner assumes all the risk. It is easier/safer for an examiner to examine title in a county where he is familiar with the different indices and the different personalities.

3. The examination can be completed quicker because the examiner, assuming he is staying on site, can work without distraction day and night until finished. I find it helpful to dictate the opinion while on site and thus be forced to think through all issues that need to be addressed prior to leaving the county.

4. Some clients are reluctant to pay attorneys their full rate for travel time.

**II. HOW TO ACCESS LOCAL RECORDS**

My Contributing Friends have provided specific information concerning the recording laws and practice of the states considered. An effort has been made to make the information from all states consistent, complete and accurate. This material is organized by the following general topics:

1. Types of records maintained by county clerks, county recorders or other county record keepers.

2. Types of public records maintained by record keepers located outside the county where the land is located; and

3. Miscellaneous topics, including the cost for purchasing abstracts, how landmen and attorneys work together in examining title and any other topic of interest to the responding friend.

DISCLAIMER

The following information is intended to be general in nature. An individual conducting an examination should always consult with the county personnel or a local attorney or landman on an initial foray into a county to ascertain exactly what indices and recording methods are employed by that particular county.

**Arkansas**

**A. Records in the County**

1. The records in the courthouses in Arkansas are kept in three main offices:

1. Circuit Clerk's office;

2. County Clerk's office;

3. Tax Assessor's office.

The Circuit Clerk's records include at least the following:

1. Deeds;

2. ***Oil*** and Gas Leases;

3. Assignments;

4. Mortgages;

5. Liens; and

6. Lis Pendens.

The Circuit Clerk maintains a single Grantor/Grantee Index on all recorded instruments. All lawsuits, except probate matters, are filed and maintained by the Circuit Clerk.

The County Clerk maintains all will and probate records which are accessed by an alphabetical index listing each probate by year. All past-due tax assessments and payments are provided in the County Clerk's office and the County Clerk maintains current voter registration.

The Tax Assessor's office maintains all current tax assessments and payments. These records are the best available to obtain current addresses. The Tax Assessor also maintains plats reflecting the surface ownership of each section and containing the subdivisions within a town or city.

Since the county offices do not maintain tract indices, the examiner must begin at the abstract office in the county. After the examiner has made a complete list of all instruments to be examined, he would go to the courthouse to review all instruments listed. After taking notes of all instruments examined, he would prepare his chain of title and determine present ownership of all interest and title defects, if any.

**B. Records Outside the County**

The Arkansas ***Oil*** and Gas Commission maintains production records which are necessary to determine if a drilling unit is held by production. The Commission also maintains records concerning pooling, unitizations and field matters. Its main office is located in Eldorado, Arkansas 501-862-4965. Duplicates of North Arkansas records are also kept in the Fort Smith office 501-646-6611.

**C. Other Topics**

1. Abstracters do not have consistent policies toward standup examinations. It is best for an attorney to be honest about his intentions and be willing to fairly compensate the abstracters for using their indices.

2. In standup work, it is common for the landman to prepare takeoffs from the abstracter's records and then work with the attorney in the courthouse assisting him in any way possible. Also, attorneys and landmen work together to reduce the number of potential requirements. While an attorney is preparing an opinion, the landman may obtain additional instruments or conduct additional research so that the issue could be resolved without the title attorney making a requirement.

3. The only source for tract indices is privately owned abstract offices. Abstract offices in Arkansas charge for examining their tract indices. Most abstract offices do not have copies of instruments or do not permit you to review their instruments. Therefore, to conduct a standup examination, you would review the instruments in the public offices previously identified.

4. In 2007 it is nearly impossible to conduct a stand up examination because of problems getting an accurate index/runsheet. The best option is to purchase abstracts prepared by Deister Ward & Witcher, a specialized ***oil*** and gas abstractor. Deister Ward & Witcher prepare well organized paper abstracts and also furnishes a copy of the Index and all documents in CD. The Index hyperlinks to the documents. I prefer to use the CD, rather than the paper version for most purposes. The images on screen are easy to read, zoom in and out, and the CD is, of course, portable. I also examine landman-abstracts when instructed to do so by the clients. I have not seen a landman-abstract which is as good as the Deister product.

5. The Arkansas Bar Association now publishes real estate title standards. They are a copyrighted product but can be obtained from the Arkansas Bar Association at a nominal cost.

6. Documents affecting federal lands are seldom recorded locally. After preparing my opinion covering federal lands in Arkansas, I recommend a supplemental federal lands opinion from Jason Warren, a Washington D.C. attorney who specializes in these opinions.

**California**

**A. Records in the County**

1. There are 58 counties in California. The principle ***oil*** and gas producing areas are as follows:

***Oil***- Orange, Los Angeles, Ventura, San Luis Obispo, ***Kern***, Kings, Tulare, Fresno, Monterey and San Bernardino counties.

Gas- San Joaquin, Contra Costa, Sacramento, Solano, Yolo, Sutter, Yuba, Colusa, Glenn, Butte and Tehema counties.

Examining the location of the referenced counties quickly discloses that production of ***oil*** in California exists west of the Sierra foothills and south from Fresno County. Production of gas primarily exists in the northern San Joaquin Valley and in the Sacramento Valley, with some modest production possible in portions of the east slope of the coastal mountain range in Northern California.

2. Recording in California requires more than the instrument simply being executed and acknowledged. The instrument must effect title to or the right to possession of real property or an interest in real property or must be an instrument which is otherwise specifically allowed to be recorded by California Statutes. If the instrument transfers real property or an interest in real property, it is required that the instrument be recorded with a completed change of ownership form, or an additional fee must be paid and the change in ownership form completed and returned within twenty days (this requirement is driven by California's ad valorem tax limitation contained in California Constitution, Article XIII A under which property is revalued only when there is new construction or a transfer has been made). The cost of recording is $5.00 for the first page and $3.00 for each subsequent page or portion thereof and is statutory.

3. Recorded instruments are identified by different county recorders in different ways. Most counties continue to identify recorded instrument by both instrument number and by book and page of recording. Some counties have, in recent years, switched to identifying recorded instruments only by instrument number. Additionally, some counties have begun in the past seven years or so identifying recorded instruments by a numerical date of recording followed by a consecutively numbered page of recording.

4. All California recorders maintain a grantor/grantee index as well as a UCC file index. Cal. Gov. Code § 27231 et seq. et al lists over 15 types of instruments that require separate grantor/grantee indices.

5. County recorders do not maintain tract indices. However, in most counties private title companies maintain tract indices which are available for examination for a fee per hour.

6. California recorders do not maintain a tract index. There are instruments allowed to be recorded in California which do not contain a legal description and, sometimes, which do not even reference two parties. These are maintained in the general grantor/grantee index.

7. In California there is a statutory form of "Abstract of Judgment" which must be recorded to obtain a judgment lien against a defendant in any particular county. An Abstract of Judgment must be recorded in the particular county where the judgment debtor's property is located in order for the judgment lien to be created in that county.

8. There must be an ancillary probate commenced and completed to transfer title to California property from a non-resident decedent. There are, however, summary administration proceedings (*California Probate Codes Sections 13,000 - 13,209* and *Sections 6,600 - 6,615*) available to facilitate distribution of property of small estates in California as long as the type and value of the property fits within the language of those sections.

9. There is no requirement that any notice of bankruptcy proceedings be recorded in California. County recorders must accept a notice of bankruptcy or a copy of a petition in bankruptcy for recording. The bankruptcy stay, of course, applies automatically whether or not any notice of bankruptcy is recorded. I have no suggestion as to how to deal with this problem, and I fully agree that it can be a significant problem.

10. Virtually all practitioners in California file UCC-1's both with the County Recorder and with the California Secretary of State. The general rule which you have expressed is generally applicable in California. However, since there are numerous exceptions to the rule, it is common practice for California lawyers to file all UCC-1's in both locations. For example, when dealing with a transmitting utility it is specifically required under *Section 9-401(5)* that the UCC-1 be filed with the Secretary of State.

11. Birth certificates are indexed in the names of both the parents and the child. They are maintained by the Department of Health in the Department of Health Services.

12. All title companies in California maintain tract indices. There is a potential battle brewing between certain title companies and ***oil*** and gas landmen and lawyers regarding utilization of title company indices. Certainly the charges per hour sought are increasing dramatically, sometimes with cause and sometimes without cause (ostensibly because of getting in the way of title company work and leaving indices and title examination rooms in a state of disarray). Some title companies are now refusing to allow nonemployees to utilize their records.

13. In theory all patents should be recorded in county records. Sometimes they are not. In that case, the local office of the Bureau of Land Management can provide a certified copy of the Federal Patent for recording, and the State Lands Commission can provide a copy of a State patent for recording.

**B. Records Outside the County**

14. Drilling and production activity, to the modest extent that it is regulated in California, is regulated by the State of California Division of ***Oil*** and Gas (1416 9th Street, Sacramento, CA 95814, (916) 445-9686). There are essentially no Division of ***Oil*** and Gas records which are recordable, with the possible exception of an Abstract of Judgment which might be obtained by the Division of ***Oil*** and Gas against an operator for failure to properly plug and abandon a well. There are essentially no Division of ***Oil*** and Gas records required to be reviewed in rendering a drilling title opinion in California.

16. A stand-up title examination of fee lands would consist of a review of the following indexes and records:

County Recorder's office:

1. general index county clerks;

2. judgment docket for all parties and

3. probate index

County Tax Collector's office:

1. ad valorem property taxes and assessments collected with tax bills

County Local Agency Formation Commission:

1. ascertain the existence of any special districts whose boundaries include the subject land, and make contact with the assessment collector for each such special district so identified to ascertain whether there exists any unpaid assessments supported by liens against the subject land.

California Secretary of State:

1. UCC-1 Financing Statements;

2. Corporate Status

**C. Other Topics**

1. Comparison of purchasing abstracts to conducting a "standup examination". Tract indices existing California only in privately owned title offices. Title companies which still allow access to their records by nonemployees are charging rates ranging from $25.00 per hour to $75.00 per hour for examining their indices, and a price per page for copying documents from $.25 to $1.00 per page. The cost for obtaining copies of recorded documents from the county recorders office is generally $.50 per page. It is exceedingly rare for a lawyer to perform a standup title examination in California. The California experience is that it is much more efficient and cost effective for an abstract to be built by a respected and trusted landman and presented to the lawyer for examination and the rendering of an opinion. To the extent that there is such a thing as a typical abstract in California (say two inches of documents) the cost of having the abstract prepared by a landman would be in the $3,000.00 range. The cost for having an experienced ***oil*** and gas title lawyer build the same abstract (prior to his review of title and the drafting of an opinion) could easily be in excess of $10,000.00.

**Colorado**

**I. Records in the County**

Out of 63 Colorado counties, 39 have production. The major producing areas are the Denver Basin (Front Range) and Piceance basin (Western Slope).

Those with production are:

|  |  |  |
| --- | --- | --- |
| Adams | Delta | Huerfano |
| Arapahoe | Denver | Jackson |
| Archuleta | Dolores | Jefferson |
| Baca | Elbert | Kiowa |
| Bent | Fremont | Kit Carson |
| Boulder | Garfield | La Plata |
| Cheyenne | Gunnison | Larimer |
| Las Animas | Phillips | Sedgwick |
| Lincoln | Pitken | Washington |
| Logan | Prowers | Weld (#1-Gas) |
| Mesa | Rio Blanco (#1-***Oil***) | Yuma |
| Moffat | Rio Grande |  |
| Montezuma | Routt |  |
| Morgan | San Miguel |  |

The elected county clerk is the ex-officio recorder of deeds and has custody and the obligation to preserve all documents received for recording or filing by the clerk and recorder. Colorado statutes obligate the clerk and recorder to maintain the following indices:

(a.) A grantor index and a grantee index of every document filed or recorded concerning or affecting real estate. *Colo. Rev. Stat. § 30-10-408* (2000);

(b.) A reception book listing chronologically each document accepted by the clerk and recorder for recording or filing. *Colo. Rev. Stat. § 30-10-409* (2000);

(c.) A file of all subdivision plats presented for recording in accordance with law. The subdivision plats are indexed in the grantor index under the name of the person that signs and acknowledges the plat as owner and dedicator and in the grantee index under the name of the plat shown. In addition, the clerk and recorder must also keep an alphabetical index of such subdivision plats by the name of the plat. *Colo. Rev. Stat. § 30-10-410* (2000); and

(d.) Index of trade name registration records provided by the Department of Revenue. *Colo. Rev. Stat. § 30-10-420* (2000).

There are few recording requirements in Colorado, and almost anything may be recorded, without an acknowledgment. Deeds must set forth the address of the grantee.

The clerk and recorders statewide charge $5 per page to record real property instruments and $10 for oversized plats. *Colo. Rev. Stat. § 30-1-103* (2000). Documents containing multiple grants, notices, assignments or releases of leases, deeds of trust, mortgages or liens, or other instruments which require multiple entries in the grantee index shall incur an additional fee of $5 for each entry in excess of one per document.

In Weld County, instruments are identified by Book and Reception Number in both the real property and U.C.C. records. Older documents were identified by Book and Page. In other counties, such as Adams, documents are still identified by Book and Page.

Since the clerk and recorder in Colorado is not required by law to maintain a tract index, most title examiners rely upon examination of the tract indices maintained by the local abstract office. In some counties, such as La Plata County, abstracters may not make their records available to the public. If the abstracter permits access to their tract records, then the charges range anywhere from $25 to $125. Many abstracters charge a separate lower fee for examining copies of their deeds and conveyances. This can sometimes be an economic proposition where the clerk and recorders' documents are difficult to access (for example, when the computers are down or all terminals are being used). It is not unusual for some of the smaller counties to have only one computer terminal or microfiche reader for the general public.

In the larger metropolitan areas, the abstract companies have also limited access to the records for purposes of searching mineral title. In Denver, Boulder, Adams, Arapahoe and El Paso Counties, most of the abstract companies are focused on the business of providing title insurance and, therefore, ceased maintaining a tract index and have been relying on a computerized system of ARBS which roughly corresponds to a tract index. These companies maintain that the information from this system is proprietary, and they will not sell the information to you. Therefore, in some situations, you have no choice but to examine the grantor/grantee indices after the date upon which the abstract company begins using the ARBS system.

Some Colorado counties also maintain a Torrens Title Registration System. We have rarely encountered situations where a title has been placed in the Torrens system. The system mainly occurs in eastern Colorado counties, such as Kiowa, Morgan or Washington Counties. If there is a Torrens system, one must examine Torrens title as well as normal title. If there is an indication of conversion to Torrens (which will appear in the title chain), it is suggested that ***oil*** and gas leases be recorded in both systems. One cannot abandon the regular county records even if conversion to Torrens is found, since many people record or file documents in one or the other.

The county assessor maintains a current list of surface owners. The county treasurer maintains an alphabetical list of owners paying ad valorem taxes assessed against lands within the county. Although severed minerals are subject to ad valorem taxation, Colorado has a voluntary reporting system. If the severed minerals are not reported and assessed, then no taxes are due and the severed mineral interest cannot be sold for unpaid taxes.

A judgment entered by the district or county court is not a lien against real property in the county until a transcript of that judgment is recorded in the county records. As a result, examination of the records of the clerk of the district court and clerk of the county court is not necessary to identify judgment liens affecting the lands under examination. Nonetheless, it would be prudent to examine these records to determine if there is any ongoing litigation or judgments that have been recently entered, but not recorded in the county. If you are relying upon the abstracter's tract index to conduct your examination of the county records, you should also be certain to examine various miscellaneous indices maintained by the abstracter in order to obtain any documents which have not been indexed in the tract book, such as transcripts of judgment.

**II. Records Outside the County**

If the minerals underlying the lands under examination are owned by the State of Colorado, then it will be necessary to examine the records of the State Board of Land Commissioners, at the Department of Natural Resources, 1313 Sherman Street, Suite 620, Denver, Colorado 80203 (303-866-3454).

If you determine that the minerals underlying the lands under examination are owned by the United States of America, then it will be necessary to examine the records of the Colorado State Office, Bureau of Land Management, located at 2850 Youngfield Street, Lakewood, Colorado 80215-7093.

To obtain information about the orders entered by the Colorado ***Oil*** and Gas Conservation Commission with respect to lands under examination, or obtain history of the ***oil*** and gas operations, you will need to examine the records of the ***Oil*** and Gas Conservation Commission at 1580 Logan Street, Suite 380, Denver, Colorado 80203. The Commission records contain a plat book of all wells drilled since 1953, individual well files, and files on spacing and other orders. Examination of the plats will allow you to ascertain if a particular spacing cause applies. If so you should examine the entire cause file to see if a spacing order has been entered or amended to affect your particular tract. Pertinent information and forms can be obtained from the Commission's web site at www.dnr.state.co.us.

**III. Miscellaneous Topics**

A. In lieu of the attorney doing a stand-up examination or obtaining from the abstractor a "title chain" for a fee, some attorneys will employ a landman to either prepare a "title chain" or prepare an abstract to be examined by the attorney in his office.

B. The Title Standards Committee of the Colorado Bar Association's Real Estate Section annually reviews and revises as necessary the Colorado Real Estate Title Standards. The title standards are published by Attorneys' Title Guaranty Fund, Inc., 999 18th Street, Suite 1101, Denver, Colorado 80202, phone 303-292-3055 or 800-525-6558; copies are available at a cost of $10.00 per copy.

C. The Colorado legislature has specifically provided that the Colorado Recording Act, *Colo. Rev. Stat. § 38-35-109* (2000), is a race-notice statute. Under a race-notice statute, one must not only acquire the property without notice of an outstanding claim or defect, but the party intended to be protected must also be the first to record. For a detailed discussion, see George E. Reeves, "*The Colorado Recording Act -- Part I: History and Character of the Act*," 24 *Colo. Law*. 1321 (1995). In Colorado, a purchaser is bound by the recitals and conveyances or other instruments of transfer in his own chain of title, except as it may be modified by statute. *See Page v. Fees-Krey, Inc.*, 617 P.2d 1188 (Colo. 1980)

A great deal of ***oil*** and gas exploration activity occurs on federal and state lands. The Colorado Supreme Court has held that the purchaser may have a duty of inquiry with respect to instruments reflected in the records of the Colorado State Office of the Bureau of Land Management or the Colorado State Land Office. *See Page v. Fees-Krey, Inc.*, 617 P.2d 1188 (Colo. 1980); *Grynberg v. City of Northglenn*, 739 P.2d 230 (Colo. 1987).

D. Colorado also has a unique statutory provision related to recording which states that when an instrument in writing has been recorded and such instrument makes reference to some other instrument which is not recorded in the county records, such reference shall not be notice to any other person. *Colo. Rev. Stat. § 38-35-108* (2000). No person other than the parties to the instrument shall be required to make inquiry or investigation concerning such recitation or reference. *Id*.

This statute can create a number of problems in the normal way that an ***oil*** and gas company conducts its business. First, the custom of making reference to agreements not of record in the conveyancing documents, such as purchase and sale agreements, farm out agreements or joint operating agreements, does not place third parties on notice and the statute arguably eliminates the duty to make further inquiry. Second, the statute calls into question the notice that would otherwise be provided by a memorandum or notice of agreement (for example, a memorandum of operating agreement). It would be better practice in Colorado to set out the pertinent terms of your agreement when recording any memorandum of agreement or notice of agreement.

**Kansas**

**A. Records in the County**

1. Most records in the State of Kansas pertaining to real estate and ***oil*** and gas are maintained in the office of the Register of Deeds, as opposed to the County Clerk's office. The Register of Deeds is required to maintain a Grantor/Grantee Index and, whenever deemed necessary by the Board of County Commissioners, the Register of Deeds may maintain a tract/numerical index containing:

1. The name of the instrument;

2. The name of the Grantor;

3. The name of the Grantee;

4. A brief description of the property; and

5. The volume and page where recorded.

The tract index usually describes the lands by sections but each page reflects quarter of quarter or 40 acre tracts.

Kansas has 105 counties. All counties maintain a tract/numerical index except for Sedgwick County and Butler County (as to records prior to the early 1960s). Therefore, a standup examination from inception of title is not possible in these counties utilizing only the county records. The Register of Deeds makes no charge for use of the records, except for copy expense.

Records not maintained by the Register of Deeds will be found in the office of the Clerk of the District Court. The Clerk of the District Court maintains at least the following records:

1. All lawsuits;

2. Probate proceedings;

3. Divorce proceedings;

4. All types of mechanic's liens;

5. Foreclosure actions;

6. Partition actions;

7. Quiet title actions; and

8. Tax warrants and judgment liens issued by the Department of Revenue for the State of Kansas.

**B. Records Outside the County**

1. Patents are normally recorded in the office of the Register of Deeds. Production records can be obtained from the Kansas Corporation Commission.

**C. Other Topics**

1. Since the counties maintain a numerical/tract index, the standup examination begins in the county.

Most abstracters in Kansas still abstract, that is they do not copy every page of every instrument, but provide a summary of most instruments. The abstracter will provide complete copies of any instruments requested. The instruments usually requested to be copied in full are:

a. ***Oil*** and gas leases;

b. Assignments and other related instruments;

c. Unitization Agreements;

2. Affidavits of Production and of Non-Production. Kansas has the same requirements as Colorado, however, *Kan. Stat. Ann. § 55-205* has some teeth. *Cities Service v. Adair*, 273 F.2d 673 (10th Cir. - Kan. 1959) held that a lease partially expired in the following situation. In 1923, Lessors executed an ***oil*** and gas lease covering 1,280 acres. The ownership of the lease became fragmented in that Sinclair owned 480 acres, Cities Service owned a separate 160 acres, with the remaining acreage owned by third parties. Sinclair drilled producing ***oil*** wells on its 480 acres and timely filed an Affidavit of Production to extend the primary term as to its acreage. This affidavit only identified the 480 acres owned by Sinclair. In 1955, Defendants obtained an ***oil*** and gas lease from the mineral owners of the same 160 acres covered by Cities Service's portion of the 1923 lease. Defendants drilled producing ***oil*** wells and Cities Service sued claiming title. The court held for the Defendants and stated that the Defendants did not have actual notice of Cities' leasehold, because Cities did not conduct any surface operations, and the Defendants did not have constructive notice of Cities' leasehold, because the Affidavit of Production was not in the chain of title for the 160 acre leasehold owned by Cities Service.

**Louisiana**

**A. Records in the County**

1. Record keeping in Louisiana's 64 parishes (same as common law counties) is not consistent. Generally, instruments conveying fee lands, mineral servitudes and ***oil*** and gas leases and assignments are found in the Deed or Conveyance Records located in the Clerk of Courts in the parish where the property is located. Some parishes, however, maintain separate records such as:

a. Conveyance or deeds;

b. Mortgage;

c. Suit;

d. Judicial;

e. Charter book;

f. Books of Donation;

g. Probate, etc.

h. U.C.C.

Usually, each type of record has its own index. While older records were indexed manually by year of transaction, many of the more recent records have been indexed by computer and may be found alphabetically in the Grantor/Vendor/Direct Index and the Grantee/Vendee/Indirect Index. Although Parish Clerks do not maintain tract indices, some abstracters do.

2. In Louisiana, an attempt to sell or reserve the ownership of ***oil*** and gas results in the creation of a mineral servitude, that is, a right in the land owned by another to explore for, produce, and reduce the minerals to possession and ownership. That right is a real right that can be owned separately from the ownership of the land. As the Louisiana Supreme Court stated in its 1984 opinion in *Steele v. Denning*, 456 So. 2nd 992 (L.A. 1984) a mineral servitude "is a dismemberment of title insofar as it creates a secondary right in the property separate from the principal right of ownership of the land. The court continued: "the creation of a mineral servitude effectively fragments the title such that different elements of ownership are held by different owners." This separate right is fully alienable and inheritable. Unlike a mineral estate which can be created in perpetuity with no obligation on the owner to use his rights, a mineral servitude is subject to prescription of non-use for ten years.

**B. Records Outside the County**

1. Because Louisiana follows the non-ownership theory of ***oil*** and gas and therefore does not recognize a separate estate in ***oil*** and gas, it is extremely important that anyone running title in Louisiana include a check of the mineral and production history of the property under examination, as well as the surrounding and contiguous tracts, if the initial examination of the public record reveals the creation of a mineral servitude. The research for the mineral and production history is done at the home office of Louisiana Office of Conservation in Baton Rouge or one of its three district offices, which are located in Lafayette, Monroe and Shreveport. This is the only accurate way to determine if the owner of the mineral servitude has exercised the rights he has acquired within 10 years from the date of the creation of the servitude in a manner sufficient to interrupt the running of prescription of non-use and prevent the extinguishment of the servitude.

2. While orders of The Office of Conservation creating compulsory units are usually recorded in the parishes, the Office of Conservation also contains other orders and drilling and production records of the Commissioner which are generally not found in individual parishes. These records are computerized and require some familiarity to retrieve and interpret the pertinent data. Use of the rights granted in a mineral servitude must meet the requirements of the Mineral Code. The Mineral Code contains more than 30 sections that deal with problems of interrupting or suspending prescription. A discussion of this subject is beyond the scope of this article.

3. Since complete severance information is often missing from the parish records, the records of the State Land Office in Baton Rouge and the records of the Bureau of Land Management in Alexandria, Virginia, should also be researched. Since early records in several parishes were destroyed in whole or in part by courthouse fires, a direct search of the state and federal severance materials is generally required to insure that the severance information contained in the parish records is complete and accurate.

4. Title 9 of the UCC has recently been adopted in part of Louisiana. UCC records are maintained, as of July 1, 2001, by the Louisiana Secretary of State in Baton Rouge but can be accessed by computer from the Clerk of Court's office in each parish. As adopted in Louisiana, financing statements do not directly affect immovable property, such as land and mineral leases, but they can affect severed minerals.

5. To verify the legal existence of corporations and partnerships, contact the Secretary of State of the State of Louisiana. This is often handled via telephone (504) 925-4704.

**C. Other Topics**

1. An examiner can conduct a standup examination by examining the indices of the Clerk of Court. However, this is neither the fastest nor the most accurate method to construct a chain of title. Since tract books are not maintained in the clerk's offices, most abstracters in Northern Louisiana will permit examination of their tract indices for a charge determined on a per hour rate (beginning at $50.00 per hour), or per reference rate (ranging from $1.00 to $4.00 per reference), or even per 40 acre tract examined. Some abstracters, however, do not permit the public to use the tract indices. There are parishes with substantial ***oil*** and gas activity in Southern Louisiana where the abstractor's records are unavailable and the examiner must look to the indices of the Clerk of the Court.

2. Abstracters have traditionally charged by the page for their services. Costs range from $2.00 to $3.50 per page. Large abstracters maintain abstract libraries and commonly rent or copy old abstracts for a lower per page rate than the rate applicable to new abstracts. Abstracters are generally willing to limit the instruments copied to meet the client's request. Some abstracters do not include subsequent grants of right of ways or mortgages of right of ways, etc., unless requested to do so.

3. There is an increasing trend to use landmen charging a day rate from $300.00 to $500.00 plus expenses to prepare chain sheets or abstracts. This permits the attorney to examine the information presented in his office.

**Michigan**

**A. Records in the County**

In Michigan, all land records are maintained by the county register of deeds. There are 83 counties in Michigan. By statute in Michigan, each register of deeds is to maintain separate grantor/grantee indices for deeds and for mortgages. While the statutes are fairly specific in terms of the types of books and information to be maintained by the register of deeds, in both form and content (MCLA 565.24 et seq.; MSA 26.542 et seq.), in actuality there is a wide diversity in the systems employed by the various county registers of deeds. In fact, certain registers of deeds maintain only tract indices. Other registers of deeds maintain tract indices in addition to the official grantor/grantee indices. Many registers of deeds have, over time, employed a variety of systems for the maintenance of the records. These include books, card systems, computer printouts and computer disks. The registers of deeds generally will maintain separate books or files for liens other than mortgages. The register of deeds also maintain separate files for UCC financing statements.

In addition to the register of deeds office, other pertinent land title records may be located in the county probate court files; circuit court files (although a lis pendens should be filed in the register of deeds office for any circuit court action which pertains to real estate); county treasurer's office (as to the status of real estate taxes - Michigan has a series of statutes which, in effect, provide for the auctioning-off of property for which real estate taxes have not been paid for three consecutive years); and county clerk's office (to locate co-partnership filings and certificates of persons doing business under an assumed name). All other instruments relating to real property should be recorded in the register of deeds office.

As previously noted, certain registers of deeds maintain tract indices as well as grantor/grantee indices. Generally, the register of deeds will charge an hourly rate for the use of the tract index, which is not the official county index. No charge may be made for use of the official grantor/grantee indices. A landman or title attorney performing a stand-up title examination would likely run title in the local county abstractor or register of deeds tract index, and confirm title in the official records for a period commencing with the first recorded conveyance prior to forty years from that date of the search. This limited method of searching title is in keeping with the Michigan Forty Year Marketable Record Title Act (*MCLA 565.101* et seq.; *MSA 26.1271* et seq.). The Marketable Record Title Act is remedial in effect and, with certain exceptions enumerated in the statute, may be relied upon to cure defects which pre-date the period of time established by the statute. The county abstractors vary as to the rates charged, and in certain instances, whether or not they allow the public to use their indices.

Most ***oil*** and gas abstracts in the State of Michigan are prepared by one of two state-wide ***oil*** and gas abstractors, as opposed to local county abstractors. Generally, there is a per page, as well as a certificate charge, and the abstractors will, upon request and with the inclusion of an abstractor's note, provide partial copies of an instrument.

Michigan is a race-notice jurisdiction (*MCLA 565.29; MSA 26.547*). Unrecorded, or after-recorded conveyances are void as against subsequent purchasers in good faith and for a valuable consideration, as against a party whose instrument of conveyance is first duly recorded. The fact that the first recorded conveyance is in the form of a quit claim deed, or contains language of quit claim or release, shall not affect the issue of good faith.

As noted in the statute, in Michigan, a person is charged with notice of facts which a reasonable person in the use of ordinary diligence would have ascertained. This has been interpreted to include, for instance, a diligent effort to obtain a copy of any written instrument which, although not of record, is referenced in a recorded instrument. Inclusion of such a reference would be construed to constitute constructive notice of the terms of the unrecorded instrument, as a matter of law.

**B. Records Outside the County**

In addition to the county records, the Michigan Secretary of State maintains Uniform Commercial Code files on a state-wide basis. The Michigan Corporations & Securities Bureau maintains records of all limited partnership and corporate filings, as required by law. Although not official records, the State of Michigan, Department of Natural Resources, Lands Division, maintains separate files as to the title to lands in which the State of Michigan owns the ***oil***, gas and minerals, whether or not in conjunction with the surface. These files would include copies of the original instrument whereby the interest was acquired or reserved, as well as any and all ***oil*** and gas leases issued by the one State, any assignments (state ***oil*** and gas lease forms require state approval before an assignment of all or part of the lessee's interest is effective), ratifications, extensions and releases thereof.

**C. Other Topics**

When conducting a stand-up title examination, it is important to know that most county abstractors, as well as registers of deeds that maintain tract indexes, also maintain a miscellaneous name file wherein may be located any instrument recorded in the county register of deeds office which does not contain a specific legal description. This may include certificates of death, certain probate proceedings, judgments of divorce and powers of attorney. As previously mentioned, in performing a stand-up search, a title attorney would generally review the county abstractor's tract index from U.S. government patent to the date through which the index is updated, and thereafter confirm title by conducting a limited grantor/grantee search in keeping with the provisions of the Forty Year Marketable Record Title Act. Copies of all pertinent documents would be obtained and the title examiner would thereafter prepare a title opinion from these materials, in effect compiling his/her own abstract with the title notes serving as an index. In addition to these records, it is generally advisable to review the county treasurer's tax records for the prior three years as to the property in question; and if there are any partnerships, persons conducting business under an assumed name, incomplete probate proceedings or circuit court actions, it would be advisable to review the appropriate records as noted above.

Frequently, attorneys and landmen will work together to cure title while the title opinion is being drafted. On larger projects (generally acquisitions of producing properties) the attorney may review the records and compile a list of the "liber and page" recording references for the pertinent documents. The landman would then review the appropriate books, hard copies, or microfilm and obtain and provide copies of same to the attorney. Depending upon the client and the sophistication level of the landman, the attorney may delegate more responsibility to the landman for review of the records. However, most clients desire a stand-up title opinion which is based, at least in part, upon a review of the pertinent records by the attorney drafting the title opinion.

**MISSISSIPPI**

**A. Records in the county**

1. The records in the courthouses of Mississippi are kept in four places:

1. Chancery Clerk's office;

2. Circuit Clerk's office;

3. Tax Assessor's office;

4. Tax Collector's office.

The Chancery Clerk's records include the following:

1. Deeds

2. ***Oil*** and Gas Leases

3. Assignments

4. Mortgages

5. Liens

6. Lis Pendens

7. Probate records

8. Court files affecting lands and title to lands

Mississippi has separate courts of law and equity at the trial level. The chancery court is the equity court. The circuit court is the law court. All actions relating to divorce, estates, adoption, confirmation of title, cloud removal and partitions are all in the chancery court and records, court files and indices of these actions are maintained in the office of the chancery clerk.

The circuit clerk's office records include the following:

1. Judgement roll

The Tax Assessor's office records include the following:

1. Tax maps

2. Individual tax statements

3. Indices to tax assessment records

The Tax Collector's office records include the following:

1. Tax statements for current year

2. Tax receipts

After the tax collection process is completed tax records and books are transferred to the office of the chancery clerk, where they may be examined in order to insure that all taxes have been paid. Taxes may be back assessed for seven years and may be redeemed from tax sales within two years after the sale. As a result a thorough title examination will include verification that taxes have been paid for the past seven years. Sometimes for reasons of expense or time, tax payments will only be verified for the most recent three-year period.

Mississippi counties maintain both a tract or sectional index and a name (direct and reverse) index. Most counties maintain separate indices for deeds and for deeds of trust (mortgages). In most counties, ***oil*** and gas records are indexed and kept among the deed records. In some counties, ***oil*** and gas instruments are indexed and maintained among the mortgage records.

Ten counties in Mississippi have two "judicial" districts, with a separate courthouse for each district. These counties and the location of the two courthouses are: Bolivar County (Rosedale and Cleveland); Carroll County (Carrollton and Vaiden); Chickasaw (Houston and Okolona); Harrison (Gulfport and Biloxi); Hinds (Jackson and Raymond); Jasper (Paulding and Baysprings); Jones (Ellisville and Laurel); Panola (Sardis and Batesville); Talahatchie (Charleston and Sumner); and Yalobusha (Coffeeville and Water Valley).

**B. Records Outside the County**

The Mississippi ***Oil*** and Gas Board contains records dealing with its enforcement of the ***oil*** and gas conservation laws of Mississippi, including permits, pooling, unitization and production records. The main office is located at 500 Greymont Avenue, Suite E, Jackson, Mississippi 39202. Telephone: (601) 354-7412. Website: http://www.ogb.state.ms.us

The Public Lands Division of the office of the Secretary of State is a successor of the now abolished State Land Office (Office of the State Land Commission) and as such maintains among other records copies of original government surveys of all lands in Mississippi, state land patents issued by the state of Mississippi and list of lands sold to the state for taxes. The Secretary of State also maintains records concerning sixteenth section school lands and publicly owned tidelands.

**C. Other Topics**

1. There are currently no abstract companies or plants in Mississippi. The predominant practice in the rendering of ***oil*** and gas title opinions is for landmen to prepare an abstract, which consists of the pertinent title documents photocopied from the public records, for examination by an attorney.

2. Lester and Witcher Abstract Library has for rent an extensive library of over 60,000 volumes of abstracts prepared by Lester and Witcher Abstract Company from the 1940's to 1990. Contact: Teresa Moody, Lester and Witcher Abstract Library, (601) 353-4946. These abstracts can be rented for $1 per page.

3. As each county has a sectional or tract index it is relatively easy to prepare an initial take-off.

**Montana**

**A. Records in the County**

1. There are 56 counties in the State of Montana, with ***oil*** and/or gas production attributable to 32. The primary producing areas are the Williston Basin (northeast Montana), Big Horn Basin (south-central Montana), Powder River Region (southeast Montana), Sweetgrass Arch (northern Montana) and the central and south-central portions of Montana.

The types of records maintained in the Montana County Clerk and Recorder's offices include, but are not limited to, the following:

1. Patents;

2. Receiver's Receipts;

3. Deeds;

4. Mortgages;

5. Releases of Mortgages;

6. Contracts for Deeds;

7. Easements and other servitudes;

8. Leases (***oil*** and gas, coal, surface, etc.);

9. Releases of various encumbrances;

10. Lis Pendens;

11. Judgments; and,

12. Other instruments bearing on real property ownership;

which are maintained in separate books with separate indices. The county clerk and recorders in the eastern part of Montana all maintain unofficial tract indices as well as the official grantor/grantee indices. As you move westward in the state, the availability of public tract indices becomes less prevalent.

The Clerk of the District Court in each county usually maintains Judgement and Lien Records. However, these records may be located in the Clerk and Recorder's office. Real and personal property tax information can be obtained from the County Treasurer and County Assessor.

2. In addition to an instrument having to be properly executed and acknowledged, the clerk and recorder cannot record any deed, mortgage or assignment of mortgage unless the post office address of the grantee, mortgagee, or assignee of the mortgagee is contained therein. Recording fees are fixed by statute.

3. In those counties which still maintain hard-copy records, instruments are identified by book and page. In counties which have switched to using aperture cards, instruments may be referred to either as a document number or by book and page. Yet other counties utilize microfilm, and generally refer to recording information as a film number followed by an exposure number.

4. The grantor/grantee indices maintained for various records differ from county to county. *Montana Code Annotated § 7-4-2619* sets forth the indices required to be maintained by every county clerk and recorder. Several categories of documents may be grouped together in a single index volume.

5. In Montana, tract indices are not official, thus grantor/grantee indices are required, and will necessarily contain instruments although lacking a legal description.

6. I have never experienced an instance where a county clerk and recorder would refuse to make a copy of the tract index for use by an examiner. As a practical matter, however, many of these indices are quite large, and do not readily lend themselves to copying.

7. Upon entry in the judgment rolls, the lien automatically attaches to all real property located in that county owned by the judgment debtor. In practice, when a judgment is in the nature of quiet title or otherwise serves to transfer title to an interest in land, the judgment should also be recorded in the clerk and recorder's office. To impose a lien upon the judgment debtor's property located in a county other than the county in which the action was maintained, the judgment must be transcribed to the other county and entered in the judgment rolls thereof.

8. Although property owned by a nonresident decedent devolves to the successors at death, either original or ancillary probate proceedings in the State of Montana are necessary to establish proper succession to such decedent's property interests.

9. In Montana, bankruptcy proceedings are filed with the Bankruptcy Court in the City of Butte. Bankruptcy proceedings are not recorded as such, although the procedure is certainly available.

10. Montana follows the general rules as to U.C.C. filings.

11. The method of indexing birth certificates varies from county to county.

12. Every abstract company which I have utilized maintains tract indices. I am unaware of any counties fitting your description wherein the abstractor does not allow access by landmen or attorneys to its tract indices. Abstractors generally charge $20 to $50 per hour for the use of their tract indices by either an attorney or landman, and they charge $1 to $5 per instrument if they prepare chain sheets. Unfortunately, there are some abstractor's records that are suspect so that the examiner has no alternative but to use the grantor/grantee indices in the county clerk and recorder's office.

**B. Records Outside the County**

13. Patents are located in the Montana State Office, Bureau of Land Management, Billings, Montana.

14. The Montana Board of ***Oil*** and Gas Conservation is the State agency charged with regulating drilling and production activity. The administrative office is located at 1520 East Sixth Avenue, Helena, Montana 59620. The technical office and southern district field office is located at 2535 St. Johns Avenue, Billings, Montana 59102. The northern district field office is located at 218 Main Street, Shelby, Montana 59474. The most critical information from an examination standpoint is any special field rules or spacing orders which may be applicable to a particular tract of land. In my opinion, there really isn't any information maintained by the Board which needs to be available in the county.

**C. Other Topics**

16. Standup title examination of fee lands would generally be conducted as follows, with the procedures perhaps varying depending on the nature of the opinion (i.e., drilling, division order, acquisition, financing, etc.):

First, a patent check is undertaken at the Montana State Office, Bureau of Land Management, to ascertain the existence of any reservations which might be contained therein. Concurrently with that examination, the appropriate abstractor is contacted and requested to compile chain sheets covering the tract of land to be examined.

In the county clerk and recorder's office, the documents indicated by the chain sheets are pulled and examined, with the various grantor/grantee indices consulted as necessary. Thereafter, the federal tax lien index and various lien indexes are examined for the presence of any liens. The clerk of district court's judgment docket is examined for all parties appearing in the chain of title, as well as for any probate information which might be indicated. The county treasurer's and assessor's records are also checked to determine the existence of any delinquent taxes, be they property or severance taxes.

Depending upon the nature of the opinion and the wishes of the company for which it is being prepared, the Board of ***Oil*** and Gas Conservation records and files are examined with respect to spacing orders, operator status, etc. Finally, the Montana Secretary of State is contacted to ascertain any outstanding UCC-1 financing statements and the corporate status of certain entities, should an issue have arisen concerning such items.

**New Mexico**

**A. Records in the County**

1. New Mexico has 33 counties. ***Oil*** and gas development is primarily in the following areas: southeastern New Mexico, including Lea, Eddy, Chaves and Roosevelt counties; Northwest New Mexico, including Rio Arriba and San Juan Counties; and North Central New Mexico including Colfax County.

Prior to 1986, most New Mexico County Clerks maintained the following separate records:

1. Deeds;

2. Mortgages; and

3. Miscellaneous.

***Oil*** and gas leases and assignments were recorded in the Miscellaneous Records. Since 1986, all instruments are recorded as "Clerk's Records". Clerks maintain Grantor/Grantee indices, not tract indices. In the last few years, most Clerks have placed their instruments and indices on computer records. County Clerks also maintain the records of the Probate Court.

The Clerk of the District Court in each county maintains the following records which should also be examined:

1. Divorce Decrees;

2. Foreclosures;

3. Civil suits; and

4. Probates filed in District Court.

New Mexico requires that an instrument be acknowledged and signed. The county clerks in N.M. are charged with the administration of these requirements.

2. Recording cost: $9 for the first page of a document, $2 for each additional page. If an assignment, mortgage, release of mortgage, etc., affects more than one property, then technically there should be a $9 charge for each property in addition to the page charge stated above. Also, if there is more than one acknowledgment, there should be an additional charge.

The recording cost is statutory but not all county clerk's offices are uniform in their interpretation of the statute.

3. Records are identified by book and page. In addition, some older records are identified by "record" (i.e., Deed Records, Mortgage Records, Mics. Records, etc.).

4. General Index for all records. Seems to be consistent throughout the state.

5. County Clerk does not maintain a tract index - this is done by an abstract company. The abstract company has a "general" file for instruments that do not contain a legal description.

6. The tract index is maintained by the abstract company and is personal property, not a public record. Abstract company will not provide a "copy" of a tract index but will allow someone to use the index, usually for a fee.

7. A "Transcript of Judgment" must be filed with the county clerk. This instrument summarizes the judgment.

8. In order to ensure that title of a decedent is marketable, the will must be probated, the estate administered, and taxes must be paid.

9. Bankruptcy Court Records are in Albuquerque, New Mexico. In order to give constructive notice, something must be filed in the county; however, there is nothing to require a person to do so.

10. The general rule as to UCC filings applies.

11. Birth Certificates are indexed by mother's maiden name, father's name, baby's name, date of birth, city and county. There is a $10 charge for a copy. Death certificates are indexed by name, date of death, place of death. There is a $5 charge for a copy.

There are limitations as to who can obtain a copy of the records from the Bureau of Vital Statistics in Santa Fe, New Mexico (505) 827-0212.

**B. Records Outside the County**

1. For state lands, it is necessary to check the records at the State Land Office in Santa Fe, New Mexico. For federal lands, it is necessary to check the records at the Bureau of Land Management in Santa Fe, New Mexico.

2. The ***Oil*** Conservation Division is located in Santa Fe and has District Offices in Aztec, Artesia, and Hobbs. The addresses are: 1000 Rio Bravos Road, Aztec, NM 87410 (50) 334-6178; Lea County: P. O. Box 1980, Hobbs, New Mexico 88240 (505) 393-6161); Eddy County is: P. O. Drawer DD, Artesia, New Mexico 88320 (505) 748-1283.

Forms sent to OCD when state or fee lands are: Application for Permit to Drill (C-101), Plat (C-102, State Sundry (C-103), Request for Allowable and Transport (C-104) and Completion (C-104).

OCD records do not provide constructive notice. Bureau of Land Management records do not provide constructive notice.

**C. Other Topics**

Usually an attorney would employ either a landman or a professional "take-off" service to prepare a run sheet from the county records or do it himself.

The following is a list of abstract companies and their specific charges:

|  |  |  |
| --- | --- | --- |
| Abstract Company | Charge to Landman | Charge to Lawyer |
| Chaves County: |  |  |
| Lawyers Title | $25.00 | $25.00 |
| Colfax County: |  |  |
| Title Services, Inc. - Raton |  |  |
| Eddy County: |  |  |
| Currier Abstract Company- Artesia | $25.00 | $100.00 |
| Guaranty Title Company - Carlsbad | $25.00 | $100.00 |
| Lea County: |  |  |
| Elliott & Waldron Title & Abstract Co. - Lovington | $25.00 | $100.00 |
| Rio Arriba County: |  |  |
| Espanola Abstract Company, Inc. - Espanola |  |  |
| Roosevelt County: |  |  |
| Graham Abstract Company, Inc. - Portales | yes? | yes? |
| San Juan County: |  |  |
| Guardian Abstract.& Title Co., Inc. - Farmington | yes? | yes? |
| San Juan County Abst. & Title Co. - Farmington | \* | \* |

**North Dakota**

**A- Records in the County**

1. There are 53 counties in North Dakota; 16 with commercial ***oil*** production. These 16 counties are all located in the approximate western half of the State. The geologic reservoir is known as the Williston Basin.

In North Dakota, the county official in charge of maintaining land records is known as the County Recorder. Pursuant to North Dakota law, all County Recorders are required to keep a tract index. *N.D. Cent. Code § 11-18-07*. They are also required to keep separate grantor and grantee indices. *N.D. Cent. Code § 11-18-08*. It is the option of the County Recorder whether to maintain one tract index for all instruments or whether to maintain separate deed, mortgage and miscellaneous tract indices. Each County Recorders' office must be consulted to determine how many separate tract indices they maintain. In addition, tax liens are filed in the Central Notice System of the Secretary of State and can be checked in the Office of the County Recorder.

2. For an instrument to be recordable, it must contain an address for each grantee named in such deed. *N.D. Cent. Code § 47-19-05*. Additionally, the execution of most instruments must also be acknowledged. *N.D. Cent. Code § 47-19-03*. The cost of recording instruments is set by statute. *N.D. Cent. Code § 11-18-05*. In most instances the cost of recording is $10 for the first page and $3 for each additional page. By virtue of the statute setting the County Recorders' fees, there is no discretion with the County Recorders in this regard as to setting the fees.

3. County Recorders have discretion to identify instruments recorded either by book and page or by document number. Some County Recorders utilize both systems; for instance, upon conversion from books to microfiche, the County Recorders commonly changed from a book and page system to a document number system.

4. Typically, one Grantor/Grantee index is maintained for all records. However, the practice varies amongst the County Recorders as to how many tract indices they maintain, some only have one index for all instruments, whereas others maintain as many as three separate tract indices. There may be more than one volume to a particular tract index. For example, several County Recorders' offices have two or more deed indices which resulted from the original deed index being filled to capacity and necessitating subsequent indices. Thus, a title examiner should first ascertain how many separate types of indices are maintained, and then how many volumes there are of each separate index.

5. Most County Recorders also maintain a separate index, usually known as a "miscellaneous" index, identifying all recorded instruments which do not contain a legal description and thus cannot be put into a tract index.

6. Most County Recorders permit copying of tract indices. In many counties a tract index can be photocopied, however, if the tract index books are very old, they often cannot be copied.

7. A judgment need not be recorded in order to constitute a lien. The judgment becomes a lien on all real property, except the homestead, of the judgment debtor upon docketing by the clerk of court. *N.D. Cent. Code § 28-20-13*. In order for the judgment to become a lien in a county other than that in which the judgment was rendered, the judgment must be transcribed to the clerk of court of such other counties.

8. An ancillary probate must be completed in this state in order to vest title of a non-resident decedent. *N.D. Cent. Code Title 30.1, Article III*.

9. A title examiner need not inquire of the Clerk of Bankruptcy Court nor require the abstracter to certify as to bankruptcy filings with the Bankruptcy Court relating to any person in the chain of title, but the examiner must take notice of a copy of the bankruptcy petition or notice of the bankruptcy petition recorded or filed with the County Recorders. *North Dakota Title Standard 16-01*.

10. The proper place to file, if local law governs perfection, in order to perfect a security interest in "as-extracted" minerals, or when the financing statement is filed as a fixture filing and the collateral is goods that are or are to become fixtures, is in the office of the County Recorders. In all other cases, filing may either be in the office of the County Recorders in any county in this state or in the office of the Secretary of State. *N.D. Cent. Code § 41-09-72*. There is a limited exception in order to perfect a security interest in collateral, including fixtures, of a transmitting utility; in which case the proper place to file is in the office of the Secretary of State. *N.D. Cent. Code § 41-09-72(2)*.

11. Birth and death certificates are maintained by the North Dakota Department of Human Services at the state capitol in Bismarck. Birth certificates are never recorded and death certificates are only recorded if necessary to establish the death of a life tenant or a joint tenant.

12. To the best of our knowledge, all abstract companies maintain a tract index. As mentioned previously, all County Recorders are required by law to maintain a tract index.

13. No separate state repository exists which needs to be reviewed when preparing a title opinion. However, typically a review will be made of the records of the ***Oil*** and Gas Division of the North Dakota Industrial Commission and of U.C.C. filings if producing properties are being transferred.

**B. Records Outside the County**

14. North Dakota Industrial Commission, ***Oil*** and Gas Division, 1016 East Calgary Avenue, Bismarck, North Dakota 58501; phone (701) 328-8020. It is not common practice in this state to examine the records of the ***Oil*** and Gas Division in preparation of a title opinion. ***Oil*** and Gas Division documents which are commonly recorded in the counties are force pooling orders and orders establishing secondary recovery units.

15. A party engaged in ***oil*** and gas drilling is subject to the regulations of the ***Oil*** and Gas Division and also to any orders issued with respect to the land in question.

16. If a title opinion includes ***oil*** and gas properties owned by the State of North Dakota, typically, a review of the records of the State Land Department at Bismarck will be made. If a title opinion includes ***oil*** and gas properties owned by the United States of America, typically, a review of the records of the Bureau of Land Management at Billings, Montana, will be made.

17. To conduct a title examination of fee lands utilizing the public records in North Dakota, one should examine the:

a. County Recorder's Office:

1. Original Government Survey or Master Title Plat

2. Tract (Deed) Indices

3. Mortgage Indices (if applicable)

4. Miscellaneous Indices (if applicable)

5. State/Federal Tax Lien Indices

6. Review of the specific documents and instruments indexed against subject lands.

b. County Treasurer's and Auditor's Offices:

1. Check status of county real property taxes

c. Clerk of District Court's Office:

1. Judgment Docket for all parties

2. Probate Index (if applicable)

18. In many instances, prior to an attorney being requested to prepare a title opinion, a landman has already examined title. In these instances a landman is often an excellent source of information to the title attorney in situations where questions arise which are not answered by examination of record title. For example, if leases appear of record from strangers to the title who live out of state, the landman is often helpful to explain that such persons are the heirs of a record title mineral owner who is now deceased and whose estate has not been probated in this state.

**Oklahoma**

**A. Records in the County**

Oklahoma has 77 counties of which 74 produce ***oil*** and gas. The County Clerk is the repository of all records other than court documents. The County Clerk's office maintains a tract index. The tract index is divided by the sections within each township and range. For example, if you wish to only look at a 40 acre tract within a section, the page would show all documents filed against that 40 acres. The page would also show all of the documents shown against the entire section. The tract indices shows all deeds, mortgages, releases and all other documents that specifically mention a referenced tract within the document. The indices identify the book and page of each document.

The types of records maintained across the State of Oklahoma are essentially the same in all offices. The primary difference is that some counties maintain records on microfilm or microfiche.

In approximately one-half of the counties in Oklahoma, the abstractor will permit examination of its own tract indexes for free. In the other one-half of the counties, the abstractor will let a landman examine its tract index, but not an attorney. From experience, an examiner learns that in certain counties, the tract indices of the abstractor is more accurate than the tract indices maintained by the County Clerk.

A stand-up title examination would consist of a review of the following indices and records:

a. County Clerk's office

(1) Tract Index

(2) Judgment Lien Index

(3) Federal Tax Lien Index

(4) Oklahoma State Tax Lien Index

(5) Mechanic's and Materialmen's Liens Index

b. County Treasurer's office

(1) Ad Valorem Property Tax Records

c. County Clerk's office

(1) Civil Suit Index for Pending Suits

(2) Probate Index (if owners appear to be deceased)

d. ***Oil***-Law Records

(1) Review of Drilling and Spacing Orders and Pooling Orders

The County Clerk also maintains a miscellaneous index which lists all instruments that do not contain a legal description. The County Clerk also maintains a grantor/grantee index to be reviewed if the tract index appears to be in error.

The filing of a Mortgage and Financing Statement affecting the ***oil*** and gas leasehold is filed in the County Clerk's records and should be indexed against the tract indices. The County Clerk maintains a separate index and books for tax liens and judgment liens which are referenced by name, not tract.

Since all tract indices are public records, the examiner can obtain a copy of the tract index by providing the clerk with an affidavit stating that the examiner will not sell the tract index copied to a third party for profit. *67 O.S. 24*

Court cases involving title to land are found in the Court Clerk's office indexed by parties to the litigation. A judgment or order affecting the ownership of land should be recorded in the County Clerk's office, but often is not. A judgment lien is perfected in a county when the judgment, together with an affidavit of judgment is recorded.

The statutory cost of recording a document is $13.00 for the first page and $2.00 for each additional page.

**B. Records Outside the County**

Orders of the Corporation Commission affect title to mineral interests. The effect of an order creating a Drilling and Spacing Unit is to pool for royalty purposes the entire mineral interest within each unit. A Force Pooling order forces all parties with the right to drill, being unleased mineral owners or lessees of ***oil*** and gas leases, to either participate in the drilling or to farmout to the participating parties. The statutes require an affidavit of pooling and elections under a pooling order be filed in the County Clerk's records. The affidavit constitutes constructive notice when filed. *52 O.S. 87.4*. Other Corporation Commission orders are not recorded in the county so copies of said orders must be obtained either directly from the Corporation Commission, Jim Thorpe Bldg., 2101 North Lincoln Boulevard, Oklahoma City, OK 73105, (405) 521-2264 or from ***Oil***-Law Records, Eight N.W. 65th, Oklahoma City, OK 73116, (405) 840-1631.

While all instruments affecting title to railroads can be filed in the County Clerk's office, all such instruments are officially maintained in the office of the Secretary of State.

**C. Other Topics**

The examiner would begin in the County Clerk's office and list all instruments reflected by the tract index. The Grantor/Grantee index maintained by the County Clerk would be reviewed only in the event the tract index appeared to be incomplete. The County Clerk also maintains a "general index" which contains all instruments that do not contain the description of specific property.

An abstractor will charge a fee per page or entry for preparing an abstract from $1.00 per page to $5.00 per page, plus a standard fee of $50-185 for the certificate. Upon direction, most abstractors will limit the abstract and include a note describing the limitation. Often the abstractor will only copy the first page of a mortgage and omit the balance. Often the abstractor will only include the judgment in a lawsuit that may contain many instruments, particularly if the judgment is over 10 years old. Abstractors are accustomed to limiting their coverage to either the surface or the minerals.

In Oklahoma, as in other states, before an attorney is requested to prepare a title opinion, often a landman has already examined title and prepared what is commonly known as a "takeoff". Thus, to assist the attorney in the preparation of the title opinion, the landman will often furnish a copy of the takeoff along with copies of ***oil*** and gas leases obtained by the landman, including any assignments thereof. In these instances, the attorney frequently discusses title issues with the landman where the answer is not apparent from the records examined.

If the attorney is conducting a stand-up examination, the landman often works with the attorney in the County Clerk's office in whatever manner requested by the attorney.

It is not common in Oklahoma for a landman to build an abstract. The attorney either utilizes the landman's "takeoff" records or orders an abstract.

**Texas**

**A. Records in the County**

1. Texas has 254 counties and there are only 35 counties without any ***oil*** and gas production last year. While the maintenance of certain types of records is mandated by law, most county clerks have exercised considerable discretion in how the records are organized and how they are maintained.

Prior to 1980, County Clerks were required to maintain separate volumes of books with corresponding indices for at least:

1. Deed Records (since 1836)

2. ***Oil*** and Gas Lease Records (since 1917)

3. Abstract of Judgment Records (since 1879)

4. Deed of Trust Records (since 1879)

5. Federal Tax Lien Records (since 1923)

6. Financing Statements (since 1966)\*

7. Lis Pendens Records (since 1905)

8. Mechanic's and Materialmen's Lien Records (since 1939)

9. Release Records (since 1836)

10. State Tax Lien Records (since 1961)

11. Utility Security Records (since 1966)

12. Vendor's Lien Records (since 1879)

13. Birth Records and Death Records (since 1903; since August 29, 1929, all county clerks forwarded a copy of Birth Certificates and Death Certificates to the Bureau of Vital Statistics in Austin) (phone)

14. Marriage Records (since 1837)

15. Probate Records (since 1836)

For a detailed discussion of the Record keeping requirements for all of the above and the statutory authority therefor, see Volume 1 of the Texas County Records Manual prepared by the Local Records Division of the Texas State Library at Austin, Texas (1987) and maintained by most County Clerks. All of the above described records are accessed by separate (usually) direct/reverse Grantor/Grantee indices.

Since 1980, to assist in the computerized consolidation of records, most County Clerk's of the more populated counties elected to microfilm their records and to consolidate their books and indices into an "Official Public Records of":

a. Real Property, etc.

1. Real property;

2. Personal property and chattels;

3. Governmental, business and personal matters.

b. Courts

4. Probate;

5. County/civil;

6. Criminal;

7. Commissioner's.

Clerks also have the option, if not microfilming records, to consolidate indices into the same seven categories and maintain hard copies of all records. *§ 193.008, Texas Government Code*.

County Clerks state-wide charge $11.00 for the first page and $4.00 for each subsequent page to record an instrument. Effective September 1, 1991, all clerks have the option to charge up to an additional $5.00, or less per instrument, to go into a fund designated for records management and preservation. Also, if grantees' addresses are not included on the instrument, the Clerk can, and often does, charge an additional $25.00 to record the instrument. In order to save a phone call, you should enclose $5.00 plus the state-wide recording fee and the clerk should refund any amount due.

Since County Clerks in Texas have not been required by law to maintain a tract index, it would be very unusual to locate a tract index in the County Clerk's office. (You shouldn't rely on it if you find one). Most, but not all, abstract companies maintain a tract index.

The District Court has jurisdiction to litigate title to land. If you choose to check further than the Lis Pendens Records recorded with the County Clerk, the examiner should review the District Clerk's index of litigation.

The Tax Assessor-Collector of each county maintains a current list of all surface owners and owners of producing ***oil*** and gas income. Texas does not tax non-producing minerals. The Tax Assessor-Collector's records usually provide a current address for all surface owners and owners of producing minerals and can identify the amount of taxes due, if any.

**B. Records Outside the County**

Usually, if a state reserves a mineral interest at the time it issues a patent, the reservation is contained in the patent. Unfortunately, Texas is not so straightforward. If the land is patented prior to September 1, 1895, the state had no authority to reserve any mineral interest. For land patented after September 1, 1895, the examiner must determine whether or not the land was classified as mineral or classified in some other manner, such as dry grazing, agricultural, etc. For lands patented subsequent to September 1, 1895, and classified as mineral land, the state reserved the following:

1. For mineral classified land patented between September 1, 1895, and August 21, 1931, the state and the surface owner shares equally in all economic benefits.

2. For land patented with a mineral classification between August 21, 1931, and June 19, 1939, the state reserves a non-participating royalty of "1/8 of all sulphur and other mineral substances from which sulphur may be derived or produced and 1/16 of all other minerals" including ***oil*** and gas; and

3. Effective June 19, 1939, the state may reserve "not less than" 1/8 of all sulphur and 1/16 of all minerals. The state usually reserves all minerals.

Not all counties contain separate classification records and the recording of a classification by reference to the land classified is infrequent. Therefore, an examiner must contact the General Land Office (512) 463-5001 in Austin and obtain a letter of classification and/or Certificate of Facts (all instruments preceding the issuance of the patent) to provide this information.

Also, in order to obtain the history or current status of land which the examiner believes may be held by production, the examiner must contact the Central Records Division of the Texas Railroad Commission, whose address is:

Railroad Commission of Texas

ATTN: Central Records Division

P. O. Box 12967

1701 N. Congress Avenue

Austin, TX 78711-2967

(512) 463-6882.

The examiner should provide the Commission with the Railroad Commission district number and/or the county, the field name, the name of the operator and the name of each well upon which he is requesting information. The following forms are the forms most often requested:

1. Form W-1 - Application for Permit to Drill, Deepen or Plug-back.

2. Form W-2 - ***Oil*** Well Potential Test, Completion of Recompletion Report and Log.

3. Form W-9 - Net Gas-***Oil*** Ratios Report.

4. Form G-1 - Gas Well Back-Pressure Test, Completion or Recompletion Report and Log.

5. Form P-12 - Certificate of Pooling Authority.

6. Form P-15 - Statement of Productive Acreage.

**C. Other Topics**

An examiner would prepare a run sheet covering the land examined either from the tract index prepared by an abstract company in the county or by utilizing the direct/reverse Grantor/Grantee, etc., indices provided by the County Clerk.

While a landman might be able to examine the tract indices of an abstracter at no charge, most abstracters will charge a title attorney up from $100.00 per hour, if they permit the title attorney to examine the tract indices at all.

Abstract companies charge by the page at a range from $4.00 to $8.00 per page. Generally, the abstracter will not limit the instruments included in the abstract or agree not to copy every page of every instrument.

Landmen work with attorneys in two ways:

1. Standup examination - The landman works with the attorney in the County Clerk's office with the landman preparing run sheets and delivering them to the attorney who examines the instruments indicated.

2. Abstract preparation - The landman "builds" an abstract himself from sovereignty to present by compiling a run sheet and copying the pertinent pages of all documents and delivering them to an attorney for examination, usually in the attorney's office. The landman would include all curative instruments that the landman believed would be necessary.

**Utah**

**A. Records in the County**

Currently, the majority of ***oil*** and gas development on fee lands in the State of Utah occurs in the Altamont-Bluebell field located in Duchesne and Uintah counties and the coalbed methane plays located in Carbon and Emery counties. The deeds and records pertaining to surface and mineral ownership and interest in these and other counties in the State are maintained by the respective county recorders.

**1. County Recorder**

County recorders are required by Utah statute to maintain the following records and indices:

a. Ownership Plats -- Ownership plats are required under *Utah Code Annotated Section 17-21-21* (2001) and show the record owners of each tract, the dimensions of the tract, and generally the tax I.D. number for that tract for ad valorem tax purposes. They typically only apply to surface ownership.

b. Entry Record -- Required under *Utah Code Annotated Section 17-21-6(1)* (2001). Although not an index *per se*, this record is a register of the receipt of instruments to be recorded in order of its reception or entry showing the sequential serial or entry number, the names of the parties, the date of the instrument, hour and day of recording, the kind of instrument, the book and page, and a brief description of the premises.

c. Abstract (tract) Index -- Required under *Utah Code Annotated Section 17-21-6(1)(f)* (2001). This index shows by tract or parcel (by township, range and section, which is then broken down into quarter sections), every conveyance, encumbrance, or other instrument recorded as against that tract, the date and kind of the instrument, the date of the recording, the book and page and entry number where recorded.

d. Grantor/Grantee Index -- Required under *Utah Code Annotated Section 17-21-6(1)(b)* and *(c.)*(2001). As the name implies, the documents are indexed alphabetically by grantor and by grantee and are maintained in separate volumes.

e. Mortgagor/Mortgagee Index -- Required under *Section 17-21-6(1)(d)* and *(e)* (2001). This index contains a listing of mortgages, deeds of trust, liens, and other instruments in the nature of an encumbrance upon real estate. The mortgagor's index must set forth the entry number of the instrument, the name of each mortgagor, debtor or person charged with the encumbrance in alphabetical order, the name of the mortgagee, lien holder, creditor or claimant, the date of the instrument, time of recording, consideration paid, the book and page and entry number in which it is recorded, and a brief description of property charged; the mortgagee's index contains the same information with the name of the mortgagee, lien holder, creditor or claimant in alphabetical order. Utah no longer requires the maintenance of a chattel mortgage index. Security interests in personal property are generally governed by the Revised Article 9 of the Uniform Commercial Code ("UCC"), codified in *Utah at Section 70A-9a-101, et seq*. (*see* subsection I. below).

f. Map, Plat and Subdivision Index -- Required under *Utah Code Annotated Section 17-21-6(1)(g)* (2001). This index, added to the statute by 1983 amendment, codified a common practice previously existing in the counties whereby subdivisions and other plats as well as recorded maps were separately indexed.

g. Index to Powers of Attorney -- Required under *Utah Code Annotated Section 17-21-6(1)(h)* (2001). However, under *Section 57-4a-4(1)(g)* (2000), a recorded document executed by an attorney in fact is presumed to be genuine and executed within the scope of the attorney's authority. The former statute (*Utah Code Annotated Section 57-1-8*, repealed in 1989) specifically required that every power of attorney be acknowledged and recorded in the same manner as conveyances of real estate (date and time of recording, the book and page, and the entry number).

h. Mining Claim Index -- Not required by statute, but maintained by some county recorders by locator name and by claim name. *Utah Code Annotated Section 40-1-4* (2002) requires notice of location to be filed in the office of the county recorder in which the claim is situated within 30 days of posting the location of a claim. However, most counties do not abstract the claim unless a subsequent conveyance affecting the same property is recorded.

I. Uniform Commercial Code Index -- *Utah Code Section 70A-9a-519(1)* (Revised Article 9 of the UCC) requires that filing offices maintain indices of each filed record (financing statement). Under the revisions to the UCC, the state maintains a central filing office known as the Division of Corporations and Commercial Code. *See Utah Code Sections 70A-9a-501* and *-526*. This is generally the place of filing unless the collateral is "as-extracted collateral or timber to be cut" (this includes ***oil***, gas and other minerals that the debtor has an interest in before extraction). *See Utah Code Annotated Section 70A-9a-102(6)*. For as-extracted collateral, the filing office is the county recorder. *See Utah Code Section 70A-9a-501(1)*. Special filing rules also apply to titled collateral like vehicles and trailers.

The filing office is required to index the records as if they were a mortgage or conveyance so that the office can retrieve the records by name of the debtor, by entry number, by a legal description of the real property, and the Division of Corporations and Commercial Code must be able to retrieve filed records by its own file number. *See Utah Code Section 70A-9a-519(4)*.

j. Miscellaneous Index -- Required under *Utah Code Annotated Section 17-21-6(1)(I)* (2001). This is an important index for a mineral title examiner in that it typically contains instruments of a miscellaneous character not otherwise provided for under the statute including ***oil*** and gas leases, declarations of pooling, communitization agreements, mining agreements, unit agreements and other instruments affecting the mineral estate.

k. Index of Judgments -- Required under *Utah Code Annotated Section 17-21-6(1)(j)* (2001). This index reflects judgment debtors, judgment creditors, the amount of judgment, the date and time of recording, the satisfaction, and the book and page, and entry number. Effective July 1, 2002, a judgment entered in a district court does not create a lien upon or affect the title to real property unless the judgment or an abstract of judgment, including the required information set forth in the statute, is recorded in the office of the county recorder in which the real property of the judgment debtor is located. *Utah Code Annotated Section 78-22-1.5* (Supp. 2002). A judgment containing a legal description shall also be abstracted in the tract index.

l. General Filing Index -- Required under *Utah Code Annotated Section 17-21-6(1)(k)* (2001). This index contains all executions and writs of attachment with names of plaintiffs in execution, the defendants in execution, the purchasers, the date of sale, and the filing number of the documents.

m. Federal Tax Lien Index -- Required by *Utah Code Annotated Sections 38-6-1 to -4* (2001). This index contains notices of federal tax liens filed by the United States and copies of certificates discharging those liens.

The records maintained by all the county recorders are substantially the same. However, only some of the recorders maintain mining claims as discussed above.

Every document executed and acknowledged on or before July 1, 1988, may be recorded "regardless of any defect or irregularity in its execution, attestation or acknowledgment", *Utah Code Annotated Section 57-4A-1*. While recording costs vary by counties, the usual charge is $10.00 for the first page and $2.00 for each additional page, plus $1.00 per additional description if the instrument contains more than one description.

In Utah, the records are identified by book and page. Tract indices are not available for photocopying.

Utah requires ancillary probate of the estate of a non-resident decedent who owns property in Utah. If the will of a non-resident decedent was admitted to probate in another state, the Utah Court would give it full faith and credit. However, a local personal representative can be appointed to administer a foreign will. A personal representative appointed by another state has all the powers of a locally appointed personal representative upon filing authenticated copies of his appointment and any bond previously given.

All birth and death certificates are maintained by the Utah Health Department, Administrative Services, located at 288 North 1460 West, Salt Lake City, Utah 84116, (801) 538-6380. Birth certificates are organized by the baby's name, father's name and mother's maiden name.

Since all county recorders maintain tract indices, most abstract companies in Utah do not maintain their own tract indices.

**2. County Clerk's Records**

Prior to July 1, 2002, civil judgments automatically become liens upon the interests of the judgment debtor in the county in which the judgment is docketed without the requirement of recording in the county recorder's office (*Utah Code Annotated Section 78-22-1* (Supp. 2002). A transcript of the judgment may be filed and docketed in the office of the clerk of the district court in any other county in Utah and has the same force and effect as a judgment entered in the district court of such county. After July 1, 2002, a judgment entered by a district court or justice court becomes a lien upon real property only if the judgment or an abstract of the judgment (containing the information required in Section 78-22-1.5) is recorded in the office of the county recorder. *Utah Code Annotated Section 78-22-1(7)* (Supp. 2002). Judgment liens in Utah continue for eight (8) years unless the judgment is satisfied; such liens may be periodically renewed. Enforcement of a child support order can continue for four (4) years after the child reaches the age of majority.

Previously under *Utah Rule of Civil Procedure 79(d)(14)*, the county clerk was required to keep "Probate Record Book" containing all wills, bonds, letters of administration, letters testamentary, and all other papers and orders of the court in probate proceedings required by law to be recorded. Unfortunately, this rule was repealed without replacement. This was an important rule because *Utah Code Annotated Section 75-3-201(1)* (1993) requires probate of a decedent's estate in the county where the decedent had his domicile at the time of death, or if decedent was not domiciled in Utah, in the county where property of the decedent was located at the time of his death. The Probate Record Book may still be maintained in some counties and if available should be checked to determine if a decedent's estate (especially a decedent with domicile outside Utah) has been probated, thus vesting title to the mineral property in the appropriate heirs and/or devisees.

**3. County Treasurer Records**

The office of the county treasurer is the repository for records pertaining to ad valorem property taxes. In Utah those records also contain taxes assessed by the State Tax Commission against mines, mining claims, ***oil*** and gas wells, and severed mineral estates (so called "state assessed" taxes). The Utah State Tax Commission assessments are then sent to the local county treasurers for levy. Notices are transmitted and taxes are collected by the county. These records are found in the county treasurer's office in the State Assessed Mineral Tax Book.

**4. County Planning and Zoning Departments**

Utah permits county-wide zoning. A mineral title examiner should check with the county zoning department to verify that the project his client is undertaking complies with applicable zoning.

Correspondence and inquiries directed to the planning and zoning departments, county treasurers, and county clerks in all of the ***oil*** producing areas in Utah can be directed to the address set forth for county recorders as these offices are all located in the same county buildings.

**B. Records Outside the County**

**1. Utah Division of Corporations and Commercial Code**

(Mailing address: Heber M. Wells Building 160 East 300 South, Salt Lake City, Utah 84111, telephone number (801) 530-4849). Utah, like most other Rocky Mountain states, has with minor variations, adopted the UCC. The Division of Corporations and Commercial Code, within the Department of Commerce, maintains the records of corporate merger and name change as well as limited partnership records. It is also the central repository for the filing of UCC-1 Financing Statements not required to be filed in the county.

**2. Utah Division of *Oil*, Gas and Mining**

(Mailing Address: 1594 West North Temple, Suite 1210, Salt Lake City, Utah 84114, telephone number (801) 538-5340). This Division, in the Department of Natural Resources, is responsible for approval and regulation of the drilling maintenance, plugging and abandonment of ***oil*** and gas wells; it is also the repository for records pertaining to well location, well production, spacing records and orders, and information on zones of production.

**3. Other Records**

Utah is a "public land" state. In fact, over 80% of the land mass of the State of Utah is owned either by the federal government, the State of Utah or various Indian tribes. Likewise, these three entities own a majority of the mineral estate in Utah. For example, in any given drilling or division order title opinion in the Altamont-Bluebell field, a title examiner is likely to encounter a combination of fee and Ute Indian Tribal lands. In other fields in eastern central Utah or southeastern Utah, an examiner commonly encounters federal and state lands in the drilling unit or federal or Indian lands or a combination of all of the above with a sprinkling of fee owned minerals. Accordingly, it is important for a title examiner to know where to go to review records pertaining to Indian, state and federal mineral ownership.

A stand-up title examination of fee lands would consist of a review of the following indexes and records:

County Recorder's Office:

1. Ownership Plat

2. County Abstract (Tract) Index

3. Mortgagor/Mortgagee Index\*

4- Mining Claim Index (if being maintained)

5. Uniform Commercial Code Index

6. Miscellaneous Index\*

7- Judgment Index

8. Federal Tax Lien Index

9. Review of specific documents and instruments noted as affecting covered lands and parties.

County Clerk's Office:

1. Judgment Docket for all parties

2. Probate Index (if being maintained)

County Treasurer's Office:

1. Ad Valorem Property Taxes

2. "State Assessed" taxes (property and severance taxes)

Utah State Division of ***Oil***, Gas and Mining:

1. Approvals to Drill, Sundry Notices, Production Records, Spacing Orders and Operator status.

Utah Division of Corporations and Commercial Code:

1. UCC-1 Financing Statements

2. Corporate Status

**C. Other Topics**

County recorders and clerks in Utah do not charge for use and review of records, however, the various counties charge different rates per page for copying records. Unlike Texas and some other states, mineral title examiners seldom, if ever, need to utilize an abstracter's records as the county recorders all maintain tract indexes. However, in our firm, because much of our mineral title work is concentrated in Duchesne and Uintah counties and because of the complexity of title in those lands (a typical drilling and/or division order title opinion in the Altamont-Bluebell field prepared by this office will involve 75 to 120 separate leases and run anywhere from 75 to 125 pages), we have developed our own extensive in-house library of documents affecting title in those counties and all other ***oil*** and gas producing counties in Utah. These documents are then available for ready review on any given project encompassing the covered lands and may require only limited updating.

Abstractors generally charge by the page with rate being around $5.00 per page. Most also charge a certification fee of approximately $200.00 per abstract. One company, GeoScout Land and Title in Salt Lake City, Utah, also offers its services on an hourly rate and will limit its search and copy of instruments as directed by the client.

In my experience, independent landmen are utilized, with the client's consent, rather than established abstracters, to examine and copy documents of title as well as research records at the BLM and the Utah School and Institutional Trust Lands. Some landmen in our state are especially adept and experienced in researching records of the BLM.

In preparation of an ***oil*** and gas title opinion, either the client or the attorney preparing the opinion may request a landman or abstracter to prepare an abstract of the county documents and/or status report of federal, state or Indian records. The abstract and status report are then delivered to the attorney. The attorney will examine the documents, then request a review of the county clerk's records regarding judgments, tax liens, and probates for the appropriate interest owners.

Our firm has found it to be economical to request an independent landman to provide the examining attorney with the landman's reproduction of the tract index and all loose copies of the applicable documents. Frequently, the attorney will examine the tract index and instruct the landman to copy only those documents we do not have in our in-house library of documents. This procedure saves substantial copying costs. As for federal, state and Indian records, the landman also provides loose copies of the appropriate files and records. This procedure avoids the expense of having an abstract or status report prepared, while having the tract index to check whether all documents were provided. This system works well for our firm because of the experience and skill of the landmen we utilize.

**III. WHAT CONSTITUTES THE CHAIN OF TITLE?**

**A. WHAT IS "INSIDE" OR "OUTSIDE" THE CHAIN OF TITLE?**

"Chain of title" is defined as the successive conveyances, commencing with the patent from the government, each being a perfect conveyance of the title, down to and including the conveyance to the present owner. A purchaser or creditor is required by law to look only for conveyances that may have been made prior to his purchase by his immediate Grantor, or by a remote Grantor through whom the present Grantor derives his title. A purchaser or creditor is only charged with notice of the public record of conveyances and encumbrances made by the persons through whom title is claimed. *Reserve Petroleum Co. v. Hutcheson*, 254 S.W.2d 802 (Tex.Civ.App.-Amarillo 1952, writ ref'd. n.r.e.) 2 O&GR 366. Thus, a purchaser or creditor is not usually charged with notice of the following:

1. Instruments executed by stranger to title. *White v. McGregor*, 92 Tex. 556, 50 S.W. 564 (1899); *Lonestar Gas Co. v. Sheaner, supra*;

2. Instruments affecting other property. *Reserve Petroleum Co. v. Hutcheson, supra*;

3. Instruments executed by Grantor but recorded before Grantor acquired title. *Breen v. Morehead*, 104 Tex. 254, 136 S.W. 1047 (1911).

4. Instruments executed by Grantee of a prior unrecorded instrument. *Southwest Title Ins. Co. v. Woods*, 449 S.W.2d 773 (Tex., 1970); and

5. Subsequent conveyances or encumbrances by immediate Grantor or Mortgagor. *White v. McGregor, supra; Campsey v. Jack County* ***Oil*** *& Gas Assoc.*, 328 S.W.2d 912 (Tex.Civ.App.- Fort Worth 1959, writ ref'd. n.r.e.).

Under the "chain of title" rule, third parties are on notice of only those instruments in the chain of title which purport to affect the lands.

There are two theories which describe the scope of search required by the states surveyed. I will call the minority position the "Broad Scope of Search Theory" and the more popular view the "Narrow Scope of Search Theory". The Broad Scope of Search view requires a prospective purchaser to examine all deeds given by all prior record owners. In other words, the indices must be checked for every prior owner of the property to the present. This view holds that every such deed, once recorded, gives constructive notice to all prospective purchasers.

California: *Mahoney v. Middleton*, 41 Cal. 41 (1871), *Clark v. Sawyer*, 48 Cal. 133 (1874) and *County Bank of San Luis Obispo v. Fox*, 119 Cal. 61, 51 Pac. 11 (1897). (Utilizes a grantor/grantee index);

Michigan: *Cook v. French*, 96 Mich. 525, 56 N.W. 101 (1893); *Van Aken v. Gleason*, 34 Mich. 477 (1876); (Michigan uses a tract index system making this scope of search reasonable);

Texas: *Davidson v. Ryle*, 103 Tex. 209, 124 S.W. 616 (1910); *Delay v. Truitt*, 182 S.W. 732 (Tex.Civ.App.-Amarillo 1916, writ ref'd.); and *White v. McGregor*, 92 Tex. 556, 50 S.W. 564 (1899).

Texas utilizes a grantor/grantee index. This is a reasonable scope of search if utilizing a tract index, but an unreasonable scope of search if using a grantor/grantee index.

The second view requires a prospective purchaser to search the record, as to each prior grantor who owned the land in question, from the date of the deed to each grantor (some states would say the day this deed is recorded) to the day the deed from that grantor to a grantee is recorded.

Colorado: *Rocky Mtn. Fuel Co. v. Clayton Coal Co.*, 110 Colo. 334, 134 P.2d 1062 (1943;

Kansas: *Cities Service* ***Oil*** *Co. v. Adair*, 273 F.2d 673 (10th Cir. 1959); *Dwelle v. Home Realty & Inv. Co.*, 134 Kan. 520, 7 P.2d 522 (1932);

Montana: *Mullins v. Butte Hardware Co.*, 25 Mont. 525, 65 Pac. 1004 (1901); *Chowen v. Phelps*, 26 Mont. 524, 69 P. 54 (1902);

New Mexico: *Sheppard v. Sandfer*, 44 N.M. 357, 102 P.2d 668 (1940).

Texas: *Delay v. Truitt*, 182 S.W. 732 (Tex.Civ.App.-Amarillo 1916, writ ref'd.).

For a good discussion of the rule in a modern setting, see *Sabo v. Horvath*, 559 P.2d 1038 (Alaska 1976). This is a reasonable scope of search if utilizing a grantor/grantee index.

The search required by the first view is not the scope of search generally recognized by lawyers and practiced by abstracters. The principle of the first view is impractical because it would require a search to date against every name in the chain of title when using a grantor/grantee index.

In states that require the clerk, recorder or register to maintain tract indices, there is much less problem in locating stray conveyances or wild deeds because all instruments covering or affecting the same land are shown upon the same tract, which usually reflects a section or parts of a section. *Balch v. Arnold*, 9 Wyo. 17, 59 P. 434 (1899). However, for those states employing the grantor/grantee index system, the problem of locating stray conveyances or wild deeds is substantial. Fortunately, most states have adopted the "Narrow Scope of Search" theory. Basey, *Clearing Land Titles*, § 3 (2d. Ed. 1970); Patton, *supra* § 69; 122 A.L.R. 909.

The record of instruments, duly recorded as provided by law, within the chain of title of purchasers and creditors is constructive notice to them of whatever a proper examination of the record would have disclosed. They are charged with notice of all the facts shown or exhibited by the recorded instruments. Thus, a properly recorded instrument is constructive notice of at least:

1. The terms, recitals, stipulations and conditions of the instrument;

2. All facts disclosed by the acknowledgment of the instrument; and

3. The legal effect of the instrument.

*Martin v. Texas Co.*, 89 S.W.2d 260 (Tex.Civ.App.-Fort Worth 1935, writ dism. by agr.); *American Medical Int'l., Inc. v. Feller*, 59 Cal. App.3d 1008, 131 Cal. Rptr. 270 (1976).

As a general rule, subsequent purchasers and creditors are charged by the record with constructive notice of the above facts but are not charged with constructive notice of facts which can be obtained only by inquiring beyond the recorded facts. *Miles v. Martin*, 159 Tex. 336, 321 S.W.2d 62 (1959), 10 OGR 580; *Texas Osage Co-operative Royalty Pool v. Clark*, 314 S.W.2d 109 (Tex.Civ.App.-Amarillo 1958) writ ref'd. n.r.e. at 159 Tex. 441, 322 S.W.2d 506. There are two exceptions to the lack of duty to inquire from the record which are:

1. When the legal description of the instrument is ambiguous or inconsistent; *Carter v. Hawkins*, 62 Tex. 393 (1884); *Wiseman v. Watters*, 107 Tex. 96, 174 S.W. 815 (1915); see 89 A.L.R. 1444; and

2. When the recorded instrument refers to or is subject to other instruments, whether the other instruments are recorded or unrecorded. *Westland* ***Oil*** *Devel. Corp. v. Gulf* ***Oil*** *Corp*. 637 S.W.2d 903, 73 O&GR 359 (Tex. 1982)(Assignee was charged with constructive notice of a letter agreement, which creates a new overriding royalty interest, which was referenced in operating agreement which was referenced in an assignment in the assignee's chain of title.)

Whether or not a fact contained in a recorded instrument is constructive notice is a question of law. *Housman v. Horn*, 157 S.W. 1172 (Tex.Civ.App.-Dallas 1913, no writ); *Miller v. Alexander*, 13 K.A.2d 543, 775 P.2d 198 (1989).

**B. MATTERS OUTSIDE THE CHAIN OF TITLE WHICH MAY HAVE PRIORITY OVER RECORD TITLE**

**1. Farmout Agreements**

**a. General Principles.**

A farmout agreement is a contract where an owner of ***oil*** and gas leases, the farmoutor, who does not desire to drill a well, agrees with a third party, the farmoutee, who is willing to drill a well under the terms specified in exchange for an assignment of farmoutor's leases.

Farmout agreements take a variety of forms, from a simple letter agreement to a formal document that purports to integrate all terms and provisions of the parties' agreement. Regardless of its form, a farmout agreement is usually not recorded, although assignments of leases, overriding royalty or other documents of title often refer to farmout agreements. *Westland* ***Oil*** *Devel. Corp. v. Gulf* ***Oil*** *Corp*. 637 S.W.2d 903, 73 O&GR 359 (Tex. 1982). It is common for such instruments to be made specifically subject to the terms of an unrecorded farmout agreement. Farmout agreements are executory contracts and, in most cases, neither party have performed the condition precedent at the time the agreement is made.

There are several other agreements that are utilized from time to time in the ***oil*** and gas industry that are similar to a farmout agreement. An optional farmout or acreage contribution agreement is a method to lock up adjacent acreage to a proposed drill site tract. In the event the proposed drilling operations result in a discovery of ***oil*** and gas, the drilling party may exercise his option to acquire a farmout on the adjacent acreage on terms that have already been agreed upon. A shooting agreement usually covers a large block of lands and the unleased mineral owner or lessee enters into an agreement allowing an interest party to shoot seismic on the block and select certain lands to lease or acquire an assignment upon previously agreed terms. A bottom hole letter is a form of agreement that creates an obligation to be performed upon the drilling a well to a specified depth. A bottom hole letter may involve the sale of acreage, payment of money, or some other consideration. Brown, *Assignments of Interest in* ***Oil*** *and Gas Leases, Farmout Agreement, Bottom Hole Letters, Reservations of Overrides and* ***Oil*** *Payments*, 5 ***Oil*** & Gas Inst. 25 (1954).

**b. Effect on Title.**

(1.) Restrictions on Alienation - Farmout agreements frequently contain limitations on title such as preferential rights to purchase, assignment limitations and prohibitions on liens and encumbrances.

(2.) Rights of Farmee Before An Assignment - Prior to earning the farmout assignment, farmee's only instrument that grants him the right to enter upon the land and conduct ***oil*** and gas exploration and drilling operations is the farmout agreement. At that point in time, farmee would be considered farmor's agent or, at most, a sublessee. Legal title to the ***oil*** and gas lease remains in farmor and farmor retains the exclusive responsibility to fulfill all lease obligations to the lessor. The farmee's interest ripens into a beneficial interest in real property at the point in time when farmee fulfills all obligations required by the farmout agreement and thus earns the right to receive the assignment. Legal title does not pass until farmor's assignment is delivered to farmee. A title examiner who is aware of a farmout agreement should still show legal title in the farmor until the farmor's assignment is recorded.

(3.) Rights of Farmee After Assignment - After delivery of the farmor's assignment farmee owns both legal and beneficial title to the interest assigned, subject to any exceptions and reservations in the assignment. If the assignment is subject to the terms and provisions of the farmout agreement this is usually considered an expression of the parties' intention that the farmout agreement survives delivery of the assignment and that no merger of the terms and provisions of the farmout agreement into the assignment occurred. However, if the assignment is not subject to the farmout agreement, and is otherwise silent on the question of merger, a court could determine that the farmout agreement did in fact merge into the assignment. The majority modern view is that merger is not favored. See Lear, *Lurking Title Problems: Snares for the Unsuspecting Federal* ***Oil*** *and Gas Lease Title Examiner,* 25 Rocky Mt. Min. L. Inst. 18-1 (1979).

Another issue that can arise from the form of the farmout assignment is whether or not third parties will be placed on notice of the terms of the unrecorded farmout agreement. If the farmout assignment is not made subject to the farmout agreement, and does not otherwise refer to instruments which would place a subsequent purchaser upon the duty to inquire, it is possible that third parties could acquire the farmed out interest unaffected by the other terms of the farmout agreement. *Westland* at 308.

(4.) Interest Earned - The farmout agreement should fully describe the interest farmee will earn. The description should contain four elements. The first two dimensions describe the surface area, the third element describes the depth and the fourth element describes the substances (usually ***oil*** and/or gas) subject to the agreement. The acreage earned may be limited to:

a. The proration or spacing unit of the test well;

b. Certain specified depths or all depths from the surface down to a total depth, usually defined as the stratigraphic equivalent of feet below total depth or the stratigraphic equivalent of feet below the base of the deepest producing formation;

c. A specific wellbore.

It is common for a farmor to reserve an overriding royalty in the interest assigned, sometimes including the option at payout, as defined in the agreement, to convert the overriding royalty into a leasehold interest.

**2. Joint Operating Agreements**

**a. Definition and Purpose**

Initially, joint operations in the ***oil*** and gas arena were conducted pursuant to the common law principals of co-tenancy, mining partnerships, and general contract law. However, beginning in the late 1940s and early 1950s the industry developed a standardize approach to the reoccurring problems created by operations among different participants in a drilling/production project. The first standard operating agreement was the Ross-Martin Form Operating Agreement which was first published in June of 1956. Wigley, *AAPL Form 610-1977 Model Form Operating Agreement*, 24 Rocky Mt. Min. L. Inst. 693 (1978). This standard form became the AAPL Form 610 which has been rewritten in 1956, 1977, 1982 and 1989.

While the AAPL forms are generally used, most active companies have their own standard amendments to meet particular needs. Joint operating agreement are seldom recorded but affect operations, and thus should be understood by title examiners.

**b. Scope of Operating Agreement**

An operating agreement may be limited to the operations of one well, where the proration unit consists of one tract that is subject to one or more leases that cover the entire tract. Or, an operating agreement may cover multiple contiguous proration units subject to multiple leases. When this situation occurs, the operating agreement is referred to as a "working interest unit". Finally, an operating agreement may be even more expansive where the contract area covers multiple scattered tracts where the parties may or may not presently own any interests.

**c. Operating Agreement as a Document of Title.**

(1.) Cost Bearing Interest - The exhibit A to the operating agreement will generally identify each party's working interest in the contract area. These percentages are normally based on the party's acreage contribution, but the Exhibit A can be based on factors other than just acreage contributions. In the event of a discrepancy between acreage ownership and the percentage stated in the operating agreement, the operating agreement will control.

(2.) Interest in Production - Likewise, the parties generally own production, equipment and materials in the percentages specified in the operating agreement, usually on the attached Exhibit A. Generally, the interest in production is the same as the cost bearing interest and, as previously stated, is normally based on a acreage basis.

The title examiner should be aware that most operating agreements contain non-consent provisions whereby operations can be maintained by less than all of the original parties. If a party elects not to participate in a specified operation, the parties who consent to the operation are allowed to proceed and recover out of production their costs for such operation, plus a specified percentage over and above their cost as a "non-consent penalty". An operator requesting a division order title opinion should advise the attorney as to the non-consenting parties and how the non-consenting working interest was shared by the consenting parties.

Occasionally, an operating agreement will provide that a party's a election not to participate in the drilling of a specific well will cause a forfeiture of that party's interest with respect to the leases subject to the operating agreement, to the extent that they cover the proration or spacing unit dedicated to the proposed well. There may be some instances where refusal to join in a subsequent operation results in a complete forfeiture of all rights to participate in any future operations in the contract area, save and except the operations in which the party have previously participated. This is commonly known as an "in or out" provision. The title examiner should require that the non-consenting party deliver an assignment to the consenting parties of the leasehold required and that the assignment to be recorded.

(3.) Assignment Restrictions and Preferential Rights to Purchase - Most operating agreements limit and restrict the ability of a party to assign its interest to any third party. The provision most commonly encountered is the maintenance of uniform interest provision. This provision provides that no party shall sell, encumber, transfer or dispose of its interest in the leases embraced within the contract area subject to the operating agreement and in wells, equipment, and production, unless such disposition covers either:

(a.) The entire interest of the party in all leases, equipment and production, or

(b.) An equal and divided interest in all leases, equipment and production in the contract area.

Every such sale is required to be made expressly subject to the terms of the operating agreement.

Also, most printed form operating agreements provide a preferential right to purchase in the event any party desires to sell all or any part of the interest subject to the operating agreement. This provision is frequently deleted. The operating agreement may contain other provisions that prohibit assignments without prior written consent of the other parties or that prohibit a party from allowing liens and encumbrances to attach to its interest. The examiner should note these limitations in the title opinion and, if there is a violation of any of these provisions by a party, make a requirement that the offended parties waive the violation in writing.

(4.) Recording - It is not typical to record an operating agreement. However, the financial difficulties experienced by many industry participants in the 1980s demonstrated the need for parties to the operating agreement to protect their leasehold interest by securing liens and perfecting securities interests against the other parties' interest in the contract area. Recording can be most easily accomplished with a memorandum of the operating agreement. The benefit of recording is to impart constructive notice to third parties of the parties' respective contractual interest in the contract area, the various liens provisions and provisions restricting certain rights of the parties, including limitations on assignments, preferential rights to purchase and other restrictions that may be contained in the operating agreement. Once evidence of the existence of the operating agreement is placed of record, either by memorandum or by reference or recital in an assignment or other recorded instrument, then third parties either are placed on constructive notice, or have a duty to inquire of the existence of the operating agreement. *MBank Abilene, NA., v. Westwood Energy, Inc.*, 723 S.W.2d 246 (Tex. App. - Eastland 1986, no writ).

**3. Pooling (Voluntary and Forced)**

Pooling is defined as bringing together two or more ***oil*** and gas leases covering two or more separately owned tracts of land for the purpose of accumulating sufficient leased surface acres to enable the drilling parties to create a sufficiently large proration unit so that the regulatory agency will grant to the drilling parties a full allowable for the unit production of ***oil*** and/or gas. Pooling in some states, such as Texas and Kansas, is primarily accomplished on a voluntary basis. This means that the owners of the leases sign an instrument, based upon the authority granted them in the pooling clauses of the various leases, which describes the leases pooled and the land description of the pooled unit. This instrument may be call many things, such as declaration of pooling, pooling declaration, consolidation of leases, etc., but it is the substance of the instrument, not its description, which determines its effectiveness. One of the major deficiencies in voluntary pooling is that it ideally requires the consent and execution of all leasehold owners of leases within the pooled unit. This is often difficult to accomplish.

Because of the difficulty in obtaining the consent of all leasehold owners to pool voluntarily, many states have adopted forced pooling procedures whereby the state regulatory agency, after application and hearing, enters an administrative order pooling the leasehold interest of all parties to a proceeding insofar as they affect the described pooled unit. This force pooling procedure is imposed against any leasehold owner who had not previously consented to the pooling and can be forced against any identified mineral owner, who had not previously leased.

The pooling clause of the leases voluntarily pooled typically provide that the leasing is accomplished by the recording of the executed pooling agreement. Prior to the recording of the pooling agreement, any drilling operations would benefit only the leases covering the drill site tract. Upon the recording of the pooling agreement the non-drill site leases receive the benefit of the drilling operations and subsequent production. In other words, after the pooling agreement is recorded, then habendum clauses of the non-drill site leases are satisfied by the drilling operations and production from the drill site tract. The recording of the pooling agreement obviously becomes a part of the chain of title.

The effect of force pooling is not so obvious. The pooling is accomplished by an administrative order executed by the appropriate state agency. Most states do not require, and in most states it is not a custom, to record the force pooling order. Sometimes, an affidavit or some other instrument will be recorded that refers to or describes the force pooling order. However, in most cases, the fact that the pooling order was executed, and the terms thereof, do not become a part of the chain of title. Therefore, the examiner who is aware that a force pooling order is or may be entered should obtain a copy from the operator and/or his client. An examiner cannot prepare an accurate division order title opinion without a copy of the force pooling order for the following reasons:

a. The force pooling order will identify the lessors who were force pooled rather than leased;

b. The force pooling order will identify the leasehold owners who participate in drilling, and the leasehold owners who were force pooled;

c. The above facts are necessary in order to determine the royalty and overriding royalty attributable to the parties who were force pooled.

An important fact not reflected by the force pooling order, but necessary to prepare a division order title opinion, is the manner in which the participating parties shared any non-consenting working interest resulting from a non-consent election pursuant to the operating agreement. This fact would normally only be obtained from the operator.

**4. Bankruptcy Considerations**

**a. Introduction**

There are five types of bankruptcy proceedings:

1. Chapter 7, which is a liquidating proceeding for an individual or business entity, 11 U.S.C. §701 et seq. (1982);

2. Chapter 9, which is available to municipalities for debt reorganization, 11 U.S.C. §901 et. seq. (1982);

3. Chapter 11, which is available for business or individual reorganization, 11 U.S.C. §1101 et. seq. (1982);

4. Chapter 12, which is a reorganization proceeding for family farmers, 11 U.S.C. §1201 et. seq. (1982); and

5. Chapter 13, which is for consumer debt reorganization, 11 U.S.C. §1301 et. seq. 1982).

The title examiner would not normally be aware of a pending bankruptcy proceeding unless the bankruptcy debtor, trustee, or some other party records a lis pendens in the county of the examination, providing constructive notice, or the examiner acquires actual notice from some source.

**b. Automatic Stay**

The filing of a bankruptcy triggers the "automatic stay" which generally prevents any collection efforts against the debtor and any other actions which might affect property of the estate. 11 U.S.C. §362 (1982). Although there is some case law to the contrary, actions taken in violation of the automatic stay generally are deemed void. However, the bankruptcy court may lift or modify the automatic stay to allow actions to take place. 11 U.S.C. §362 (d) (1982).

**c. Assumption or Rejection of Executory Contracts or Unexpired Leases.**

Section 365 of the Bankruptcy Code gives the debtor-in-possession or trustee the power to assume or reject executory contracts or unexpired leases subject to court approval of the decision. In bankruptcy, an executory contract commonly is defined as one in which performance remains due and owing on both sides, the failure of which by one party would constitute a material breach and excuse the performance of the other party. The bankruptcy courts in different states have reached different decisions as to whether or not an ***oil*** and gas lease is an executory contract.

From an ***oil*** and gas perspective, the better view appears to be that an ***oil*** and gas lease should not be an executory contract because any outstanding performance or duties by lessor are slight or non-existent. However, because the primary purpose of an operating agreement is to detail the ongoing relationship between operators and non-operators, it has been held that an operating agreement covering a producing property is an executory contract. *Wilson v. TXO Production Corp*. (In re: Wilson), 69 BR. 960, 963 (Bankr. En. Tex. 1987).

**d. Power to Transfer Property**

The Bankruptcy Code provides that if the business of a debtor is authorized to be operated under Sections 721, 1108, 1304, 1203 or 1204 of the Code, that the Trustee/debtor-in-possession may enter into transactions, including the lease or sale of property of the estate, without notice or hearing where the transactions is in the ordinary course of business. For transfers that are not considered within the ordinary course of business, the transfer must be approved by the bankruptcy court after hearing. 11 U.S.C. §363 (1982). Again, bankruptcy courts in the different states do not agree as to what constitutes a transfer in the "ordinary course of business". Thus, for a title examiner to approve a transfer of property while the bankruptcy is pending, the examiner should require that the transfer first be approved by the bankruptcy court. If the order approving a sale expressly provides that the sale is "free and clear of any interest in such property of an entity other than the estate" then all pre-petition liens or other claims against the property are extinguished and terminated. 11 U.S.C. §363(f)(1982).

**e. Abandonment of Property.**

It is not uncommon for the examiner to know that the owner of an interest in the property subject to examination has filed bankruptcy, the estate has been closed, but there is no order acknowledging the disposition of the property in question. If there is no disposition of the property in the bankruptcy record, and the debtor listed the property in his schedules filed with the bankruptcy court, then that property is automatically abandoned to the debtor upon the closing of the bankruptcy case. 11 U.S.C. §554 (c.) (1982). However, if the property was not listed on the debtor's schedule and the property was not otherwise disposed of during the administration of the case, the property "remains property of the estate." 11 U.S.C. §554 (d.)(1982). In such instances, the bankruptcy case would have to be reopened and an order entered by the court regarding such property to convey the property or provide for some other disposition of the property. 11 U.S.C. §350 (b.)(1982).

**f. Ownership of Production.**

Absent valid pre-petition suspension, production runs that belong to the debtor upon filing the bankruptcy petition become property of the bankruptcy estate. 11 U.S.C. §541 (a.)(1982). In Chapter 11 and 12 cases, the dispersing agent/payor should make careful inquiry of whether there is a debtor-in-possession or a trustee who will accept payments. In Chapter 13 cases, where there is always both a trustee and a debtor-in-possession, payment should be made to the debtor in possession. 11 U.S.C. §§ 1302(b)(1) and 1303 (1982). In Chapter 9 cases, payment is always made to the debtor-in-possession. In Chapter 7 cases, payment is always made to the trustee.

A common question of an examiner preparing a division order title opinion when there is a bankrupt interest owner is whether or not the operator can pay himself out of suspended runs based upon principals of set-off or recoupment. The common laws concept of set-off is severely restricted in bankruptcy as to monies owed to the debtor. For example, only mutually owing pre-petition debts maybe setoff against one another. 11 U.S.C. §553 (1982). Thus, a Texas court has held that where an operator has suspended the runs of a working interest owner because of unpaid joint interest billings and the working interest owner files for bankruptcy protection, only post-petition runs may be offset against post-petition joint interest billings. *Wilson v. TXO Production Corp., supra*, 69 BR at 966-67. There are further restrictions on set-off, the discussion of which goes beyond the scope of this paper. See 11 U.S.C. §553 (1982).

No such restrictions apply to the more narrow common law doctrine of recoupment. Thus, for instance, a purchaser of production who overpays a seller prior to the date the seller files a bankruptcy petition, may recoup the overpayment on production sold post-petition under the seller's division order. *Ashland Petroleum Co. v. Appel (In re: B&L* ***Oil*** *Co.)*, 782 F2d 155 (10th Cir. 1986).

**C. SUMMARY OF EFFECTS OF LIEN BURDENS UPON TITLE**

**1. Important Terms**

**a. Mortgage or Deed of Trust**

A mortgage or deed of trust is an interest in real property providing security for the performance of an obligation, usually evidenced by a note. On default, the mortgage or deed of trust may be foreclosed, the property may be sold, and the proceeds applied for the mortgagee's benefit. While a mortgage is a two-party instrument between a mortgagor and mortgagee, a deed of trust is a conveyance to a trustee for the benefit of the mortgagee and, in Texas, gives the trustee the power of nonjudicial foreclosure and sale. *Johnson v. Snell*, 504 S.W.2d 397, 399 (Tex. 1973). The general practice in Texas is to use a deed of trust; however, lenders and attorneys commonly use the terms "mortgage" and "deed of trust" interchangeably. The secured creditor under a deed of trust is often identified as the "beneficiary" or "mortgagee," the debtor is often identified as the "borrower," "grantor," or "mortgagor," and the party having the power of nonjudicial foreclosure and sale in the event of default is identified as the "trustee."

**b. Lien Theory**

Texas follows the "lien theory" of mortgages and deeds of trust, under which the creditor or the trustee, despite granting language in the instrument, is not regarded as the owner of the property securing the debt. *Taylor v. Brennan*, 621 S.W.2d 592, 593 (Tex. 1981); *NCNB Tex. Nat'l Bank v. Sterling Projects, Inc.*, 789 S.W.2d 358, 359 (Tex. App.-Dallas 1990, writ dism'd w.o.j.). Legal title does not pass from the mortgagor, and the mortgagee receives only a lien or equitable title. *Flag-Redfern* ***Oil*** *Co. v. Humble Exploration Co.*, 744 S.W.2d 6, 8 (Tex. 1987); *First Baptist Church v. Baptist Bible Seminary*, 347 S.W.2d 587, 590-591 (Tex. 1961). A mortgagee ordinarily has no right of possession. The mortgagor remains entitled to possession of the land and is entitled to use the land without being accountable to the mortgagee, except for waste. *State v. First Interstate Bank*, 880 S.W.2d 427, 429-430 (Tex. App.-Austin 1994, writ denied); *NCNB Tex. Nat'l Bank v. Sterling Projects, Inc.*, 789 S.W.2d 358, 359 (Tex. App.-Dallas 1990, writ dism'd w.o.j.).

**c. Vendor's Lien**

A vendor's lien is a lien in favor of the seller of real property to secure payment of the unpaid purchase price. The usual practice in Texas is to expressly reserve a vendor's lien in the deed so that, when the deed is recorded, third parties will have notice of the lien. Even if the lien is not reserved in the deed, an express vendor's lien may be created by acknowledging the lien in the purchase money note. *Simms v. Espindola*, 310 S.W.2d 364, 366 (Tex. Civ. App.-San Antonio 1958, writ ref'd n.r.e.). An express vendor's lien makes the deed an executory sales contract and gives the seller superior title to the real property until the purchase price is paid.

Even if an express lien is not reserved in the deed, the seller still has, by operation of law, an implied or equitable vendor's lien to secure payment of any unpaid portion of the purchase money. However, when there is no express vendor's lien in the deed, the buyer receives full title to the property, and the seller's only remedy under an equitable vendor's lien is a judicial foreclosure. *Zapata v. Torres*, 464 S.W.2d 926, 928 (Tex. Civ. App.-Dallas 1971, no writ).

**d. Rents, Issues and Profits**

Unless the mortgage or deed of trust provides otherwise, the property owner generally retains the right to rents, issues, and profits while the property is subject to the lien. However, the deed of trust or a separate instrument commonly includes a provision assigning to the mortgagee the mortgagor's interest in rents or other income accruing after the date of the mortgage as additional security. *NCNB Tex. Nat'l Bank v. Sterling Projects, Inc.*, 789 S.W.2d 358, 360 (Tex. App.-Dallas 1990, writ dism'd w.o.j.); *McGeorge v. Henrie*, 94 S.W.2d 761, 762 (Tex. Civ. App.-Texarkana 1936, no writ).

If an assignment of rents is given as additional security for the debt, the assignment does not become operative until the creditor takes affirmative action, such as obtaining possession of the property, impounding the rents, or securing the appointment of a receiver. *Summers v. Consol. Capital Special Trust*, 783 S.W.2d 580, 583 (Tex. 1989). On the other hand, if the assignment of rentals is an "absolute assignment," it does not create a security interest, but instead automatically gives the creditor title to the rent on the occurrence of a specified condition, such as default. *NCNB Tex. Nat'l Bank v. Sterling Projects, Inc.*, 789 S.W.2d 358, 360 (Tex. App.-Dallas 1990, writ dism'd w.o.j.). Whether the assignment is an absolute assignment or is given as additional security depends on the intent of the parties, as determined by examining both the assignment of rents clause and the security agreement executed contemporaneously with it. *Oryx Energy Co. v. Union Nat'l Bank of Tex.*, 895 S.W.2d 409, 415 (Tex. App.-San Antonio 1995, writ denied). Absolute assignments are not favored by the courts

**e. Cover-all and Mother Hubbard Clauses**

A mortgage or deed of trust typically includes general language that purports to cover lands or interests that are not specifically described. This language is often called, but seldom labeled in the instrument, a "cover-all" clause or "Mother Hubbard" clause. An examiner should examine any mortgage or deed of trust within the chain of title in a grantor index that does not specifically cover the lands under examination to determine whether that instrument, by reason of the scope of any "cover-all" clause or "Mother Hubbard" clause, may encumber the lands under examination. The typical cover-all or Mother Hubbard clause includes real property interests appurtenant to the land described, such as easements, strips and gores, etc.; however, the clause may be much broader by also referring to all of the mortgagor's land in the county or all of the grantor's land, as described in another document. Compare *Jones v. Colle,* 727 S.W.2d 262 (Tex. 1987); *Smith v. Allison*, 301 S.W.2d 608 (Tex. 1957); *Broaddus v. Grout*, 258 S.W.2d 308 (Tex. 1953); *Sun* ***Oil*** *Co. v. Bennett*, 84 S.W.2d 447 (Tex. 1935); *Sun* ***Oil*** *Co. v. Burns*, 84 S.W.2d 442 (Tex. 1935); *Smith v. Westall*, 13 S.W. 540 (Tex. 1890); *Witt v. Harlan*, 2 S.W. 41 (Tex.1886); *Holloway's Unknown Heirs v. Whatley*, 131 S.W.2d 89 (Tex. 1939); *Sanderson v. Sanderson*, 109 S.W.2d 744 (Tex. 1937); *J. Hiram Moore, Ltd. v Greer*, 172 S.W.3d 609 (Tex. 2005); and *Lauchheimer v. Saunders*, 65 S.W. 500 (Tex. Civ. App. 1901, no writ).

**2. Judgment Liens**

If a court-certified "abstract of judgment" is properly prepared, recorded, and indexed, a judgment lien attaches to the judgment debtor's non-homestead real property, then owned or thereafter acquired, located in the county or counties where the abstract of judgment is of record. *Tex. Prop. Code Ann. §§ 52.001, 52.002*. The term "real property" includes any interest in land including any undivided interest. *Robertson v. Scott*, 172 S.W.2d 478 (Tex. 1943); *Stroble v. Tearl*, 221 S.W.2d 556 (Tex. 1949). An examiner should identify potentially enforceable liens evidenced by recorded abstracts of judgment and advise the client as appropriate to the circumstances of the examination. Typically, an examiner will require that any lien evidenced by a recorded abstract of judgment be released.

In general, neither the entry of a money judgment nor the recordation of a judgment creates a lien. *White v. FDIC*, 19 F.3d 249, 251 n.5 (5th Cir. 1994). Although a judgment may create a separate judicial lien by its express language, a certified copy of a judgment does not qualify as an abstract of judgment and does not create a lien by recordation. *Citicorp Real Estate, Inc. v. Banque Arabe Internationale D'Investissement*, 747 S.W.2d 926, 929 (Tex. App.--Dallas 1988, writ denied).

The lien comes into existence only when the abstract of judgment has been recorded and indexed as to each plaintiff and each defendant. *J. M. Radford Grocery Co. v. Speck*, 152 S.W.2d 787, 789 (Tex. Civ. App.--Amarillo 1941, writ ref'd). An abstract of judgment may not be enforced if it is indexed under an incorrect name. For example, in *Wicker v. Jenkins*, 108 S.W. 188 (Tex. Civ. App. 1908, no writ), the court held that the abstract of judgment was invalid where record title was in W. F. B. Wicker, but the abstract of judgment was indexed against the Plaintiff as "W. B. F. Wicker." Likewise, in *Anthony v. Taylor*, 4 S.W. 531(Tex. 1887), the court held that the abstract of judgment was invalid where a judgment recovered by "Joan and William Bankhead" was abstracted as a judgment recovered by "Joan and William Burkhead". The cases dealing with the validity of abstracts of judgment do not seem to apply *idem sonans*. See *Texas Title Standard 3.10*.

The judgment creditor has the burden to prove that the abstract of judgment complied with the statute and that it was properly recorded and indexed. *Alkas v. United Sav. Ass'n of Texas, Inc.*, 672 S.W.2d 852, 859 (Tex. App.--Corpus Christi 1984, writ ref'd n.r.e.). The judgment creditor cannot use as a defense the fact that the error was caused by the clerk. *Caruso v. Shropshire*, 954 S.W.2d 115, 116 (Tex. App.--San Antonio 1997, no writ).

An abstract of judgment creates a judgment lien only if issued by a Texas state court under *Tex. Prop. Code Ann. §§ 52.001, 52.002*, or by a United States district court located in Texas, as authorized by *Tex. Prop. Code Ann. § 52.007*. See *Reynolds v. Kessler*, 669 S.W.2d 801, 806 (Tex. App.--El Paso 1984, no writ); *28 U.S.C. § 1962*. A foreign judgment must first be domesticated as provided in *Tex. Civ. Prac. & Rem. Code Ann. ch. 35* and *ch. 36,* whereupon an abstract of judgment may be issued and recorded in the same manner as any other Texas judgment. *Hennessy v. Marshall*, 682 S.W.2d 340, 343 (Tex. App.--Dallas 1984, no writ).

**3. Other Involuntary Liens**

There are a multitude of specialized involuntary statutory liens that may affect Texas real property. Among them are the following:

Child Support Lien, *Tex. Fam. Code Ann. §§ 157.311-.331*.

Cotton Pests (Texas Department of Agriculture), *Tex. Agric. Code Ann. § 74.004(e)-(g)*.

County Assessments For Road Improvements,\* *Tex. Transp. Code Ann. § 253.009*.

County Litter Lien, *Tex. Health & Safety Code Ann. § 365.034©*.

County Weed and Sanitary Lien, *Tex. Health & Safety Code Ann. § 343.023*.

Federal Lien Securing a Judgment Imposing a Criminal Fine, *18 U.S.C. § 3613*.

Miscellaneous State Tax Liens, *Tex. Tax Code Ann. ch. 113*.

Municipal Assessments for Street Improvements,\* *Tex. Transp. Code Ann. §§ 312.002, 312.064, 313.042, 313.051, 313.054*.

Municipal Assessments for Water/Sewer Systems,\* *Tex. Loc. Gov't Code Ann. §§ 214.013(b), 214.014, 402.065, 402.067*.

Municipal Demolition Lien,\* *Tex. Loc. Gov't Code Ann. § 214.0015, -.004*.

Municipal Utility Services Lien,\* *Tex. Loc. Gov't Code Ann. § 402.0025(d)-(h)*.

Municipal Weed and Sanitary Lien,\* *Tex. Health & Safety Code Ann. § 342.007*.

Solid Waste Facility Remedial Lien, *Tex. Health & Safety Code Ann. § 361.194*.

State Hospital Lien, *Tex. Health & Safety Code Ann. § 533.004*.

Surface Coal Mining Reclamation,\* *Tex. Nat. Res. Code Ann. § 134.150*.

Texas Workforce Lien,\* *Tex. Lab. Code Ann. §§ 61.081-.085*.

Unemployment Taxes, *Tex. Lab. Code Ann. §§ 213.057-.058*.

Water District Standby Fees,\* *Tex. Water Code Ann. § 49.231*.

Water District Taxes,\* *Tex. Water Code Ann. § 55.604, Texas Tax Code Ann. § 32.01*.

In most instances, a statutory lien is not perfected until a notice has been filed for record in the pertinent county clerk's office, and the lien's priority is determined according to the time of filing. However, the liens marked with an asterisk (\*) in the above listing may have special priority independent of the time or fact of filing over other titles and encumbrances.

**4. Ad Valorem Taxes**

Ad valorem taxes are assessed as of January 1 of each year. They are due and payable on the following October 1 but are not delinquent if paid before February 1 of the following year. A tax lien attaches on January 1 of each year to secure payment of taxes, penalties, and interest ultimately imposed for that year. *Tex. Tax Code Ann. § 32.01*.

In determining the status of payment of ad valorem taxes, an examiner customarily relies upon a tax certificate issued by a collector for a taxing unit. The methods of assessment and collection are not uniform. The collection of taxes may be consolidated in one collector of taxes or may be separately maintained by separate tax units. *Tex. Tax Code Ann. §§ 6.23, 6.26*. Any person may request a tax certificate, which must be issued by the collector for the taxing unit. The certificate shows the amount of delinquent taxes, penalties, and interest due according to the unit's current records. The effect of a tax certificate is as follows: "If a person transfers property accompanied by a tax certificate erroneously showing that no delinquent taxes, penalties, or interest are due a taxing unit on the property, the unit's tax lien on the property is extinguished and the purchaser of the property is absolved of liability to the unit for delinquent taxes, penalties, or interest on the property. The person who was liable for the tax for the year it was imposed remains personally liable for the delinquent tax, penalties, and interest." *Tex. Tax Code Ann. § 31.08*. However, a tax certificate issued through fraud or collusion is void.

The examiner should ordinarily assume that an ad valorem tax lien is superior to any mortgage, judgment, other lien, or homestead right.

All ad valorem tax liens have equal priority. The ad valorem tax lien is superior to a federal tax lien. *Tex. Tax Code Ann. § 32.04; 26 U.S.C. § 6323(b)(6)*. Except as hereafter provided, a tax lien takes priority over the claim of any holder of a lien on the land encumbered by the tax lien, regardless of whether the debt or lien existed before the tax lien. *Tex. Tax Code Ann. § 32.05*.

**5. Operator's Lien**

The lien provisions contained in the AAPL Model Form Operating Agreements are sufficient to grant a lien in real property and will satisfy the requirements of UCC Article 9 for a security agreement if the operating agreement is properly executed and the Exhibit A included with the form is completed. If a recital that the model form is to be filed in the real estate records is added, the model form operating agreement will also then satisfy the corresponding requirement of UCC Section 9-402 (e) for financing statements covering minerals. The model forms do not, however, include an acknowledgment. Accordingly, in order to record the Operating Agreement in the real estate records of most jurisdictions, an acknowledgment must be added to the instrument contemporaneously with its execution.

While operating agreements are seldom recorded, producers are recording memoranda of operating agreements (containing the lien provisions and executed by all parties) with increasing frequency. In some states, a reference to an unrecorded operating agreement in the chain of title will afford notice of the operator's lien. In such "notice" states, the unrecorded operator's lien then become superior to even a subsequent, recorded deed of trust lien. See *Page v. Fees-Krey, Inc.*, 617 P.2d 1188 (Colo. 1980); *MBank Abilene NA v. Westwood Energy, Inc.*, 723 S.W.2d 246 (Tex. Civ. App. - 1986, no writ).

**6. Statutory Mineral Contractor's Liens**

**a. The Nature of the Lien**

The most singular attribute of the statutes creating liens for ***oil*** and gas contractors is that they grant a perfected lien to mechanic's and materialmens immediately and automatically upon the performance of labor or services or providing the materials to ***oil*** and gas properties. The contractor's lien statute of the major producing states require a subsequent filing by the lien claimant in order to preserve the priority and validity of the lien. Until then, it constitutes a "secret lien" and creates potential trouble for subsequent purchasers and lenders.

**b. Persons Entitled to the Lien**

**(1) Contractors.**

While the contractor's lien statutes in each state will vary, such statutes generally require that labor or materials must have been provided under contract with the owner of the land or the owner of an interest in an ***oil***, gas or mineral leasehold interest in the land.

**(2) Subcontractors**

The states that require that the lien claimant provide labor or materials under contract with an owner of the leasehold estate have separate statutes granting liens to subcontractors. There is great variety among the states regarding the treatment of subcontractors liens.

**(3) Operators**

Presumably, an operator under a "standard form" operating agreement qualifies as one furnishing the materials and performing labor and as such is entitled to the lien to secure the obligations of non-operators to pay the portion of joint interest billings attributable to materials and labor, but not the portion attributable to legal fees, administrative overhead, etc.

**c. Property Subject to the Lien**

**1. Leases**

**(a.) Less than the Entire Working Interest**

The contractor's lien attaches to leases or leasehold interest and is not limited to wells or the proration units around wells, so the lien claimant who performs labor or provides material for a well will acquire land in other wells on the same lease and in non-productive acreage covered by the lease. *Mercantile Nat'l Bank v. McCullough Tool Co.*, 259 S.W.2d 724, 728-29 (Tex. 1953). In Texas and Colorado the lien attaches only to the leasehold interest of the owner who contracts with the lien claimant. In these states, if the person who contracts with the lien claimant owns an equitable interest or a legal interest that is subject to forfeiture upon a condition subsequent (e.g. under a "drill to earn" farmout), and the interest of that owner fails to ripen into legal title or the conditions subsequent occurs causing forfeiture of such person's interest in the lease, then the lien claimant does not have a lien on the lease.

If the person who contracts with the lien claimant owns only an undivided interest in the ***oil*** and gas lease, the lien does not attach to the interest of the other co-owners unless the lien claimant can establish that the co-owners are mining partners or joint venturers or that an agency relationship exists. *Youngstown Sheet & Tub Co. v. Penn*, 355 S.W.2d 239, 241 (Tex. Civ. App. - 1962), modified on other grounds, 363 S.W.2d 230 (Tex. 1962). However, it is well settled under Texas law that any of the co-owners of the working interest on a lease can act as the operator under an agreement with the other co-owners designating the operator as an independent contractor, and, so long as their conduct is not inconsistent with that characterization, the working interest owners will not be joint venturers. *Ayco Dev. Corp. v. GET Serv. Co.*, 616 S.W.2d 184, 186 (Tex. 1981).

It should be noted, however, that in Texas the lien will attach to the entire interest to which the person contracting with the contractor holds record title, so if the operator of the property holds record title and the non-operators have unrecorded beneficial or equitable interests, the interest of the non-operators will be subject to the lien. *Energy Fund of AM., Inc. v. GET Serv. Co.*, 610 S.W.2d 833, 836 (Tex. App. 1980), affm'd in part, rev'd in part, 616 S.W.2d 184 (Tex. 1981).

**(b.) The Entire Working Interest**

Unlike Texas and Colorado, the statutes in Oklahoma and New Mexico provide for the contractor's lien to attach to the entire working interest in the lease. Thus, in those states, a non-operator may find himself in the position of having paid his share of the expense to the operator, yet having to pay a second time directly to the lien claimant in order to have the contractor's lien removed from the lease.

**7. *Oil* and Gas Products Lien**

The states of Kansas, New Mexico, Oklahoma, Texas and Wyoming\* have enacted statutes that provide to royalty owners, producers, and other interest owners a statutory security interest in their ***oil*** and gas production to secure the payment of the purchase price for that production- By granting to the mineral owners a purchase money security interest in the production (and the proceeds therefrom), these statutes were intended to place theses interest owners in a secured position, rather than an unsecured position, as against other creditors of the first purchaser. Thus, in the event a purchaser files for bankruptcy or becomes insolvent, the mineral interest owners have the standing of a secured creditor.

**8. Personal Property**

**a. Property Subject to Lien**

Article 9 of the U.C.C. governs the creation, perfection, priority and enforcement of security interests in personal property. The personalty typically involved in ***oil*** and gas properties includes equipment and fixtures located on the leased premises, severed ***oil*** and gas, contracts, operating agreements, farmout agreements, gas sales contracts, and any resulting accounts, general intangibles, or proceeds.

**(1) Fixtures**

Even though fixtures are generally regarded as realty under state law, U.C.C. Section 9-313 treats the creation of a security interest in fixtures the same as security interests in personalty. However, what is or is not a fixture will depend on state law. In addition, the nature of equipment used in ***oil*** and gas operations is such that very little of the equipment will be fixtures.

**(2) Security Agreement**

Rarely, if ever, due lenders take possession of severed ***oil*** and gas. Accordingly, the "attachment" or effectiveness of a security interest in ***oil*** and gas production and other personal property is accomplished through a security agreement signed by the debtor which describes the ***oil*** and gas to be produced and contains a description of the land concerned. However, in most cases, the mortgage covering the ***oil*** and gas properties will satisfy the UCC requirements. Usually such mortgages contain a security agreement stating the borrower's intent to create a security interest in the ***oil*** and gas to be produced. Under UCC Section 9-203 (2), the security interest then attaches when value has been given and the borrower has rights in the collateral.

**(3) Financing Statement**

To perfect by filing a financing statement covering ***oil*** and gas to be produced, the financing statement must adhere to the formal requirements of the UCC as enacted in the applicable state. Most states require the financing statement to recite that it is to be filed for record in the real estate records and to contain a description of the real estate sufficient for recordation purposes. If the borrower does not have an interest of record in the real estate, the financing statement must show the name of the record owner. The collateral and instrument itself (whether a mortgage, deed of trust, security agreement, etc.) can also constitute, and be filed as, a financing statement if it satisfies the requirements.

**b. Perfection**

The perfection of a security interest in these types of collateral will depend on how they are classified under Article 9 of the UCC for the applicable state. In addition, the application UCC provisions will specify the rules by which the lenders' security interest is to be perfected. In general, however, to perfect a security interest in ***oil*** and gas produced and any related accounts or fixtures (and collateral which is intended to become fixtures), a financing statement complying with UCC Section 9-402 should be filed in the appropriate recording office. In most cases, the mortgage, if formally prepared and when properly recorded, will satisfy the local filing requirements under UCC 9-401(2). Perfection of all other personal property collateral will require filing a financing statement centrally within the applicable secretary of state or other designated state office.

A financing statement lapses five years from the date of filing. However, the lender can continue the effectiveness of the financing statement and maintain perfection by filing a continuation statement within six months prior to the end of the five year period. The debtor need not execute the continuation statement in order for it to be effective.

**9. Lien Priority and Subordination.**

Subject to exceptions, an examiner may presume that a lien created and filed for record has priority over a subsequently created competing lien or interest in the same property unless the priority has been altered by a subordination agreement.

After a senior lien is validly foreclosed, junior liens and junior interests in the same property are extinguished. *Arnold v. Eaton*, 910 S.W.2d 181 (Tex. App.--Eastland 1995, no writ). Under common law, the lienholder whose lien first attaches to the property has the right to satisfy the lien against the property before the holders of subsequently attached liens. *Windham v. Citizens Nat'l Bank*, 105 S.W.2d 348 (Tex. Civ. App.--Austin 1937, writ dism'd). However, recording statutes have modified the common law rules of lien priority. Generally, the first lien filed for recordation is superior to a lien or other interest created subsequent to the first lien filed because subsequent creditors and owners of junior interests are charged with constructive notice of the earlier recorded lien. *Regold Mfg. Co. v. Maccabees*, 348 S.W.2d 864 (Tex. Civ. App.--Fort Worth 1961, writ ref'd n.r.e.); *Tex. Prop. Code Ann. § 13.002*. A deed of trust or mortgage that has not been recorded is void as to a creditor or subsequent purchaser for valuable consideration without notice of the unrecorded encumbrance. *Tex. Prop. Code Ann. § 13.001(a)*.

A subordination agreement is a contractual modification of lien priorities which establishes different lien priorities than those provided under the statutory or common law rules. In agreeing to subordinate a superior lien secured by real property to a subsequent lien or other interest in the same property, the superior lienholder voluntarily contracts to be paid after a junior lienholder if the liens are foreclosed or agrees that foreclosure will not extinguish a previously junior interest. *Vahlsing Christina Corp. v. First Nat. Bank of Hobbs*, 491 S.W.2d 954 (Tex. Civ. App.--E1 Paso 1973, writ ref'd n.r.e.).

If there are more than two liens against a real property interest at the time of subordination, the subordinated lien is placed directly after the lien to which it is subordinated. Any liens not participating in the subordination agreement that have a priority ranking between the liens participating in the subordination move up in priority, becoming superior to the liens involved in the subordination. Liens that have a lower priority ranking than the liens involved in the subordination do not move up in priority. For example, if four liens against a parcel of real property are ranked A, B, C, and D, and lien A is contractually subordinated to lien C, the ranking after subordination would be B, C, A, and D.

A recorded lien may be inferior to a subsequent lien created under an instrument actually recorded before the first lien, such as a deed of trust with a future advance clause, because the first lienholder is charged with constructive notice of the lien that may arise in the future. *Coke Lbr. & Mfg. Co. v. First Nat. Bank*, 529 S.W.2d 612 (Tex. Civ. App.--Dallas 1975, writ ref'd).

There are several exceptions to the general rule under recording statutes that the first lien recorded is the first in priority. If a creditor has actual or constructive notice of a prior unrecorded lien, the general priority rules under the recording statute may not apply. For instance, a lender's deed of trust is inferior to a contractor's lien if construction or construction materials are visible from an inspection of the land before the deed of trust is executed, because the lender is charged with notice of the possible existence of an unrecorded prior lien. *Hagler v. Continental Nat. Bank of Fort Worth*, 549 S.W.2d 250 (Tex. Civ. App.--Texarkana, 1977, writ ref'd n.r.e.). Texas has a notice system of recording, in contrast with race-notice or race recording systems. Under a notice system of recording, a prior mortgage not filed for record at the time of delivery of a subsequent mortgage to a good faith lender for valuable consideration may not have priority over that subsequent mortgage, even if the prior mortgage is filed for record first. Tex. Prop. Code Ann. § 13.001. However, a vendor's lien retained in a deed will be prior to a previously recorded judgment lien against a purchaser. *Donie State Bank v. Parker*, 554 S.W.2d 858 (Tex. Civ. App.--Waco 1977, writ ref'd n.r.e.).

**10. Removal of Liens**

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.

Regardless of whether a written release is delivered, the lien ceases to exist when the underlying debt is paid; however, the lienholder has a duty to issue a written release. *Knox v. Farmers' State Bank*, 7 S.W.2d 918 (Tex. Civ. App.--Eastland 1928, writ ref'd); *Spencer--Sauer Lumber Co. v. Ballard*, 98 S.W.2d 1054 (Tex. Civ. App.--San Antonio 1936, no writ) (full release); *Cook v. Leslie*, 59 S.W.2d 302 (Tex. Civ. App.--El Paso 1933, no writ) (partial release). Preferably a written release should be obtained whenever reasonably possible. To give notice to third parties dealing with the property, a written release must be recorded in the county in which the lien was recorded. Tex. Prop. Code Ann. §§ 11.001, 13.002.

Commonly, a release of a mortgage or deed of trust may fail to expressly release a related assignment of rents or leases or a separate financing statement which may have been given to the same lender as additional security. If a deed of trust or other mortgage was filed for record at or about the same time as the filing of a financing statement or the recordation of an assignment of rents, leases, production, or other collateral to the same lender and appears to be part of the same transaction evidenced by the deed of trust or other mortgage, it is common practice for an examiner to assume that a full release of the deed of trust or other mortgage without specific reference to the financing statement or assignment is sufficient as a release of the financing statement or assignment.

**11. Lis Pendens**

The filing of a lis pendens notice gives notice of a pending cause of action involving eminent domain, title to real property, establishment of an interest in real property, or enforcement of an encumbrance against real property. A properly filed lis pendens notice effectively prevents a grantee from being an innocent purchaser. The doctrine does not void a conveyance during the pendency of a suit, but the interest of the grantor merely passes subject to the results of the cause. *Cherokee Water Co. v. Advance* ***Oil*** *& Gas Co.*, 843 S.W.2d 132 (Tex. App.--Texarkana 1992, writ den.). The lis pendens notice is considered part of the judicial process, and the resulting absolute privilege bars a suit for damages arising from the filing of the lis pendens. *Bayou Terrace Inv. Corp. v. Lyles*, 881 S.W.2d 810 (Tex. App.--Houston [1st Dist.] 1994, no writ).

A lis pendens only gives constructive notice while the underlying cause of action is pending and has no existence separate and apart from the litigation of which it gives notice. *Taliaferro v. Smith*, 804 S.W.2d 548 (Tex. App.--Houston [14th Dist.] 1991, no writ); *Wagner v. Oliver*, 256 S.W. 302 (Tex. Civ. App.-- Amarillo 1923, writ dism'd). However, a lis pendens notice is rarely released and may remain on record many years after the litigation is terminated. Thus, unless the underlying litigation has been dismissed or resolved, an unreleased lis pendens continues to cloud title, regardless of its age.

**D. SUMMARY OF THE DOCTRINE OF AFTER-ACQUIRED TITLE.**

**1. Current Rule.**

The after acquired title doctrine applies in the factual situation where a grantor, who owns a lesser interest in the property than he purports to convey, conveys by a warranty deed or other conveyance, and thereafter acquires all or part of the interest he intended/purported to convey. The general rule estops the grantor from claiming ownership of the after acquired interest as against his grantee. Under the rule, title to the after acquired interest passes "*eo instante*" to the grantee and to the grantee's heirs and successors upon the grantor's acquisition of the after-acquired property interest. *Caswell v. Llano* ***Oil*** *Co.*, 120 Tex. 139, 36 S.W.2d 208, 211 (Com. App. 1931), citing *Baldwin v. Root*, 90 Tex. 553, 40 S.W.36 (1897).

The Texas Supreme Court clearly articulated the current rule in the well known *Duhig v. Peavy-Moore Lumber Co.*, case: "It is the general rule, supported by many authorities, that a deed purporting to convey a fee simple or a less definite estate in land and containing covenants of general warranty will estop the grantor from asserting an after-acquired title or interest in land, or the estate which the deed purports to convey, as against the grantee and those claiming under him." *Duhig*, 135 Tex. 503, 144 S.W.2d 878, 880, (1940). As a simple example, Grantor A represents in his deed to Grantee B that he is conveying all of Blackacre; however, he only owns an undivided 3/4 of Blackacre. Grantee B conveys the property to Grantee C. Grantor A subsequently acquires the other 1/4 of Blackacre. As against Grantee B and Grantee C, Grantor A will be estopped from claiming title to the 1/4 interest, because of his representations in his deed that he was conveying all of the tract. The 1/4 interest will vest in Grantee C immediately upon Grantor A's acquisition of such interest.

The effect of the rule is binding not only on the original grantor and his heirs and successors, but, after recording, it also binds subsequent purchasers from the original grantor who acquired the grantor's interest with actual or constructive notice of the grantor's prior conveyance. *Caswell*, 36 S.W.2d at 211, citing *Leonard v. Bennford Lumber Co.*, 110 Tex. 83, 216 S.W. 382 (1919); *Robinson v. Douthit*, 64 Tex. 101 (1883); *Davis v. Field*, 222 S.W.2d 697, 699 (Tex. Civ. App. - Fort Worth 1949, writ ref'd n.r.e.). A subsequent purchaser under the original grantor, who may or may not have actual notice of what the grantor represented that he was conveying, is nonetheless put on constructive notice by the recordation of the original conveyance instrument in the records of the county where the property is located. Such a purchaser cannot claim to be an innocent purchaser entitled to recover the original grantor's after-acquired interest. *Caswell*, 36 S.W.2d at 211

**2. Nature of the Doctrine.**

The doctrine of acquired title is a remedy at common law, equitable in nature and based on the estoppel of the grantor to deny that which he has represented in his conveyance instrument. *Lindsay v. Freeman*, 83 Tex. 259, 18 S.W. 727, 730 (1892). See also, Richard W. Hemingway, *After Acquired Title in Texas*, 20 S.W. L. J. (No. 1), 117 (1966). The principle underlying the estoppel is that one who has contracted with another should not be permitted to deny what he has asserted or implied is true in his document(s). *Lindsay*, 18 S.W. at 730; *Davis*, 222 S.W.2d at 699-701.

Consequently, in Texas today, the application of the after acquired title doctrine does not depend solely on the breach of an obligation created by a title warranty. The presence of a warranty goes to the nature of the grantor's manifested intent, indicating whether or not he purported to convey the land described and describing the estate in the land he actually intended to convey. *Lindsay*, 18 S.W. at 727-730; *Blanton v. Bruce*, 688 S.W.2d 908, 911 (Tex. Civ. App. - Eastland 1985, writ ref'd n.r.e.); Hemingway, *supra*, at 118. Instead of covenants of warranty, the courts look to the equitable principles of "good faith, right conscience, fair dealing and sound justice" in deciding to apply the after acquired title rule. *Lindsay*, 18 S. W. at 730.

**3. Limitations and Exceptions.**

**a. Covenants of Warranty and Claims of Ownership.**

As noted above, the application of the after acquired title doctrine in Texas does not depend on the breach of a covenant to warrant title, but may be asserted in equity to find "sound justice". *Lindsay*, 18 S.W. at 729. The effect of this viewpoint is that courts do not require a conveyance instrument to contain an express covenant of warranty of title to support a claim of after acquired title. *Id*. Covenants of warranty may be implied from the face of the document or they may not be required at all. Words in an instrument that imply a claim of ownership of title or that show the grantor's clear intent to claim such ownership, together with the assumption that the grantor has the right to make the conveyance, are sufficient to apply the doctrine. *Id*. Texas courts have held that language in a deed stating the grantors are conveying a fee simple in land constitutes a recital that implies an assertion by the grantors that they are the owners of the land. Having asserted that fact, equity will estop them from denying such fact. *Id. Land Title Bank & Trust Co. v. Witherspoon*, 126 S.W.2d 71, 73 (Tex. Civ. App. - Amarillo 1939, no writ).

In addition to common law, the Texas Property Code assists those using implied covenants to support a claim of after acquired title. The statute provides that one can imply from the use of the words "grant" or "convey" in any conveyance that, unless expressly stated otherwise, the grantor did not convey the same estate to another party prior to the present conveyance and that the estate is free from encumbrances at the time the estate is conveyed. Tex. Prop. Code Ann., §5,023 (Vernon 2000 & Supp. 2004).

**b. Mortgages/Deeds of Trust.**

Texas courts have clarified that the after acquired title doctrine applies to deeds of trust (and mortgages), as well as deeds and other conveyance instruments, *Shields v. Donald*, 253 S.W.2d 710, 712 (Tex. Civ. App. - Fort Worth 1952, writ ref'd n.r.e.); *Galloway v. Moeser*, 82 S.W. 1607, 1069 (Tex. Civ. App. - Eastland 1935, no writ); *Logue v. Atkeson*, 80 S.W.137, 140 (Tex. Civ. App. 1904, writ denied). The rationale behind the court's decisions is that mortgages and deeds of trust generally contain covenants that warrant title to the encumbered property. The courts have found that the mortgagor, having made such covenants, will not be allowed to assert title to after acquired property that was the subject of his covenant. *Shield*, 253 S.W. at 712. The doctrine has also been applied to other types of liens, such as a mechanic's and materialman's lien. *Land Title Bank*, 126 S.W.2d at 73.

**c. Foreclosure.**

When a deed of trust (or mortgage) encumbers a conveyed interest and the lien holder subsequently forecloses on his lien, the question arises whether the foreclosure affects the application of the after acquired title doctrine. Texas courts have held that the after acquired title doctrine still applies despite the foreclosure. *Burns v. Goodrich*, 392 S.W.2d 689, 693 (Tex. 1965); *Cherry v. Farmers Royalty Holding Co.*, 135 Tex. 576, 160 S.W.2d 908, 911 (1942). The doctrine applies whether the interest in question is a fee interest granted on a deed or a fee simple determinable granted under an ***oil*** and gas lease. *Caswell*, 36 S.W.2d at 211-212. In *Caswell*, the land owner, executed an ***oil*** and gas lease covering property that was subject to a deed of trust lien. The lien holder foreclosed the deed of trust lien and conveyed title to a third party, Whereupon the lease was "cancelled and terminated." *Id*. The third party conveyed the property to the original landowner who executed an ***oil*** and gas lease to the second lessee. In the suit between the two lessees, the court held that by virtue of the general warranty clause in the first lease, the after-acquired title doctrine applied and, upon the original landowner's acquisition of the property, the first lessee acquired its leasehold interest and it was again valid. *Id.*.

**d. Title Limited to Estate Conveyed.**

Texas courts have limited their application of the after acquired title rule in certain circumstances, including an estate not granted. *Talley v. Howsley*, 142 Tex. 81, 176 S.W.2d 158, 160 (1943); *McKinnon v. Lane*, 285 S.W.2d 269, 273-274 (Tex. Civ. App. - Fort Worth, writ ref'd n.r.e.). The courts will apply the rule to estop a grantor from claiming title to the estate he has purported or intended to convey by his grant; however, they have restricted the estoppel to that estate only. *McKinnon*, 285 S.W.2d at 273-274. They will not apply the doctrine to a reserved estate or to an excepted interest or to an interest not conveyed. *Id*. The rationale behind the limitation is that the grantee is entitled to receive the estate or interest intended to be conveyed, but he is not entitled to receive a greater estate than the deed or conveyance document would have conveyed had his grantor owned the estate described in the document.

It is because of this concept that deeds of trust in Texas usually include an express after acquired property clause stating the deed of trust lien attaches to all after acquired property of the grantor as long as the lien is still in effect. Without a provision expressly conveying any after acquired title to the mortgagee until the debt paid off, the mortgagee's lien will attach only to the lands and the property interests specifically described in the deed of trust.

**e. Quitclaims and Forms of Deeds or Conveyances.**

Texas courts have also limited their application of the after acquired title rule to conveyance instruments that convey a specific interest in the land itself and not just the grantor's title to the land, whatever it may be at the time of the conveyance. *Clark v. Gauntt*, 138 Tex. 558, 161 S.W.2d 270, 273 (1942). As a result, the courts will not apply the doctrine where a quitclaim deed is involved. *Halbert v. Green*, 156 Tex. 223, 293 S.W.2d 848, 851 (1956). In Texas, this limitation will apply to a conveyance of all of a grantor's "right, title and interest" in and to a described property, because the courts view such language as constituting a quitclaim. Unless the document or other evidence reflects an intent to convey the land itself, or contains recitals specifying a quantum of interest, the grantor only conveys whatever interest he actually had at the time of the conveyance. *Clark*, 161 S.W.2d at 273. The result is that any subsequently acquired interest does not contradict a quitclaim deed and the after acquired title doctrine will not apply. *Id*. This limitation controls even if the deed contains a warranty based on the rationale that the warranty will not enlarge the intended grant. *Wilson v. Wilson*, 118 S.W.2d 403, 405, (Tex. Civ. App. - Beaumont 1938, no writ).

**f. Title Acquired in Trust.**

Texas courts have declined altogether to apply the doctrine of after acquired title to estates acquired and held in trust for another party. *MacDonald v. Sanders*, 207 S.W.2d 155, 158 (Tex. Civ. App. - Texarkana 1947, writ ref'd n.r.e.); *Newton v. Easterwood*, 154 S.W. 646 (Tex. Civ. App. - Texarkana 1913, writ ref'd). The rationale is that the doctrine of after acquired title cannot be used to benefit a grantee whose grantor is holding the interest in trust for a third party, because the grantee is not entitled to claim greater rights than his grantor under such subsequent title. *MacDonald*, 207 S.W.2d at 158. While the grantor holding in trust may have legal title to the property, he has no beneficial rights in such land. Consequently, he has nothing to convey to his grantee. *Id*. The same is true where legal title is held by virtue of a fraud and a constructive trust is imposed in equity. *Newton*, 154 S.W. at 650.

**g. Limited Application to *Oil* and Gas Leases.**

In contrast to foreclosure of a lessor's title discussed in the *Caswell*, case, Texas courts have declined to apply the "Duhig" rule, which is based on the after acquired title doctrine, to ***oil***, gas and mineral leases where the lessor acquired an additional interest after execution of the lease. *McMahon v. Christmann*, 157 Tex. 403, 303 S.W.2d 341 (1957). The *McMahon* court explained that in many instances an ***oil*** and gas lease purports to cover the entire mineral estate, even though the parties know the lessor only owns an undivided interest in the land, in order to make certain that no fractional mineral interest is left outstanding in the lessor. The court reasoned that if the lease contains the standard provisions, the lessee is protected against overpayment of royalties by the inclusion of a proportionate reduction clause in the lease, thus application of the Duhig doctrine is unnecessary.

In my opinion, an ***oil*** and gas lease should contain an after-acquired property provision, for the same reasons as it is contained in a mortgage or deed of trust, plus the promise by the lessee to pay lessor the same bonus for the after-acquired mineral interest as was paid initially.

**E. DORMANT MINERAL ACTS.**

**1. Abandonment**

\_\_\_ The common law conceptually does not permit the abandonment of a possessory interest in real property. Therefore, a freehold estate in real property could not be abandoned. On the other hand, a non-freehold estate, such as a tenancy for a term of years, could be abandoned since seisin was considered to remain with the landlord and there was an identifiable estate in which it could be abandoned. Through a similar analysis, the common law recognized the abandonment of an easement, which is classified as a non-possessory interest in real property, because there is always a servient estate in which the abandoned easement can immediately merge upon abandonment.

Some states, such as Kansas and Texas, have determined that a mineral interest owner has a freehold estate in real property that cannot be abandoned. *Rogers v. Ricane Enterprises, Inc.*, 772 S.W.2d 76, 80, 108 O&GR 331 (Tex. 1989). Other states, such as California and Oklahoma, do not recognize a possessory interest in ***oil*** and gas while in place. These states follow the "non-ownership" or "exclusive-right-to-take" theory which dictates that the mineral interest be classified as a non-possessory interest in real property. Therefore, conceptually, in California and Oklahoma a mineral interest, and therefore any interest carved out of a mineral interest, can be lost by abandonment. In *Gerhard v. Stephens*, 68 Cal. 2d 864, 69 Cal. Rptr. 612, 442 P.2d 692 (1968) the California Supreme Court, after noting that a mineral interest in California creates a *profit a prendre* - an incorporeal hereditament - stated that:

The abandonment of a *profit a prendre*, therefore, because the profit in essence is an easement, does not become subject to the void in ownership that the common law of land title sought to avoid. If a perpetual right of way or other easement is abandoned, the property interest reverts to the servient estate. ... Similarly, a perpetual right to remove ***oil*** and gas ... would ordinarily revert to the surface estate, thereby freeing that estate of its burden and permitting its owner more complete utilization and enjoyment of his property.

442 P.2d at 711. The court in *Gerhard* held that some of the mineral interests owned by shareholders of a defunct corporation had been abandoned, and some had not. The court concluded that abandonment would occur only when there was both a lack of use of the interest, coupled with the owner's intent to abandon their interest.

Therefore, abandonment analysis is a two step process. First, the interest must be classified to determine whether abandonment is an available theory. If the interest passes the classification test, the second step is to determine whether the requisite intent to abandon exists. Since mineral interest are often held for long periods of time without development, nonuse alone will not support a finding of abandonment. The *Gerhard* court noted:

In order to protect the owner of an unlimited *profit of prendre* or other incorporeal hereditament against "involuntary" abandonment under the circumstances in which conflicting inferences may be drawn from his nonuse, we hold that the trial court must find either that the owner's future use of the right could result only from a palpably unsound business judgment or that the owner has given further indication of his intent to abandon. 442 P.2d at 716.

**2. The Louisiana Solution - Prescription of Nonuse**

A detailed discussion of the prescription of nonuse is beyond the scope of this article, but this concept of prescription in Louisiana mineral law is perhaps its most distinguishing feature. The Louisiana Mineral Code sets out fairly detailed provisions concerning the extinguishment of mineral interests by the running of the prescription of nonuse. See Louisiana Mineral Code Articles 27 through 79 relating to mineral servitudes, Articles 85 through 103 relating to mineral royalties, and Article 107 relating to executive rights. Very generally speaking, if a mineral servitude is created without a specific term, prescription of nonuse commences running from the date of creation and accrues ten (10) years later unless interrupted by good faith drilling operations on or production obtained from the servitude tract or acreage pooled therewith. Louisiana Mineral Code Articles 29 and 36. Prescription of nonuse running against a mineral royalty is interrupted by production from or attributable to the royalty tract. Louisiana Mineral Code Article 87. It is not necessary that production obtained from the royalty or servitude tract be in paying quantities. Louisiana Mineral Code Articles 38 and 88. If the well in question is located on the servitude or royalty tract, prescription is interrupted as to the entirety of the tract. If, however, the well in question is a unit well which is located off of the royalty or servitude tract, unit operations and unit production interrupt prescription only as to that portion of the servitude or royalty tract situated within the unit. Louisiana Mineral Code Articles 33, 37 and 89. It should also be noted that a single mineral servitude or single royalty cannot extend to noncontiguous tracts of land; a separate mineral servitude or mineral royalty is created for each noncontiguous tract unless the instrument creating the mineral interest provides for more. Louisiana Mineral Code Articles 64 and 101. A mineral lease is not subject to prescription but cannot be maintained in effect for more than ten (10) years without drilling operations or production. Louisiana Mineral Code Article 115.

**3. Constitutionality - *Texaco, Inc. v. Short***

Initially, many title examiners believed dormant mineral statutes to be unconstitutional on one or more of the following grounds: impairment of contracts, taking without compensation, lack of due process or denial of equal protection. For the most part, these concerns proved to be unfounded when the United States Supreme Court upheld the Indiana dormant mineral act in *Texaco, Inc. v. Short*, 454 U.S. 516, 72 O&GR 217 (1982).

The Indiana Act provides that a severed mineral interest that is not used for a period of 20 years automatically lapses and reverts to the surface owner unless the severed mineral owner files a statement of claim in the county recorder's office.

Prior to reaching the constitutional issues, the Supreme Court first considered it appropriate to determine whether a state has the power to provide that dormant mineral rights shall be extinguished if their owners do not take the affirmative action required by the statute of recording a statement of mineral claim within the statutory period. The court first noted that property interests are not created by the Constitution but rather, they are created and their dimensions defined by state law. Thus, the court reasoned that just as a state may create a property interest that is entitled to constitutional protection, the state also has the power to condition the permanent retention of the property on the performance of reasonable conditions that indicate a present intention to retain the interest. *Texaco*, 454 U.S. at 526. The rationale being that a state by enacting a dormant mineral statute has not destroyed a property right; rather, the owner has abandoned it. Thus, the property interest which state law created has been withdrawn by the owner's failure to use it.

The court found that the statute furthered the legitimate state goals of encouraging owners of mineral interests to develop their properties with the resulting benefit to the state in the collection of taxes. In furtherance of these goals, the court concluded that a state has the power to condition the ownership of property on compliance with conditions which impose such a slight burden on the owner while providing such clear benefits to the state. *Id* at 530.

The court then went on to consider the three constitutional issues. The court found that there was no "taking" of the mineral interests as it was the owner's failure to make use of the property, and not any action of the state, that caused the lapse. The rationale being that after abandonment, the former owner retains no interest for which he or she may claim compensation. *Id*.

As to the claim that the act unconstitutionally impaired the obligation of contracts, the court noted that the ***oil*** and gas leases in question were not executed until after the statutory lapse and therefore the statute cannot be said to impair a contract that did not exist at the time of its enactment. *Id*, at 531.

The requirement that an owner of a severed mineral interest file a statement of claim every 20 years does not constitute a "taking" and is such a minimal "burden" on contractual obligations, that the act was not found by the majority of the justices to be beyond the scope of permissible state action. *Id*.

The court then turned to the mineral owners' primary attack on the act, which was that it extinguished their property rights without adequate notice. The mineral owners' argument that they were unaware of the statute's enactment was quickly disposed of. The old axiom that persons owning property within the state are charged with knowledge of relevant statutory provisions affecting their property was applied; the state need not notify citizens every time the law is changed. *Id* at 532.

The court then considered the more serious question of whether the mineral owners had a constitutional right to be advised by the surface owner that the 20-year period of nonuse was about to expire. Crucial to the court was to distinguish between the self-executing feature of the statute, which provides that the mineral interest automatically lapses after 20 years of nonuse, and a subsequent judicial action in which it is determined that the lapse did in fact occur. In particular, the court recognized that a "use" may have occurred but would not be apparent by a review of record title. Indiana Code §32-4-11-3 (1976), delineated the following "uses":

A mineral interest shall be deemed to be used when there are any minerals produced thereunder or when operations are being conducted thereon for injection, withdrawal, storage or disposal of water, gas or other fluid substances, or when rentals or royalties are being paid by the owner thereof for the purpose of delaying or enjoying the use or exercise of such rights or when any such use is being carried out on any tract with which such mineral interests maybe unitized or pooled for production purposes, or when, in the case of coal or other solid minerals, there is production from a common vein or seam by the owners of such mineral interests, or when taxes are paid on such mineral interest by the owner thereof. Any use pursuant to or authorized by the instrument creating such mineral interest shall be effective to continue in force all rights granted by such instrument.

In directing in what manner the constitutionally mandated notice must be provided, the court reached its most startling conclusion. After the 20-year period of nonuse has expired, the surface owner must bring a quiet title action so as to determine conclusively that a mineral interest has vested in the surface owner. In part, the court was concerned that only by such a method could it be conclusively determined that no "use" had occurred, including any use that would not be apparent from examination of title. The court closed by stating that before judgment could be entered in any such quiet title action, the full procedural protections of the due process clause - including notice reasonably calculated to each the severed mineral owners and a prior opportunity to be heard - must be provided. *Texaco*, 454 U.S. at 534.

More specifically, the court determined that notice to a mineral owner of the possibility of lapse of his/her mineral interest is not required under the federal Constitution. The automatic vesting procedure in the Indiana statute was equated with a statute of limitations. No citizen is entitled to prior notice that a statute of limitation on a cause of action he or she might have is about to run. *Id* at 536. Thus, under the Indiana statute and most likely under the statutes of other states, a dormant mineral act will have automatically vested the mineral interest in the surface owner and the only purpose of the quiet title action will be to verify the same unless the severed mineral owner can establish some "use" which is not apparent from examination of record title.

States which presently have dormant/mineral lapse statutes are:

California - *Cal. (Civil) Code §883.001 et. seq*. (West 1982) - 20 year lapse

Florida - *Fla. Stat. Ann. §712.01 et. seq*. (West 1969) - 30 year lapse

George - *Ga. Code Ann. §85-407.1* (1978) - 7 year lapse

Illinois - *Ill. Ann. Stat. Ch. 96 ½ §9201. et. seq*. (Smith -Hurd 1979) - 7 year lapse

Indiana - *Ind. Code §§32-5-11-1 - 32-5-11-8* (1976) - 20 year lapse

Indiana - *Ind. Code Ann. §32-5-11-1 et seq*. - 20 year lapse

Kansas - *Kan Stat. Ann. §55-16-0 et. seq*. (1983) - 20 year lapse

Kentucky - *Ky. Rev. Stat. §353.460 et. seq*. (1983) - 7 years after the date of a judgment appointing a trustee for the unknown mineral interest owner.

North Dakota - *ND Cent. Code, Chapter 38-18.1 et seq*. (1982) - 20 year lapse

Ohio - *Ohio Rev. Code Ann. §5301.56 et. seq*. - 21 year lapse

Tennessee - *Tenn. Code Ann. §66-5-108* © - 20 year lapse

**4. The North Dakota Solution - Dormant Mineral Act**

North Dakota adopted a Dormant Mineral Act in 1982, effective, July 1, 1985. See *N. D. Cent. Code*, Chapter 38-18.1. This Act is perhaps the state's greatest difference in ***oil*** and gas law with many of the other major ***oil*** producing states, and understanding its potential effect on a company's leasing, drilling, and production operations is essential for any company operating in the state. CAUTION must be exercised by any land company or ***oil*** company where a potential dormant mineral interest is involved.

The key statutory provisions of the Act:

N.D.C.C.§38-18.1-02. Statement of claims - Recording - Reversion

Any mineral interest is, **if unused for a period of twenty years** immediately preceding the first publication of the notice required by section 38-18.1-06, **deemed to be abandoned,** unless a statement of claim is recorded in accordance with section 38-18.1-04. Title to the abandoned mineral interest vests in the owner or owners of the surface estate in the land in or under which the mineral interest is located on the date of abandonment. (emphasis added).

N.D.C.C. section 38-18.1-03 provides a mineral interest is deemed to be **used** when:

a. There are any minerals produced under that interest.

b. Operations are being conducted thereon for injection, withdrawal, storage, or disposal of water, gas, or other fluid substances.

c. In the case of solid minerals, there is production from a common vein or seam by the owners of such mineral interest.

d. The mineral interest on any tract is subject to a lease, mortgage, assignment, or conveyance of the mineral interest recorded in the office of the County Recorder in the county in which the mineral interest is located.

e. The mineral interest on any tract is subject to an order on an agreement to pool or unitize, recorded in the office of the County Recorder in the county in which the mineral interest is located.

f. Taxes are paid on the mineral interest by the owner or his agent.

g. A proper statement of claim is recorded as provided by section 38-18.1-04.

h. The owner or lessee utilizes the mineral interest in a manner pursuant to, or authorized by, the instrument creating the mineral interest.

If the mineral owner has failed to record a statement of claim and the mineral interest has not been "used" as defined in section 38-18.1-03, above, the surface owner **may** succeed to the dormant interest by complying with the following provisions:

§38-18.1-06. Notice of lapse of mineral interest - Method

1. **Any person intending to succeed to the ownership of a mineral interest upon its lapse, shall give notice of the lapse of the mineral interest by publication.**

2. The publication provided for in subsection 1 must be made once each week for three weeks in the official county newspaper of the county in which the mineral interest is located; however, if the address of the mineral interest owner is shown of record or can be determined upon reasonable inquiry, notice must also be made by mailing a copy of the notice to the owner of the mineral interest within ten days after the last publication is made.

3. The notice must state:

a. The name of the record owner of the mineral interests;

b. A description of the land on which the mineral interest involved is located; and

c. The name of the person giving the notice.

4. A copy of the notice and an affidavit of service of the notice must be recorded in the office of the County Recorder of the county in which the mineral interest is located and constitutes prima facie evidence in any legal proceeding that such notice has been given.

The Act provides a "second chance" for the dormant mineral owner to preserve his interest. Failure to use the mineral interest or record a Statement of Claim will not cause a mineral interest to be extinguished **if, within sixty days after first publication of the notice provided for in section 38-18.1-06, the owner recorded a statement of claim**. *N.D. Cent. Code §38-18.1-05(3)*.

Case law interpreting the North Dakota Dormant Mineral Act.

In *Spring Creek Ranch, LLC v. Svenberg*, 595 N.W.2d 323 (N.D. 1999), the surface owner, in 1989, published a Notice of Lapse of Mineral Interest and Claim of Ownership in the official county newspaper. The particular mineral interest claimed to be dormant had not been "used" of record since 1950. Seven years later, in 1996, the surface owner obtained a default quiet title judgment vesting the dormant mineral interest in the surface owner. Next, in 1997, a local land company located the heirs of the dormant owners and obtained ***oil*** and gas leases from the heirs. The heirs then were able to vacate the default judgment. However, the district court found the surface owner made a "reasonable inquiry" in attempting to locate the dormant owners in compliance with the Act and held the heirs did not timely act to preserve their interests. On appeal to the Supreme Court, the surface owner asserted a search of the records in the County Recorder's office was the only search necessary to satisfy the statutory "reasonable inquiry" requirement as a matter of law. The successors contended a "reasonable inquiry" requires more than a search of the County Recorder's office as a matter of law. The Supreme Court reversed the district court's summary judgment order and remanded, holding "Whether Spring Creek [the surface owner] made a reasonable inquiry to ascertain the addresses of the mineral interest owners is a material fact necessary to the ultimate decision whether Spring Creek strictly complied with N.D.C.C. chapter 38-18.1. Based on the record, reasonable minds could differ when deciding whether Spring Creek's inquiry was reasonable. Because reasonable minds could reach more than one conclusion from the facts, we conclude the trial court erred when deciding Spring Creek made a reasonable inquiry as a matter of law. Summary judgment was therefore in appropriate."

The holding in *Spring Creek Ranch* certainly complicates the application of the dormant mineral act. Even if the surface owner appears to have complied with the statutory provisions to succeed to the dormant interest, and obtains a default quiet title judgment, there remains a possibility a third party at a later date could locate the dormant owners and vacate the quiet title judgment in favor of surface owner if it is determined the surface owners actions violated due process and did not constitute a "reasonable inquiry".

CAUTION should be exercised by any land company seeking to assist a surface owner in acquiring dormant minerals. See *Miller v. Diamond Resources*, 205 ND 150, wherein the Supreme Court held Diamond's failure to comply with the notice provisions constituted actionable negligence.

**5. Some Lingering/Unanswered Questions**

a. Is the goal of the statutes to restore all severed minerals to the surface owner, as in the case of Louisiana, or to clear title only as to those mineral owners who have truly abandoned and neglected their mineral interest?

b. Does the lapsed period start on the date the lapsed mineral owner acquires his interest? the date he records his interest? or does the lapse period begin on the date the surface owner files his petition or gives notice of his claim?

c. Do the statutes cover the mineral estate only, or do they cover all other property interests created from the mineral estate, such as non-participating royalty, ***oil*** and gas leasehold, overriding royalty, etc.?

d. If the mineral estate is undivided, will a use or activity by one owner benefit the other undivided interest owners?

e. Must there be a quiet title suit to confirm that there were no non-record "uses" which would prevent the lapse?

The obvious cure whenever there is a potential lapsed mineral interest is to obtain a lease both from the potential lapsed mineral owner and from the surface owner. Another option, applicable in all states, is to have a court with real property jurisdiction in the county appoint a receiver/trustee to execute a lease covering the potential lapsed interest.

**IV. ASSIGNMENTS OF LEASES - WELLBORE ONLY.**

**A. Examples of Assignments.**

It is my observation that wellbore assignments were originally created for economic reasons. Leasehold owners with multiple wells, who chose to rid themselves of uneconomic wells but retain the rights to develop the remainder of the leases, started assigning a wellbore only. While farmouts, in my experience, were originally a conveyance by the farmoutor of all of his interest in a lease from the surface to a specified depth, the practice changed so that farmoutors would convey a wellbore only and thus reserve to themselves the rights for further development in the farmed out acreage. Over the years an industry custom has developed where owners of a wellbore only believe that they had the right to go up the hole, perforate, and produce because they alone own the wellbore. I am advised that there are some wellbore owners who have drilled their wellbore deeper, believing that they have this right. It is obvious that, for a wellbore owner to perforate uphole or drill his wellbore deeper he must have obtained the necessary Railroad Commission permits to do so. My co-author, Ana, will address the Railroad Commission issues in her chapter infra.

My purpose at this point is to provide what I consider to be typical examples of assignments involving a wellbore only, or arguably a wellbore only, to set the stage for a discussion of the *PetroPro v. Upland Resources* case infra. I suggest a title examiner would reach the following results in the following examples of assignments.

**Example 1**

Grant - All or part of assignor's interest in the leases identified in Exhibit A.

Exhibit A - Identifies leases.

Result - Conveys leases.

**Example 2**

Grant - All or part of Assignor's interest in the leases identified in Exhibit A.

Exhibit A - Leases identified plus wells referenced, may or may not include WI and NRI for each well.

Result - Conveys leases.

**Example 3**

Grant - All or part of Assignor's interest in the King #1 wellbore.

Exhibit A - Identifies leases supporting the King #1 wellbore.

Result - Conveys wellbore only.

**Example 4**

Grant - All or part of Assignor's interest in the leases identified in Exhibit A.

Exhibit A - Identifies Leases, then states that they are limited to the King #1 wellbore only.

Result - Conveys wellbore only.

**Example 5**

Grant - All or part of Assignor's interest in the King #1 well located in Section 10..

Exhibit A - No Exhibit A and no identification of leases.

Result - Conveys wellbore only? Void?

Comment - Not void if it identifies the location of the well, or if the Assignor only owns one King #1 in Section 10.

**Example 6**

Grant - All or part of Assignor's interest in the leases identified in Exhibit A, but only "insofar as they cover the wellbore of the King #1 well".

Exhibit A - Identifies leases

Result - Conveys wellbore only.

Ed Horner's analogy:

Owning a wellbore is like owning a condominium in a building consisting of numerous condominiums. One condominium owner has the full right to use his condominium, but no right to use the condominiums owned by third parties.

In a wellbore context, the question becomes:

What rights does the condominium owner have "to use his condominium"?

**B. The Best Description**

In the author's opinion, the best description of a wellbore only assignment would identify, in as much detail as the parties believe necessary, the rights of the wellbore assignee to conduct at least the following operations:

1. Produce existing producing formation;

2. Drill deeper;

3. Move up the borehole and perforate;

4. Move up the borehole and drill a horizontal well;

5. Drill a replacement well if the producing well ceased to produce because of mechanical problems.

**C. The Difficult Description - *PetroPro v. Upland Resources***

The opinion issued June 14, 2007 by the Amarillo Court of Appeals, Cause No. 07-05-0327-CV in *PetroPro. Ltd., et al v. Upland Resources, Inc., et al*, is the first opinion in the country to discuss the rights of an assignee in a wellbore only assignment.

In 1992 and 1993 Upland Resources, Inc. (Upland) obtained five ***oil*** and gas leases covering two separate tracts in Roberts County. In 1993 Medallion Production Company (Medallion) acquired the leases and drilled the King "F" No. 2 well (King well) on the 500 acre tract as a gas producer from the Cleveland formation, located approximately 6,500′ to 6,600′ beneath the surface. After the completion, Medallion pooled the leases covering the 500 acre tract with 204 acres from an adjacent tract to create an irregular shaped 704 gas unit. The leasehold in the 704 acre unit was subsequently acquired by KCS Medallion Resources (KCS) and MB Operating Co., Inc. (MB). The leasehold outside the 704 acre pooled unit and below 6,800′ was released.

In 1968 KCS and MB sold the leases to L&R Energy (L&R) at an auction sale, one assignment from each, identical in all respects, conveying the following:

All of seller's right, title and interest in and to the ***oil*** and gas leases described in Exhibit "A" attached hereto and made a part hereof (Subject Leases) *insofar and only insofar as said leases covering rights in the wellbore* of the King "F" No. 2 well. (emphasis added by court).

Some years later operators began to complete gas wells in the area producing from the shallower Brown Dolomite formation, approximately 3,400′ to 3,600′. In May, 2003, Upland, pursuant to a farmout from KCS, completed a horizontal gas well in the Brown Dolomite formation called the Skeeterbee No. 1, whose wellbore was within 600′ of the King well. By June, 2004 Upland had completed two more gas wells producing from the Brown Dolomite formation, the horizontal Skeeterbee No. 2 and the vertical Skeeterbee No. 3.

In April of 2004 L&R assigned its interest in the King well to PetroPro, Ltd. (PetroPro). PetroPro sent a letter to Upland claiming that Upland's wells constituted a trespass and conversion as to PetroPro's rights to produce gas from the Brown Dolomite formation and demanding that Upland cease production from the Skeeterbee wells.

In September 2004 PetroPro and L&R filed this suit against Upland, et al for trespass, bad faith trespass, conversion, and money had and received, claiming that PetroPro owned the exclusive right to produce gas from the entire 704 pooled gas unit, from the surface to a depth of 6,800′. PetroPro also requested a declaratory judgment declaring the property rights and ownership of the respective parties by virtue of the assignments and an accounting of all proceeds from the sale of gas produced from the Skeeterbee wells. Upland initially responded by general denial. The royalty owners within the 704 acre pooled gas unit, upon learning of the dispute, intervened seeking damages for the alleged breach of implied covenants and for tortuous interference with existing contracts. Intervenors claimed that PetroPro's lawsuit and wrongful claims of ownership prevented Upland from fully developing the lease and protecting the lease from drainage by adjacent wells.

All parties filed motions for summary judgment. Upland contended that PetroPro's rights were restricted to the physical confines of the King well only, without the right to deepen the well to other zones or horizons, or the right to perforate the wellbore casing for the purpose of producing any other zone or horizon lying between the surface and the presently producing Cleveland formation. Intervenors claimed that PetroPro had the right to produce from any formation above the Cleveland formation subject to governmental regulations, which it claimed limited PetroPro's rights to 40 acres around the King "F" No. 1 wellbore. PetroPro claimed that it was the exclusive owner of any portion of the leasehold estate that could "reasonable be reached and produced" through the King wellbore. The trial court ruled that the King wellbore assignments were unambiguous and granted Upland's Motion for Summary Judgment. The Judgment denied PetroPro's and Intervenor's Motions for Summary Judgment and PetroPro's motion to have funds for production tendered into the court's registry. The trial court also severed and abated Intervenor's damage claims against PetroPro. The Judgment did not detail the property interest and rights conveyed by the assignments. The Amarillo Court identified the question specifically as:

"What interest is conveyed by the assignments and what are the rights of the parties?"

Upland claimed that PetroPro's rights should be limited to the production from the Cleveland formation. The Court disagreed because there was no language in the assignments limiting PetroPro's leasehold interest to the Cleveland formation. Therefore, the vertical limit of PetroPro's rights was defined by the depth of the wellbore as assigned. The more challenging question:

"What were the horizontal limits of PetroPro's wellbore ownership?"

The language in the assignment itself contained neither vertical nor horizontal limitations. Intervenor's claimed that PetroPro's horizontal rights were limited only by "governmental regulations", which it further defined as the minimum amount of surface acreage needed to obtain a plug-back or re-completion permit in the Brown Dolomite formation. The court disagreed stating that the Intervenor's position was inconsistent with the plain language of the assignments.

Since the assignments were only limited to "rights in the wellbore" the court set out to define that term. After looking to industry standard texts for definitions, the court concluded the PetroPro's leasehold rights "extend horizontally only to the area of the hole identified as the King "F" No. 2 well, and, by implication, such surface area adjacent thereto as is reasonably necessary to operate the well."

In an attempt to define the rights appurtenant to the horizontal and vertical limitations of PetroPro's wellbore interest, the court concluded that PetroPro had the right to develop the leased premises for the purpose of "exploring, drilling, mining, operating for and producing ***oil*** and/or gas and other minerals", as stated in the leases. This right was limited to the right to rework the King well, so as to produce from any formation that might possibly be reached from existing wellbore, but not the right to extend the present well beyond its current depth, or the right to drill horizontally beyond the confines of the existing well.

Another appurtenant right the court recognized was the right to produce. The court said PetroPro has the exclusive right to produce ***oil*** and gas from the King well, but PetroPro does not own an interest in the ***oil*** and gas in place outside the confines of the King well. For this reason, Upland's completion of the Skeeterbee wells did not constitute a trespass upon any property which PetroPro owned. For this reason, Upland's production of gas from the Skeeterbee wells did not constitute conversion of property belonging to PetroPro, and thus PetroPro is also not entitled to an accounting.

In summary, the court said that PetroPro:

1) owned the exclusive right to produce ***oil***, gas or other minerals from the King wellbore;

2) owns the right to develop the wellbore and conduct any operations within the wellbore, subject to governmental regulations, including the right to produce from other formations.

Upland retained the exclusive right, subject to the terms of the leases and governmental regulations, to produce ***oil***, gas or other minerals from the leases, other than through the King wellbore.

Justice Campbell issued a concurring and dissenting opinion wherein he stated that the assignments should be interpreted as limiting PetroPro's rights to the production of gas from the Cleveland formation, the formation which was producing at the time of the assignments.

As of this writing, PetroPro has filed a Motion for Rehearing asking the court to explain how it can obtain a drilling permit to perforate uphole without owning any ***oil*** and gas leasehold around the wellbore.

**EXHIBIT 1**

BIBLIOGRAPHY

**ANNOTATIONS**

*Continued Possession of Tenant as Constructive Notice to Third Person of Unrecorded Transfer of Title of Original Lessor*, 1 A.L.R.2d 322

*Failure properly to index Conveyance or Mortgage of Realty as affecting Constructive Notice*, 63 A.L.R. 1057

*Improper Insertion or Omission of Middle Initial of One's Name as affecting Constructive Notice from Public Record*, 122 A.L.R. 909

*Knowledge of Notice of Inadequacy of Consideration for Conveyance in Chain of Title as affecting Bona Fide Status of Purchaser*, 42 A.L.R.2d 1088

*Length of Period of Possession before Accrual of Rights of Person sought to be affected by Notice as affecting the Rule regarding Constructive Notice from Possession of Real Property*, 105 A.L.R. 892

*Liability of Officer Charged with Duty of Keeping Record of Instruments affecting Title to or Interest in Property for Mistakes or Defects in respect to Records*, 94 A.L.R. 1303

*Necessity that Mortgage covering* ***Oil*** *and Gas Lease be recorded as Real Estate Mortgage, and/or filed or recorded as Chattel Mortgage*, 34 A.L.R.2d 902

*Neglect or Fault of Recording or Filing Officer as affecting Consequences of Failure Properly to Record or File Instrument affecting Property*, 70 A.L.R. 595

*Occupancy of Premises by both Record Owner and Another as Notice of Title or Interest of Latter*, 2 A.L.R.2d 857

*Pleading Bona Fide Purchase of Real Property as Defense*, 33 A.L.R.2d 1322

*Presumptive or Circumstantial Evidence to establish Missing Link in Chain of Title*, 64 A.L.R. 1333

*Presumption or Burden of Proof as to whether or not Instrument affecting Title to Property is Recorded*, 53 A.L.R. 668

*Presumptions and Burden of Proof as to Time of Alteration of Deed*, 30 A.L.R.3d 561

*Priority between Devisee under Devise pursuant to Testator's Agreement and Third Person claiming under or through Testator's Unrecorded Deed*, 7 A.L.R.2d 541

*Record as charging One with Constructive Notice of Provisions of Extrinsic Instrument referred to in the Recorded Instrument*, 82 A.L.R. 312

*Record of Deed or Contract for Conveyance of One Parcel with Covenant or Easement Affecting another Parcel owned by Grantor as Constructive Notice to Subsequent Purchaser or Encumbrancer of Latter Parcel*, 16 A.L.R. 1013

*Record of Instrument which comprises or includes an Interest or Right that is not a Proper Subject of Record*, 3 A.L.R.2d 577

*Record of Instrument without Sufficient Acknowledgment as Notice*, 59 A.L.R.2d 1299

*Recorded Real Property Instrument as charging Third Party with Constructive Notice of Provisions of Extrinsic Instrument referred to therein*, 89 A.L.R.3d 901

*Relative Rights to Real Property as between Purchasers from or through Decedent's Heirs and Devisees under Will subsequently sought to be established*, 22 A.L.R.2d 1107

*Right of Present Claimant of Title as against Original or Immediate Grantor to Reformation to correct Error in Description Common to Conveyances in Chain of Title*, 89 A.L.R. 1444

**TABLE OF ARTICLES/SECONDARY MATERIALS**

Aigler, *The Operation of the Recording Acts*, 22 Mich. L.Rev. 405 (1924)

Aigler, *Symposium - Notice and Recordation*, 47 Iowa L. Rev. 221 (1962)

Bjella, *Dormant Mineral Acts: A Comparison of the Uniform Act With Similar State Statutes and the Implications for Landmen*, The Landman (May/June 1989).

Brown, *Hiatus in Land Titles: The Problem and Suggested Remedies*, 7 Baylor L.Rev. 48 (1955)

Cross, *The Record "Chain of Title" Hypocrisy*, 57 Colum. L. Rev. 787 (1957).

Cross, *Weaknesses of the Present Recording System*, 47 Iowa L. Rev. 245 (1962).

Cross, ***Oil*** *and Gas Liens & Foreclosures - A Multi-State Perspective*, 51 Ok L. Rev. 175 (1998)

Dickenson, *The Doctrine of After-Acquired Title*, 11 S.W.L.J. 217 (1957);

Ellis, *Rethinking the Duhig Doctrine*, 28 Rocky Mt. Min. L. Inst. 947 (1982)

Hemingway, *After-Acquired Title in Texas - Part I*, 20 S.W.L.J. 97 (1966) and *Part II*, 20 Sw.L.J. 310 (1966)

Hill, *Fundamentals of* ***Oil*** *and Gas Conveyancing*, 34 Rocky Mt. Min. L. Inst. 17-1 (1988)

Hill, *Title Repositories, Recording, and Constructive Notice*, 28 Rocky Mt. Min. L. Fdn. 469 (1984)

Hobfeld, *Fundamental Legal Conceptions as applied in Judicial Reasoning*, 26 Yale L. Jour. 710 (1917).

McSwain, *Westland* ***Oil*** *Development Corp. v. Gulf* ***Oil****: New Uncertainties as to Scope of Title Search*, 35 Baylor L. Rev. 629 (1983)

Maxwell & Summers, *Recording Statutes: Their Operation and Effect*, 17 Washburn Univ. L. Rev. 615 (1978)

Nibert, *Non-Record Title Considerations*, Rocky Mt. L. Fd. Mineral Title Institute (1992)

Olds, *Recording Act - The Object of Search and the Period of Search*, 2 Houston L. Rev. 169 (1964)

Olds, *The Requirement of Value in Bona Fide Purchase and in Recording Act*, 6 Houston L. Rev. 534 (1969)

Olds, *Aspects of Unrecordable Interests and the Recording Act*, 10 Houston L. Rev. 25 (1972)

Olds, *The Scope of the Texas Recording Act*, 8 S.W.L.Jour. 36 (1954)

Patton, *Patton on Land Titles* (2nd Edition), West Publishing Co. (1957)

Philbrick, *Limits of Record Search and Therefor of Notice*, 93 U. of Penn. L. Rev. 125 (1944)

Powell, *The Law of Real Property*, Matthew Bender (1981)

Sinex, *Revisiting the Doctrine of After-Acquired Title Revisited*, State Bar of Texas 30th Advanced ***Oil***, Gas & Mineral Law Course (2004).

Smith, *The "Subject to" Clause*, 30 Rocky Mt. Min. L. Inst. 15-1 (1984)

Student Symposium, *Texas Land Titles*, 6 St. Mary's L.Jour. 802 (1975)

Tealing & Diamond, *Burden of Proof in Priority Problems*, 10 Baylor L.Rev. 42 (1958)

Williams, *Recordation Hiatus and Cure by Limitation*, 29 Tex. L. Rev. 1 (1950)

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