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***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 21 (YOU PAID FOR THE TITLE OPINION, NOW WHAT DO YOU DO WITH IT: HANDLING TITLE CURATIVE)***

**YOU PAID FOR THE TITLE OPINION, NOW WHAT DO YOU DO WITH IT: HANDLING TITLE CURATIVE**

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While taking time away from the ***oil*** industry during the 1990s, Susan continued to develop expertise in negotiations, management and business operations in telecommunications, mining, and manufacturing ... including work in Asia, Mexico, Canada and Europe.

In 2004, Susan established Alfson Energy Land Services, Inc., a firm specializing in the mitigation of title risks related to ***oil*** and gas field development and corresponding projects for the benefit of ***oil*** and gas field operators. Located in Littleton, Colorado, Alfson Energy serves the Rocky Mountain Region.

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*The information contained herein is of a general nature and is not intended to address the circumstances of any particular individual or entity. We make every effort to provide accurate and timely information; however, we make no assertions or guarantees that such information is accurate as of the date it is presented or that it will continue to be accurate in the future. No one should act on such information without appropriate professional advice after a thorough examination of their particular circumstances*.

**I. Introduction**

Title curative is simply the process of correcting a deficiency in the title to real property. In the context of the ***oil*** and gas industry these deficiencies surface when:

· a landman's title memorandum uncovers a problem during leasing, or

· an ***oil*** and gas attorney identifies a deficiency or *risk* during examination of a land abstract in preparation for the drilling of a well or payment of production royalties.

Defects in the chain of title can be as straightforward as correcting the misspelling in the name of a party in interest, or as intricate as resolving discrepancies in ownership along a shifting river bank, or commissioning the probate of a deceased mineral owner's estate. Because *to err is human*, there is no limitation on the types or complexity of issues that arise during examination of chains of title. While some title issues lend themselves to ready solutions, others may require the involvement of legal counsel or resolution through court or administrative adjudication. Each curative requirement presents a potential risk to the operator of a drilling program. Some risks are minimal in their impact or remote in probability; others are sufficiently serious -- in both impact and probability -- to delay the drilling of a well until the matter is resolved.

There have been a number of papers published previously on title curative, some general and others specific to certain jurisdictions. All of these have something of value to offer to the landman or legal practitioner charged with responsibility for curative. An addendum has been included at the end of this paper listing a number of these articles and where they can be found. There are also addenda containing information on statutes applicable to curative matters by state, links to helpful Internet sites, and information on whether counties in various ***oil***-producing western states have public records that can be searched on the Internet.

The purpose of this paper is to: (a) provide practical approaches to evaluating requirements that need to be addressed while managing available time; and (b) address issues that create particular and serious challenges during the curative process, that tax the ability of the landman, title attorney and others to complete curative requirements timely and successfully. Some of these issues involve policies or practices within the operating company, itself.

**II. Revisiting some basics.**

In almost all circumstances involving curative the enemy is *time*. There has likely been an appeal made by others in this forum to provide the title attorney with as much time as possible to adequately prepare the title opinion. On the other side of the equation, drilling programs involve too much money to allow title issues to be resolved while a rig is standing by. Aggressive drilling schedules mean that pressure is brought to bear on landmen by their management and engineering departments. Often there is insufficient time remaining for the landman to manage the curative requirements, once the title opinion is complete. Unfortunately, this scenario can be a prescription for costly errors.

Whether drillsite, division order or combined, the title opinion needs to be thoroughly reviewed by the landman when it's received from the title attorney. The next step should involve the creation of some type of project plan from which the landman can manage all curative activities from that point forward.

At a minimum, the project plan should contain a brief summary of all title requirements, a priority rating of each requirement, a required due date (if there's not a date certain, then a projected date for completion), and an actual completion date for each requirement. It's also helpful to have an area to track work status and enter comments. If there are several people involved in completing curative work, the project plan should also contain a data field indicating who has responsibility for completing each task.

Figure 1 on the following page shows a portion of a sample project plan developed for managing curative requirements.

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| Drillsite | Div Ord |  |  | Due | Target | Actual |
| Review Title Opinion and Create Project Plan | 7/20/05 | 7/20/05 |  |  |  |  |
| Materials Examined did not include a complete set of records for those |  |  |  |  |  |  |
| 1 | - | instruments filed of record in County, State affecting the Captioned Lands. | Advisory Only |  |  |  |
| Operator has agreed to assume the business risk of that limitation. |  |  |  |  |  |  |
| (a) There is a communitization agreement for production of gas and |  |  |  |  |  |  |
| 2 | 1 | associated hydrocarbons from the Captioned Lands and the XXX Formation | 9/30/05 | 7/30/05 | 8/2/05 |  |
| from the XYZ Well. Ensure that the State ***Oil*** and Gas Conservation |  |  |  |  |  |  |
| Commission has approved that infill drilling |  |  |  |  |  |  |
| Req. 2: (b) File an Affidavit it in County to provide notice of an extension by |  |  |  |  |  |  |
| production for the following ***oil*** and gas leases: |  |  |  |  |  |  |
| Lease A-- From United Sates, Dept. of Interior, BLM to \_\_\_\_\_; |  |  |  |  |  |  |
| 3 | 3 | not recorded; dated April 1, 1978; primary term 10 years |  |  |  |  |
| Lease B-- From United States Dept. of Interior BLM to \_\_\_\_\_; | 2/15/06 | 11/1/05 | 11/21/05 |  |  |  |
| recorded Book \_\_\_, Page \_\_\_, Reception # \_\_\_; dated May 1, 9999; |  |  |  |  |  |  |
| primary term 10 years |  |  |  |  |  |  |
| The Materials Examined did not indicate a patent of any of the Captioned |  |  |  |  |  |  |
| 4 | Lands granted by the U.S.A. The title examination conducted by \_\_\_\_ | Advisory Only |  |  |  |  |
| indicated that the surface estate was owned by the U.S.A. |  |  |  |  |  |  |
| statutory law requires the proceeds from production to be paid to the entitled |  |  |  |  |  |  |
| 5 | persons no later than six months after the end of the month of which the | Advisory Only |  |  |  |  |
| production was first sold. |  |  |  |  |  |  |
| (a) Conduct a visual inspection of Captioned Lands and identify any |  |  |  |  |  |  |
| easements or rights-of-way over, under or through the Captioned Lands. |  |  |  |  |  |  |
| 6 | 1 | (b) Obtain an affidavit from a disinterested third party with know ledge | 9/1/05 | 9/1/05 | 8/27/05 |  |
| regarding the persons in possession of the surface. If one other than U.S. is |  |  |  |  |  |  |
| in possession, inform title attorney for modification of T.O. |  |  |  |  |  |  |
| File an original or certified copy of the following assignments in County: |  |  |  |  |  |  |
| 7 | 2 | Assignment A.7--From \_\_\_\_ to \_\_\_\_; dated November 30, 1993 |  |  |  |  |
| Assignment A.8--From \_\_\_\_ to \_\_\_\_; dated August 31, 1996 | 11/1/05 | 8/15/05 | 9/15/05 |  |  |  |
| Req. 7: File original or certified copies of the following assignments with BLM |  |  |  |  |  |  |
| State Office in file for Lease #COC-00000: |  |  |  |  |  |  |
| 7 | 3 | Assignment B.1--From \_\_\_ and \_\_\_\_ to \_\_\_\_\_\_\_\_; |  |  |  |  |
| recorded Book \_\_\_ 1, Page \_\_\_, reception # \_\_\_; dated October 22, 1990 |  |  |  |  |  |  |
| Assignment B. 2--From \_\_\_\_ to \_\_\_\_\_; recorded Book \_\_\_, | 11/1/05 | 8/15/05 | 9/15/05 |  |  |  |
| Page \_\_\_, Reception # \_\_\_\_; Dated May 4, 1994 |  |  |  |  |  |  |
| Added: provide field office with a list of easements, rights of way and other | 9/1/05 | 8/15/05 | 8/21/05 |  |  |  |
| 8 | 1 | surface encumbrances affecting the subject property |  |  |  |  |
| 9 | 3 | Added: Obtain a communitization agreement covering the Captioned Lands | Ibd |  |  |  |

figure 1: Project Plan for Curative

Once the project plan is drafted, it is helpful to classify requirements by identifying those that are: (a) critical, (b) necessary, (c) temporarily waivable, and (d) waivable.[[1]](#footnote-2)1 Waiving requirements is discussed in more detail later in this paper-

Prioritizing requirements in the project plan is different from the prior discussion on classification in that it adds in the element of time. A critical requirement that needs to be satisfied before royalty payments can be made to a lessor will have a lower priority number than a necessary requirement that has to be completed before the well is spud.

When the project plan is complete the landman should give some thought to those individuals within the land organization that should be provided with a copy of the plan. It needs to be distributed to anyone with responsibility for satisfying any of the requirements, but it may also be helpful to provide a copy to the division order group -- especially if there are division order requirements being addressed in the plan.

The following discussion addresses practical approaches to coping with challenges presented by curative requirements. Several examples, derived from real curative situations, are used to illustrate points in the discussion. Any identifying details have been modified or eliminated.

**III. Help, the rig is standing by! Business risks vs. legal requirements.**

The landman and title attorney are presented with their greatest ordeal when the operator is ready to move a rig on location and title examination or curative is not complete. In the interest of establishing as large a presence as possible, as quickly as possible, operators often do not allow time during the initial leasing phase for negotiating with disinclined mineral owners, small interests or for locating absentee mineral owners. In addition, thorny title problems, such as unprobated estates that leave title in the decedent, are typically not addressed at the time of leasing. Generally, the ***oil*** company is not prepared to finance drilling at the leasing stage without additional geologic and seismic support; consequently, there is a reluctance to fund expensive title curative until drilling becomes certain. When engineering, geology and finance are ready to move forward, the landman and title attorney often find themselves with little time to address complex, time-consuming, and critical title issues.

The title opinion, if it is combined, will identify which requirements are specific to drillsite issues and which need to be satisfied for division order purposes. In either a combined title opinion or a drillsite title opinion it is possible under certain conditions to demote a drillsite title requirement to a division order requirement.

**a. When to demote a drillsite requirement to a division order requirement.**

Any circumstance wherein certainty of title cannot be identified will appear in the title opinion as a requirement to be satisfied <s>before</s> drilling is commenced. The title attorney relies on the business acumen of the client to determine whether to assume the risk of unresolved title requirements or delay drilling until the risk is mitigated. If the threat to expected financial gain is too great for the operator, the drilling program should be delayed until the matter can be resolved. The challenge for the operator is determining that point at which *the risk becomes too great*. It is the responsibility of the landman charged with curative duties to present the case to the decision makers, providing sufficient information to allow an informed decision to be made. In most situations, it is not the nature of the present risk but the impact to the operator that is determinative. For example, while an unprobated estate conjures up a serious impediment, if the interest represented by the estate is only a small fraction of the revenue ownership picture, the decision to demote this requirement may be an easy one.

A practical example involves an actual situation where no less than fifteen unresolved estates threatened to hold up a drilling schedule for an operator. Figure 2 on the following page shows a profile of several of the estates. Note that the following information is included in the profile:

· Deceased party;

· State of residency at the time of death;

· Type of documentation available for the decedent (e.g., death certificate, LWT, affidavit of heirship, etc.);

· Risk represented by leaving the requirement unresolved during drilling (shown as *maximum at risk*);

· Putative heir(s) for the estate;

· Lease status of the interest;

· A summary of the Title Opinion requirement.

Also note that in two instances in figure 2 there is more than one decedent involved in a chain.

|  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- |
| X = need | - = have |  |  |  |  |  |  |
| Estates and Probable Heirs | Death Certificate (certified) | Last Will and Testament | Affidavit of Death and Heirship | Letters Testamentary or Letters of Administration | Final Determination of Probate Proceedings certified by the XXX County District Court | Determination of Heirs or Devisees ... and of Interests in Property | Requirement |
| Estate of Bitty Gean (died in Arkansas) | - | maximum at risk 0.00% |  |  |  |  |  |
| heir | Merry Sue as administrator of the Estate of | Requirement: Have XXX County District Court certify the |  |  |  |  |  |
| Bitty Gean, OGL dated 6-2-2004, recorded | Letters of Administration for Merry Sue issued by a foreign |  |  |  |  |  |  |
| 1617/252 | court. |  |  |  |  |  |  |
| Estate of Kitty Diamond (died in California) | - | maximum at risk 0.00% |  |  |  |  |  |
| heir | Irm a Gales, aka Cissy Irm a Gales, OGL. | Requirement: Examine Dist Ct. Case #02\_Z34 to |  |  |  |  |  |
| dated 4-20-2004; recorded 159B/77 | determine if XXX Co. certified Letters of Administration |  |  |  |  |  |  |
| issued by a foreign court. if not, petition court to certify. |  |  |  |  |  |  |  |
| Estate of Oscar Oscar (died in Arizona) | X | - | X | maximum at risk: 0 156250% |  |  |  |
| Estate of Euflalia A. Oscar (died in Arizona) | X | X | - | X |  |  |  |
| heir | Buster Oscar | Requirement: Will need an attorney to petition the XXX |  |  |  |  |  |
| heir | Cuetsee Oscar Weabler | County District Court to initiate probate on behalf of an |  |  |  |  |  |
| heir; can be done for both Oscar and Euflalia jointly. |  |  |  |  |  |  |  |
| Estate of Duggard G. Jasmine III (died in Rorida) | X | X | X | maximum at risk 0.572918% |  |  |  |
| heir | Krilla Souser, OGL dated 4-20-2004; | Requirement: Will need an attorney to petition the XXX |  |  |  |  |  |
| recorded 1598/74 | County District Court to initiate probate on behalf of an |  |  |  |  |  |  |
| heir | Dandee C. Jasmine, Jr., OGL dated | heir. |  |  |  |  |  |
| 10/27/2000; recorded 1238/420. |  |  |  |  |  |  |  |
| Estate of Rilla Nita Toots (died in Arizona) | X | - | - | X | maximum at risk 0.312501% |  |  |
| Estate of Jed R. Toots (died in Arizona) | X | - | - |  |  |  |  |
| Estate of Ditsey Lalley Toots (died in Arizona) | X | X | - |  |  |  |  |
| heir | Eppie Toots Mustee, OGL dated 7-9-2004; | Requirement: Will need an attorney to petition the XXX |  |  |  |  |  |
| recorded 1635/385 | County District Court to initiate probate on behalf of an |  |  |  |  |  |  |
| heir | Jazzy Toots Roop (quit claimed all interest | heir, can be done for Rilla, Jed and Ditsey jointly. (have |  |  |  |  |  |
| to Eppie Toots Mustee) | copies of death certificates for all 3, but not certified) |  |  |  |  |  |  |
| Estate of Chipster Hoochit (died in Illinois) | X | - | X | maximum at risk 0.260417% |  |  |  |
| heir | Polly Jersey Hoochit, OGL dated 6/7/2000; | Requirement: Will need an attorney to petition the XXX |  |  |  |  |  |
| recorded 1197/456 | County District Court to initiate probate on behalf of an heir |  |  |  |  |  |  |
| (Polly); Note: LW&T leaves 100% of estate to Polly, |  |  |  |  |  |  |  |
| conditioned upon her survival; diminishes risk on this |  |  |  |  |  |  |  |
| interest since lessor was Polly. |  |  |  |  |  |  |  |
| Estate of Emrath Foozier (died in Colorado) | X | - | - | X | maximum at risk 0.260415% |  |  |
| heir | Cozee Boots, OGL dated 6/5/2000; | Requirement: Will need an attorney to petition the XXX |  |  |  |  |  |
| recorded 1208/490 | County District Court on behalf of an heir to have |  |  |  |  |  |  |
| heir | J. Waldo Foozier, OGL dated 6/5/2000; | Determination made; Note: LW&T leaves 100% of estate |  |  |  |  |  |
| recorded 1208/487 | to her two children (Cozee Boots and J. Waldo Foozier), |  |  |  |  |  |  |
| conditioned upon their survival; diminishes risk on this |  |  |  |  |  |  |  |
| interest since lessors were Cozee and Waldo. |  |  |  |  |  |  |  |

figure 2: Unprobated Estates Profile

Once the profile was completed a risk analysis was prepared to determine the severity of the threat to the operator's revenue position in the proposed well.

**b. Financial risk analysis: determining what's really at stake**

In preparing the risk analysis, the landman needs to identify the interests of all the parties, leased and unleased, claiming to be beneficiaries of the unprobated or partially probated estates. For purposes of this discussion, *partially probated estates* are: (a) those for which probate proceedings have begun but not closed, and (b) those that were closed in a jurisdiction foreign to that where the land/interest is located. At this stage all such parties are *putative* (i.e., presumed, reputed or alleged) heirs or devisees.

Next, the net revenue interest of each party needs to be calculated. The landman also needs to make a min-max assessment of risk. The maximum risk is the easiest to determine as it is always the complete failure of a putative interest expressed as 100% of the NRI.

The minimum risk is a subjective reduction of the maximum risk. It involves the landman making some intuitive or educated deductions. Any documentation that the landman has in-hand, to support the claim of a party, helps to reduce the risk. The more reliable the document, the greater the reduction in risk. For example, an affidavit of death and heirship signed by a person with broad and continuous knowledge of the decedent's personal and business affairs gets high marks for credibility. Even higher marks would be accorded a properly executed and attested last will and testament produced by the decedent's attorney. Bear in mind that until a determination is made by a court of competent jurisdiction, neither of these documents is indisputable. Less reliable would be an affidavit of death and heirship signed by the decedent's neighbor who moved to the area six months before the decedent's death. The comment: "*Mom always liked me best. She told me she was leaving everything to me*," (wink, wink) communicated by the claimant in a phone conversation with the landman gets no marks at all. This is not to say that discussion of the matter with the claimant(s) lacks credibility. The landman will have to exercise judgment as to how reliable the information is and how much weight to accord the claimants' word. Personal statements are the most difficult types of support to rate and the landman may want to disregard them entirely. The higher the credibility rating of the supporting evidence, the lower the minimum risk score.

Following the creation of the Unprobated Estate Profile shown in figure 2, the next step was to conduct an analysis of the risk of failure presented by each claimant in the various estates and then combine the risks to create a total risk picture for the company, should it elect to drill before addressing the probate issues outlined by the title attorney.

At the end of the analysis of the fifteen estates, assuming worst case -- that 100% of the protective leases failed -- the maximum risk to the operator presented by the failure of the protective leases was slightly more than 0.021 or two percent. However, there were two putative interests that were unleased. The operator elected to reduce all fifteen probate requirements to division order requirements and proceed with drilling the well as soon as the unleased interests were leased.

An abbreviated version of the actual risk analysis applied to the profile in figure 2 is shown on the next page as figure 3. Note that the data has been divided into tracts of land and all interest owners in each tract are shown on the analysis. Those that do not prevent a threat are shown to have "ownership supported by title".

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| At Risk |  |  |  |  |  |
| Status | Lessor | NRI | Min | Max | Comments |
| Tract 1 |  |  |  |  |  |
| Unleased | Buster Oscar | 1.041667% | 1.041667% | 1.041667% | (1) unleased interest, would reduce to 0.156250% if leased at 15% royalty; |
| Unleased | Cuetsee Oscar Weebler | 1.041667% | 1.041667% | 1.041667% | (2) Heirs of the Estate of Oscar Oscar and Euflalia A. Oscar; word of Buster as |
| supporting documentation |  |  |  |  |  |
| at risk on this tract | 2.083334% | 2.083334% |  |  |  |
| Tract 2 |  |  |  |  |  |
| 1 | AAA, et vir OGL dated 12/23/2003 | 4.375000% | 0.000000% | 0.000000% | ownership supported by title |
| 2 | BBB, single man, OGL 4-20-2004 | 1.250000% | 0.000000% | 0.000000% | ownership supported by title |
| 3 | CCC, et ux, OGL dated 6/5/2000 | 0.781250% | 0.000000% | 0.000000% | ownership supported by title |
| 4 | DDD, et ux, OGL dated 6/5/2000 | 0.781250% | 0.000000% | 0.000000% | ownership supported by title |
| 5 | EEE, et ux, OGL dated 8-18-2004 | 0.781250% | 0.000000% | 0.000000% | ownership supported by title |
| 6 | FFF, a married man, OGL dated 1/21/2004 | 0.781250% | 0.000000% | 0.000000% | ownership supported by title |
| 7 | GGG, et ux, OGL dated 8-18-2004 | 0.781250% | 0.000000% | 0.000000% | ownership supported by title |
| 8 | HHH, et ux, OGL dated 8-18-2004 | 0.781250% | 0.000000% | 0.000000% | ownership supported by title |
| 9 | III, et ux, OGL dated 4-20-2004 | 0.625000% | 0.000000% | 0.000000% | ownership supported by title |
| 10 | Krilla Souser, OGL dated 4/20/04 | 0.312501% | 0.312501% | 0.312501% | Heirs of the Estate of Duggard G. Jasmine, III; word of K Souser is only |
| 11 | Dandee C. Jasmine, Jr. OGL dated 10/27/2000 | 0.260417% | 0.260417% | 0.260417% | supporting documentation |
| at risk on this tract | 0.572918% | 0.572918% |  |  |  |
| Tract 3 |  |  |  |  |  |
| 12 | Merry Sue, admin of the est. of Bitty Gean, OGL | 0.312501% | 0.000000% | 0.000000% | No risk assessed as probate complete, only Letters of Adm need to be certified |
| dated 6-2-2004 | in state where interest located. |  |  |  |  |
| 13 | Eppie Toots Mustee, OGL dated 7-9-2004 | 0.312501% | 0.312501% | 0.312501% | Heir of the estates of Rilla Nita Toots, Jed R. Toots and Ditsey Lalley Toots |
| along with Jazzy Toots Roop who quitclaimed all her interest to Eppie. Have |  |  |  |  |  |
| Affidavit of Heirship on all 3 decedents signed by Eppie. |  |  |  |  |  |
| at risk on this tract | 0.312501% | 0.312501% |  |  |  |
| Tract 4 |  |  |  |  |  |
| 14 | JJJ, a widow, OGL dated 6/7/2000 | 0.260417% | 0.000000% | 0.000000% | ownership supported by title |
| 15 | Polly Jersey Hootchit, widow, OGL dated 6/7/2000 | 0.260417% | 0.085938% | 0.260417% | Heir of the Estate of Chipster Hootchit; have LWT from atty of decedent signed |
| 6 mos before DOD |  |  |  |  |  |
| at risk on this tract | 0.085938% | 0.260417% |  |  |  |
| Tract 5 |  |  |  |  |  |
| 16 | Crimpsey M. Bilgo, sw, OGL dated 6/5/2000 | 0.130208% | 0.065104% | 0.130208% | Heirs of the Estate of Ezradine Mipps Bilgo; have copy of LWT from CD (son) |
| 17 | Coolest Dude Bilgo, sm, OGL dated 6/5/2000 | 0.130208% | 0.065104% | 0.130208% |  |
| at risk on this tract | 0.130208% | 0.260416% |  |  |  |
| Tract 6 |  |  |  |  |  |
| 18 | Popsaline Trumpledour, a widow, OGL dated | 0.729166% | 0.109375% | 0.729166% | Heir of the Estate of N. Axel Ormstergorgon; have LWT from decedent's atty |
| 5-26-2004; recorded 1607/1736 | and affidavit of heirship from business partner |  |  |  |  |
| at risk on this tract | 0.109375% | 0.729166% |  |  |  |
| Total NRI on leased Interests | 13.645836% |  |  |  |  |
| Total NRI on unleased Interests | 2.083334% |  |  |  |  |
| At Risk on Leased Intersts | 1.080732% | 1.875002% |  |  |  |
| Note: this example does not include all estates in the original case |  |  |  |  |  |
| Maximum At Risk on All | 3,294274% | 4.218752% |  |  |  |

figure 3: Risk Analysis

This type of risk analysis tool is invaluable to the landman who undertakes the management of handling complex curative projects. Here, it is illustrative of risk presented by certain types of curative requirements in the following section it will be introduced again as a decision tool for determining the suitability of waiving a requirement.

**III. To waive or not to waive, that is the question.**

Title attorneys know that their clients will waive some curative requirements ... they just hope that the client will waive the requirement that *would be nice to have but is not essential*. At times it seems to the landman that there is an unspoken game afoot in which the title attorney's objective is to identify every nit-picky nugget that can be ferreted out of the abstract and then diabolically describe them all as requirements of equal significance. While it's appealing to believe that this might be the case, the title attorney has an obligation to raise every potential threat, no matter how small, to the attention of the client. It's the client's responsibility to exercise informed judgment on the significance of any threat to the client's business operations.

For the landman, understanding how to evaluate the significance of requirements is as essential as knowing how to resolve them. The process of this evaluation should not be taken lightly because the consequence of doing so can result in a negative impact on the operator's investment. A case in point is securing releases of ***oil*** and gas leases that have not been released of record but are beyond their primary term. It is tempting to ignore a requirement to release ***oil*** and gas leases that should have been released twenty, thirty or even forty years ago; however, the greater the amount of acreage included in the old lease the greater the cause for concern. It has been common practice for many operators to file affidavits of production that describe only the lease lands included in the spacing unit for a producing well. Even intervening ***oil*** and gas leases are no assurance that a prior lease is not producing. When all attempts to secure a release of an aged lease, or affidavit of non-production, fails, only an affidavit of an actual inspection of the lands described by the aged lease provides assurance that the lands are not held.

The new technology that enables an operator to drill under a lease from a pad location on another lease more than a mile away presents an unforeseen title challenge. In the former example a surface inspection would be useless. In the absence of a Pugh clause or other language of limitation, it is becoming more useful than ever before to include the entire lease acreage description in the exhibits when affidavits of production are filed -- to serve as notice to third parties that the operator intends the well to hold the entirety of the leased lands no matter how far away from the surface plant. It is important to emphasize that many state statutes do not require a description of the leasehold acreage affected by the production in such an affidavit, only the drillsite description for the producing well. In Colorado, for example, the exhibit need only contain a list of the leases by lessor name and recording data. While meeting this minimum requirement will save money in recording fees it may only assure that the affidavit is indexed in the public records against the quarter-quarter on which the well is located. Including a description of the leasehold lands included in the spacing unit is slightly better for public notice purposes and represents only a minimal increase in recording costs, if any. *Best practice* would be inclusion in the exhibit of the full leasehold description for each affected lease. While this could represent higher recording costs in the short term, if the operator continues to work the area it will very likely move to other leasehold lands associated with the same leases. The operator will then have to pay for a title attorney to insert a requirement to determine if any of the lands under the new title opinion are held by production; and then pay additional for someone to do the title examination to make that determination. In the long term, the operator may be better served from a cost stand-point to undertake the *best practice*.

So, when would waiving a requirement to obtain a release of an ***oil*** and gas lease taken in 1956 be appropriate? The answer is "sometimes." We're back to the risk assessment. If the 1956 lease was taken by an entity that never assigned it to anyone, is no longer in business, and appears from the state records to never have drilled a producing well anywhere near the lease, the risk is diminishing significantly and a waiver may be acceptable to the operator. It would be even better if a subsequent lessee drilled on the acreage in 1967, P&A'd the well and released the intervening lease.

There is no hard rule about what can be waived. The answer is "it depends." What it depends on is the ability of the landman to evaluate: (a) the financial risk of waiving the requirement and (b) the probability that the waiver would be the wrong thing to do. The process for determining whether to waive a requirement should take into account the following:

· Has all the reasonably obtainable information about the circumstances (that led to the requirement) been discovered and evaluated?

· What is the financial impact to the operator's interest if the requirement is waived and shouldn't have been?

· Does the evaluation of the requirement and the associated information indicate that the probability of a problem is low? Why?

· Has the matter been thoroughly discussed with the appropriate decision maker(s) in the operator's organization (e.g., Land, Exploration, Finance, etc.)?

· Is there agreement on how to proceed?

· Has the decision and its outcome been documented and placed in the company records?

Notwithstanding the foregoing discussion, there are some requirements that should never be waived -- primarily, requirements dealing with strangers to the chain of title and uncertainty of ownership. Some may present a threat of such significance to the operator's financial position that they need to be resolved prior to drilling. For requirements of lesser impact the same risk analysis process should be used -- not to demote the requirements but to waive them.

**IV. When a curative instrument doesn't cure: revisiting company practices.**

Not all curative instruments are equal. Many of them clearly resolve the issue identified in the title opinion requirement; and, when put of record, serve to ensure that the requirement won't be raised in a subsequent title when the operator embarks on an offset or in-fill drilling program. Other instruments masquerade as curative solutions, but are only appropriate for an interim measure. These necessitate more final and conclusive action at a later time (e.g., before drilling commences). A prime example of this is the affidavit of death and heirship, much prized by field landmen. This affidavit, signed by a disinterested third party "well acquainted" with a decedent is used to support the purchase of protective leases from putative heirs or devisees in a case where, in the absence of probate, title to a mineral interest remains in the name of a deceased party. The affidavit is usually in a form similar to figure 4 below.

AFFIDAVIT OF DEATH AND HEIRSHIP

|  |  |
| --- | --- |
| STATE OF | ) |
| ( | ss |
| COUNTY of | ) |

\_\_\_\_\_\_ of \_\_\_\_, \_\_\_\_, CO \_\_\_, of lawful age, being first duly sworn states:

That the statements hereinafter set forth, including answers to questions, constitute a true and correct and complete statement of the family history of the person hereinafter named as "decedent" and of the estate of such decedent.

1. Name of the decedent;

2. Date of death;

3. Place of death;

4. Marital Status at time of death;

5. The decedent left a □ Living Trust □ Last Will and Testament □ None □ Other: \_\_\_\_

6. The decedent's estate □ was not probated □ was probated in \_\_\_\_\_ (State).

7. During his/her lifetime, the decedent was married to only the following individuals:

|  |  |  |
| --- | --- | --- |
| NAME OF SPOUSE | DATE OF DEATH | PLACE OF DEATH |

8. Decedent had no children from his/her marriage to \_\_\_\_:

9. Decedent had the following children from his/her marriage to \_\_\_\_\_\_\_:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| NAME OF CHILD | ADDRESS | AGE | GENDER | D.O.D. |

10. \_\_\_\_ (child) died at the age of \_\_\_ without spouse or children, natural or adopted.

11. Decedent had no children by adoption.

Affiant states that he/she was well acquainted with the financial condition of the decedent and knows that the decedent died solvent and that all debts of the estate were paid. Affiant further states that he/she was a \_\_\_\_\_ (relationship e.g. business associate, neighbor, social acquaintance, etc.) and friend of the decedent's for more than \_\_\_ years and knew the decedent well.

Further affiant sayeth not.

\_\_\_\_\_\_\_\_\_\_

(insert name), Affiant

Subscribed and sworn to before me this \_\_\_ day of \_\_\_\_, 2007.

|  |  |
| --- | --- |
| \_\_\_\_\_\_\_\_\_\_ |  |
| Notary |  |
| My commission expires: | residing at: \_\_\_\_\_\_\_\_\_ |

Figure 4: Affidavit of Death and Heirship

While an affidavit of death and heirship can provide useful information, it does not transfer title and it should not be considered conclusive evidence of the outcome of a proper proceeding to transfer title to the property. When then, should it be used? It is useful as a preliminary document in the curative process prior to a final determination by a court of competent jurisdiction. It can also be useful in supporting payment of a lease bonus for protective ***oil*** and gas leases taken from putative heirs or devisees.

During times when the ***oil*** and gas industry was not as financially profitable, many operators adopted a practice of paying lessor production royalties based on affidavits of death and heirship, in the absence of probate. The rationalization being that the royalties at risk were not significant enough to justify the cost of probate curative ... especially for small interests. This has proven to be a dangerous practice for some operators. In one example, a prospective lessor helped the field landman by providing information on the unprobated estate of her deceased brother. The information was used to draft an affidavit of death and heirship that was signed by a friend of the family. The affidavit represented that the decedent was widowed, died intestate and without surviving children. The cooperative sister, as the apparent sole heir of the decedent under the laws of intestate succession, signed an ***oil*** and gas lease on the decedent's interest and accepted the bonus payment. Shortly thereafter the lessee/operator successfully completed a producing well on the leased lands and began making royalty payments to the sister. Within the year, and shortly before her death, the sister, titling herself *as personal representative for the estate of* [her brother], but without apparent benefit of court approval, conveyed the decedent's interest to her three children. Over the next five years the operator continued to develop the field. When the operator began preparation for a new drillsite that included more of the mineral interest owned by the decedent, the title attorney urged that the decedent's estate be formally probated so that title was transferred through a final determination. Thankfully, the operator had begun devoting more time and attention to title curative. At the request of the title attorney, examination of the public records in the District Court was undertaken. This revealed that the decedent had been married twice. The first marriage, which had produced a child, ended in divorce in the 1940s and record of the marriage dissolution was filed in the public records at the time. Without too much effort, the adult child of the first marriage was located living in Ohio, married and with adult children of his own. This case is still being resolved.

There are many motivations for signing a document, not all of them honorable. In the previous example, the probability that the decedent's sister was unaware of her brother's first marriage, which lasted fourteen years and produced a child, is remote. It is also unlikely that the operator will be able to recover the incorrectly attributed royalties paid to the sister and her children. Further, the decedent's son is not apt to forego his right to the previously paid royalties.

It is tempting to dismiss this case as an aberration; however, it is only one of a half-dozen similar situations being resolved on behalf of clients at the time of this writing -- all of them relying on affidavits of death and heirship to pay production royalties to putative heirs of unprobated estates.

Reevaluating company practices related to the curative process -- and particularly blanket (or standing) waivers -- should be undertaken every year or so in light of changes in: (a) the company's operations and economic projections, (b) the industry, (c) the legal climate, (d) statutes or regulatory rulings, and (e) previous experiences. *Best practice* would advocate that the land department develop documented procedures for handling curative issues and would also provide for periodic review of the process.

**V. *In an abundance of caution* -- when the title attorney leaves you scratching your head.**

The phrase "... in an abundance of caution, the client should ..." is all too familiar to the landman charged with clearing curative issues. It could almost be tagged as the mantra of the title attorney. It is typically applied to situations where some uncertainty, giving rise to a potential threat in the title, is so remote that it may border on the improbable. The landman may even read the requirement once, twice, three times trying to comprehend why the matter is even included in the title opinion in the first place. What was the title attorney thinking! Unfortunately for the hopeful landman, *in an abundance of caution* is not lawyer-speak for "waive this requirement" and should not be considered as such.

The message the title attorney is conveying to the client is: (a) the attorney has made one or more assumptions that need to be validated by the client; or (b) that some element in the title chain is not certain. Intervening events, such as passage of time, direction of case law, lack of a prior challenge, continuous acceptance of consideration (e.g. royalty payments) based on one of several interpretations by one or more parties in interest, etc. would suggest that it might not need to be taken as seriously as other requirements; however, *something about this situation is not certain* and the opening for a challenge to the title has not been closed.

A typical example might read as follows:

There appears of record, a transfer of operating rights in an ***oil*** and gas lease dated December 5, 1995 from Jodie Jean Shmaatz ***Oil*** Producers, Inc. to Breezy BobO's Gas-O-Rama, L.L.C., of all of assignor's interest in Lots 3 through 6 and 9 through 11 of Section 14, T0N,R0W, limited to the zones "below the base of the Iles Mesaverde formation as found at a depth of 7,492 feet, and above the base of the Mesaverde formation, as found at a depth of 8,799 feet in the Shrub Federal #0 well, or the stratigraphic equivalent of such measured depths."

The formation limitations cited above, being below the base of the Iles formation and above the base of the Mesaverde, do not effectively describe any formations based on the stratigraphic data submitted by the client to the undersigned. *In an abundance of caution*, the client should obtain and file with the BLM a correction of said transfer of operating rights to reflect the correct formations subject to the transfer.

In the above scenario, the title attorney was unable to equate the specific formation limitations to geologic data provided by the client to help the attorney ascertain the integrity of the interest assigned. Since it created uncertainty for the title attorney, it is likely that others may become similarly confused. In point of fact, the description in question may be accurate but the client has not satisfied the attorney that it is and therefore the attorney is going to assume an ambiguity and include a requirement that the ambiguity be removed by correcting the assignment. The client is being called on to correct the problem -- or exercise its judgment as to whether there is a problem at all. In either case the client should not just waive this out of hand.

The preceding discussion notwithstanding, the author would like to appeal to title attorneys to refrain from overusing *in the abundance of caution* language -- including its various disguises, *it would behoove the client*, or *for greater certainty of title* and the like. The following example from a title opinion causes landmen to roll their eyes into the backs of their heads.

*In an abundance of caution*, the client should make or cause to be made an examination of the records of XXX County to insure that no documents were omitted by World's Greatest Abstractors-R-Us in the preparation of the abstract of title.

**VI. "What do you mean I could lose my job?": the importance of understanding (oops!) appreciating what the title attorney is telling you.**

Title attorneys do not take their jobs lightly and neither should landmen tasked with curing the problems the attorney exposes. The attorney understands only too well the legal risks inherent in broken or ambiguous chains of title and is trained to ensure, as comprehensively as possible, that the client is made aware of the nature of the risks. The client's responsibility is to ensure that the risks are mitigated.

Pressure from all sides notwithstanding, this is not the place in the landman's career to take a gamble. That is better left for Friday night poker games and weekends in Las Vegas. The author is aware of one sorrowful incident where a seasoned landman was invited by her employer to pursue a career in an unrelated field when a title requirement she waived resulted in a significant financial loss to her company. It seemed innocuous enough, she'd done it *many* times before on the same type of requirement -- and, there had never been a problem!

Title curative is fraught with more opportunities for serious failure than any other aspect of land work. And, there are often hefty financial penalties to the operator when such failures come to pass. Understanding a title requirement means (1) acknowledging the gravity of the problem, (2) identifying the reasonably foreseeable repercussions, and (3) weighing the potential consequences. Managing to a plan, classifying for significance, assigning priorities and assessing risk are tools that offer the landman a means and method for coping with timing, resources, and threats. The landman also needs the means to fix the problems so that the risk is mitigated to the satisfaction of the company. While some problems may require additional involvement of legal counsel or necessitate taking, or causing others to take, legal action there are many that can be repaired through negotiation of curative instruments designed to address the problem at hand. Figure 5 presents some of the most commonly used remedial documents. Also included are several documents that are not necessarily curative in nature but are the basis for common title opinion requirements and, if not filed properly, can give rise to future curative events.

|  |  |
| --- | --- |
| Document | Description |
| Communitization | Evidences approval by the U.S. government, Department of the Interior, |
| Agreement | to the state mandated spacing orders for a commercial ***oil*** and gas well |
| that contains federal acreage within the drillsite spacing unit. |  |
| Consent to Pool | Evidences the agreement of one or more parties-in-interest to an |
| executed Declaration of Pooling or Pooling Agreement previously |  |
| placed of record. |  |
| Corporate Mergers & | Provides public notice of changes in the name or status of a corporation. |
| Name Changes |  |
| Correction Documents | Corrects mistakes and/or ambiguities in any type of document that is |
| already of record. Where mistakes or ambiguities are complicated, care |  |
| should be taken in drafting the recitals of the correction document to |  |
| clearly explain who, what and why the document is being corrected. |  |
| Death Certificate | When placed of record, evidences the death of an interest owner for |
| various title-related purposes. In the case of a life estate, it services to |  |
| evidence vesting of executory rights and the right to receive proceeds in |  |
| the remaindermen. |  |
| Declaration of Interests | An agreement among parties in interest in a commercially-producing |
| in a Pooled Unit | pooled unit as to their respective interests in the unit where ambiguity |
| exists because of natural changes in topography (e.g., change in the |  |
| course of a river, etc.) or otherwise. |  |
| Extension of ***Oil*** and Gas | Used in situations where only the term, and possibly minor provisions, |
| Lease | of the original ***oil*** and gas lease is being changed because lessee's |
| operations have been insufficient to extend the lease beyond its primary |  |
| term. If material provisions of the original ***oil*** and gas lease have been |  |
| renegotiated, the superior curative document is a top lease or new ***oil*** |  |
| and gas lease. |  |
| Pooling Agreement | Evidences compliance with state-mandated well spacing orders by |
| consolidating smaller fee interests into a pool. |  |
| Probate | To transfer title from an estate, probate documents should be placed of |
| record e.g., letters, deeds of distribution. |  |
| Protective ***Oil*** and Gas | Taken to cover interests claimed by individuals or entities who do not |
| Leases | have record title or whose record title is ambiguous. Also used to ensure |
| full leasehold coverage when multiple parties have conflicting claims of |  |
| ownership. |  |
| Quit-Claim Deed | Used to convey title to interests that may or may not exist or to confirm |
| or repair title when ambiguities exist as a result of prior conveyances. |  |
| Quiet Title Action | A judicial action to resolve complicated title issues (e.g., adverse |
| possession issues, overlapping claims, strangers to title, and |  |
| condemnation issues, etc.). The final ruling should be placed of record |  |
| as evidence of title ownership as determined by the court. |  |
| Powers of Attorney | Evidence of the authority of one party to act on behalf of another in |
| specific legal matters or to conduct all business matters on behalf of a |  |
| individuals unable or unwilling to act on their own. |  |
| Ratifications | Evidence that a party in interest by title, grant of authority, or act of law |
| confirms and adopts the specific act of another party in interest (e.g., |  |
| Execution of an ***oil*** and gas lease, mortgage, assignment, etc.) without |  |
| altering the terms of the original act. |  |
| Release of Deed of Trust | Provides public notice of the satisfaction of debt. |
| Release of ***Oil*** and Gas | Provides notice that a lessee or assignee or other party in interest |
| Lease | relinquishes any further interest or claim in all or part of an ***oil*** and gas |
| lease. |  |
| Grant of Authority | Formal or policy documents granting limited or unlimited signature |
| authority to an individual to act on behalf of an entity. |  |
| Statement of Authority | Evidences the authority of a trust to convey and own property. |
| Stipulations of Interest | Without words of grant and cross-conveyance, clarifies the |
| understanding of two or more parties as to their individual interests in |  |
| certain lands to correct ambiguities of record. With words of grant and |  |
| cross-conveyance, corrects ambiguities or incorrect prior conveyances |  |
| among two or more parties; or amends ownership interests due to natural |  |
| changes in topography. |  |
| Subordination | Protects an ownership interest from encumbrances of higher priority. |
| Agreement |  |
| Sundry Notice | Provides evidence of the completion of a commercial well sufficient to |
| hold a federal lease beyond its term. |  |
| Top Lease | Provides evidence of the intent of a lessor to grant leasehold rights |
| beginning at a future time certain under the conditions that (1) the |  |
| underlying lease expires or is terminated by its lessee and (2) the top |  |
| lessee pays full consideration within a defined period of time. |  |
| Affidavits |  |
| Affidavits are many and varied. They can be used for providing notice to the public of matters pertaining |  |
| to age; gender; birth; military service; marital status; residency; death; familial relationships; heirship; |  |
| identity; possession of real property. Affidavits can also provide notice of the nature of a legal entity; |  |
| identity or authority of officers of corporations; identity and authority of members of partnerships, |  |
| L.L.C.s, joint ventures, and trusts; and other matters. Several frequently used types of affidavits are listed |  |
| below. |  |
| Affidavit of Extension of | Provides public notice that operator believes a lease is extended beyond |
| ***Oil*** and Gas Lease | its primary term under the provisions of the lease. |
| Affidavit of Heirship | Provides record notice that an interest is claimed to have been |
| (aka Affidavit of Death | transferred by death to the putative heirs or devisees of a decedent |
| and Heirship) | without the benefit of probate. Affidavits of Heirship do not convey |
| title. |  |
| Affidavit of Identity | Corrects inconsistencies in a party's name as it appears in the public |
| record. |  |
| Affidavit of Joint | Affirms the existence of a joint tenancy at the time of death of one of the |
| Tenancy | joint tenants and evidences the passing of the interest of the joint tenant |
| by operation of death. |  |
| Affidavit of Address | Provides formal notice of a lessor's change of address from that shown |
| Change | on an ***oil*** and gas lease or on a division order. |
| Affidavit of Possession | Provides evidence that a lessor who owns the surface of the leased lands |
| remains in possession of the surface and that the lands are not being |  |
| occupied by a stranger who could assert a claim by adverse possession. |  |
| Affidavit of Production | In compliance with statutory requirements, provides public notice that a |
| commercial well has been completed, the drillsite location of the well, |  |
| and the ***oil*** and gas leases extended beyond their primary terms by |  |
| production. |  |
| Affidavit of Non-production | Provides evidence that certain leases/lands are not being held by |
| production. |  |
| Affidavit of Surface | Evidences the presence or absence of ***oil*** and gas operations following a |
| Inspection | physical inspection of described land. |

Figure 5: Commonly Used Curative Documents

Each area of the country will have its own versions for many of these documents, so sources in the area where the landman is working should be consulted for standard forms. There are also resources listed in the addenda to this paper where various editions of these instruments can be found.

There are two areas in particular that are somewhat outside the title opinion, itself, that seem to be ripe for serious problems for both the title attorney and the landman. One has to do with the foundation from which the title opinion is built and the other with follow-up and aftercare.

In geographic areas where the industry has been active for a number of years, operators are building internal libraries of title abstracts and title opinions. As a result, it is common practice to order complementary abstracts (including lands adjacent to and/or partially overlapping a prior abstract) and supplemental abstracts (covering records filed since the date of a prior abstract to the present). From one or more of these, the title attorney is asked to prepare a supplemental title opinion, which updates a prior title opinion -- not always prepared by the same attorney. Title attorneys seem to be fairly willing to grant the equivalent of full faith and credit to their colleagues' work. Title attorneys are being asked more frequently to provide title opinions based on not one or two prior documents but several. The more prior documents involved the uglier and more ungainly the task becomes.

A case in point is illustrated by the spreadsheet on the following page that was created to help a landman see the gaps in the compilation of supporting documents from which a title attorney was asked to render a supplemental title opinion. It should be noted that the well for which the opinion was being created was being drilled to a third formation (frmtn 3).

Title Opinions dated 4/20/1988, 5/6/1988, 5/30/1989, and 5/23/1991 are cited in the 8/21/1999 TO as source material but abstracts used in preparation of those TO.s were not provided to the Attorney who prepared the 8/21/19995 TO or to Stigurd Suaveson who prepared the 8/23/07 Supplement. Please note that the 6 original TOs did not cover all depths.

Title Opinion dated 2/2/1995 states that the materials examined in preparation of the TO were the abstracts shown (in the column below the heading)+ prior Title Opinions(see above)

Stigurd Suaveson's TO dated 8/23/2007 states that it is based on the supplemental abstracts shown (in the column below the heading) + the 8/21/1999 Title Opinion

Stigurd Suaveson's TO dated 8/23/2007 states that the author of the 2/21/1999 TO recites that he relied only on the BLM records for preparing the TO as to Lot 2 and not an examination of the records in the County.

|  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- |
| Abstract and Title Opinion Coverage: Hope-it-Happens #7-17 |  |  |  |  |  |  |  |  |  |  |  |  |  |
| Township 0 South, Range 0 West Section 17: Lots 1, 2, 8, 9, NWNE, SE (E/2) |  |  |  |  |  |  |  |  |  |  |  |  |  |
| Known Abstract Coverage | Title Opinions (cited in TO dated 8/21/1999) | 8/21/99 | 1/23/07 | ISSUE: |  |  |  |  |  |  |  |  |  |
| 4/20/88 | 5/6/88 | 5/30/89 | 5/23/91 | 5/23/91 | 5/23/91 | Surt to | Surt to | TOs appear to be based on incomplete |  |  |  |  |  |
| Bubba's | Bubba's | Bubba's | Bubba's | Bubba's | Below | Below | Below | Surt to | Surt to | Surt to | Frmtn 2\* | Frmtn 2\* | Abstract Coverage and rely on prior |
| Abstract | Abstract | Abstract | Abstract | Abstract | Frmtn 1+ | Frmtn 1+ | Frmtn 1+ | Frmtn 1 | Frmtn 1 | Frmtn 1 | TO's in the absence of Abstracts |  |  |
| Summary | # 6072 | # 2082-A | # 6073 | # 6064 | # 6471 |  |  |  |  |  |  |  |  |
| Abstract Coverage for above TO's Unknown | Abstract Coverage |  |  |  |  |  |  |  |  |  |  |  |  |
| Lot 1 | Incep to | Incep to | 10/19/94 to | Incep to | 10/19/94 to | Lot 1 |  |  |  |  |  |  |  |
| 3/31/06 | 10/19/94 | 3/31/06 | 10/19/94 | 3/31/06 | Lot 1 |  |  |  |  |  |  |  |  |
| Missing Abstract Date: |  |  |  |  |  |  |  |  |  |  |  |  |  |
| Lot 2 | 12/4/87 to | 12/4/87 to | 10/18/94 to | 12/4/87 to | 10/18/94 to | Incep to 12/4/87 for all depths & | Lot 2 |  |  |  |  |  |  |
| 3/31/06 | 10/18/94 | 3/31/06 | 10/18/94 | 3/31/06 | 12/4/87 to 10/18/94 |  |  |  |  |  |  |  |  |
| below Frmtn 1 |  |  |  |  |  |  |  |  |  |  |  |  |  |
| Lot 8 | Incep to | Incept to | 10/19/94 to | Incept to | 10/19/94 to | Lot 8 |  |  |  |  |  |  |  |
| 3/31/06 | 10/19/94 | 3/31/06 | 10/19/94 | 3/31/06 |  |  |  |  |  |  |  |  |  |
| Lot 9 | Incep to | Incept to | 10/19/94 to | Incept to | 10/19/94 to | Lot 9 |  |  |  |  |  |  |  |
| 3/31/06 | 10/19/94 | 3/31/06 | 10/19/94 | 3/31/06 |  |  |  |  |  |  |  |  |  |
| NWNE | Incep to | Incep to | 10/19/94 to | Incep to | 10/19/94 to | NWNE |  |  |  |  |  |  |  |
| 3/31/06 | 10/19/94 | 3/31/06 | 10/19/94 | 3/31/06 |  |  |  |  |  |  |  |  |  |
| Missing Abstract Date: |  |  |  |  |  |  |  |  |  |  |  |  |  |
| E½SE | 2/3/88 to | 2/3/88 to | 10/3/94 to | 2/3/88 to | 10/3/94 to | Incept to 2/3/88 surface | E½SE |  |  |  |  |  |  |
| 3/31/06 | 10/3/94 | 3/31/06 | 10/3/94 | 3/31/06 | to base of Frmtn 1 |  |  |  |  |  |  |  |  |
| Missing Abstract Date: |  |  |  |  |  |  |  |  |  |  |  |  |  |
| W½SE | 2/3/88 to | 2/3/88 to | 10/3/94 to | 2/3/88 to | 10/3/94 to | Incept to 2/3/88 surface | W½SE |  |  |  |  |  |  |
| 3/31/06 | 10/3/94 | 3/31/06 | 10/3/94 | 3/31/07 | to base of Frmtn 1 |  |  |  |  |  |  |  |  |

figure 6: Title Document Support Analysis

Undoubtedly the landman thought she was saving her company money and time by making use of the prior title documents- Actually, she cost her company both time and money, to say nothing of the headaches created for the title attorney. It took the attorney much longer than usual to render the title opinion, when completed it was over 500 pages long and contained over 180 requirements -- atypical for this area. The attorney augmented his normal disclaimers as spectacularly as he dared. The curative project plan is over 100 pages long. It is estimated that at least 30% of the requirements might be eliminated with full abstract coverage. In the landman's defense, there were so many documents it was hard to figure out what might be missing. In this case the company elected to order additional abstracts.

The second issue to be discussed is a troublesome one. Time after time, title attorneys will request that when certain curative documents are obtained they be submitted to the attorney for review and possible modification of the title opinion. There does not seem to be a good record of follow through by title attorneys provided with such curative documents nor by their clients, who should be clamoring for assurance from the attorney that the attorney's conclusions in the original title opinion are valid -- particularly if the possible consequence of the curative is a change in ownership or in interest that affects production payments.

**VII. Best Practices**

In closing this discussion, the author would like to urge landmen, who have responsibility for managing title curative for their companies, to consider adopting best practices that ensure the undertaking and completion of curative activities provides the greatest benefit possible to the operating company. These best practices will also yield an additional benefit to title attorneys and landman that will have subsequent responsibility for title examination and curative in the same areas at a future date. There are also some best practices included below that apply to title attorneys.

1. *Best practice:* implement documented procedures for handling curative issues including periodic review of the process and the company practices.

2. *Best practice:* utilize classification, prioritization, project plans and risk analysis to correctly identify impacts to the operator and assist in managing curative activities.

3. *Best practice:* involve the necessary parties from within the operating company in decisions concerning the waiver or demotion of curative requirements.

4. *Best practice:* document decisions made concerning waiver or demotion, including the date of the decision, the parties involved and a brief statement of the issues.

5. *Best practice:* include the full land description for affected leases in exhibits to affidavits of production.

6. *Best practice:* place curative documents that repair or clarify chain of title issues in the public records in the county where the lands are located. While having such documents in-house provides the operator with evidence that the requirement has been satisfied, failing to put such documents of-record will ensure that the same requirements will be repeated in future drilling projects involving the same lands.

7. *Best practice:* properly resolve or cause the resolution of unprobated estate issues.

8. *Best practice:* refrain from using blanket waivers; circumstances change. Every requirement in the title opinion deserves at least some consideration.

9. *Best practice:* the title attorney is not finished when the title opinion is provided to the client. He or she should expect to participate in any discussion with the client where to have the title attorney's input would be valuable and necessary.

10. *Best practice:* refrain from requesting a supplemental title opinion based on prior title opinions where the abstract(s) for the prior title opinion(s) is not available.

11. *Best practice:* a comprehensive abstract covering a larger drillsite spacing unit will be more useful and efficient for the title attorney than several abstracts covering smaller units under the same lands -- and ultimately for the person doing the curative work.

12. *Best practice:* title attorneys should follow-through on reviewing curative documents that are provided to them, under instructions in the title opinion, and modify the title opinions accordingly. This should also be done in a timely manner.

13. *Best practice:* the landman managing curative should ensure that the title attorney reviews any curative documents obtained that change the ownership or the interest reflected in the title opinion. And, require that the title opinion be modified as indicated.

14. *Best practice:* title attorneys should be asked to review any substantive curative documents for requirements classified as *critical* to insure that they produce the desired outcome.

15. *Best practice:* be careful not to create future curative events by filing incomplete, incorrect, or ineffective curative documents of record.

Despite the complexity, engaging in title curative work can be some of the most rewarding on the land side of the ***oil*** and gas industry. For those who love a challenge, curative provides all the convolutions and brain-teasers of a satisfying puzzle and the twists, sub-plots, blind alleys, red-herrings and surprise endings of a great detective story. At its best, curative title work offers the motivated landman and title attorney limitless challenges that can have the most rewarding outcomes.

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**Addendum 2a: Pertinent State Statutes <para>**

**</para>**

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| STATES | AK | AZ | CO | CA |
| Title Transfer |  |  |  |  |
| - Conveyance: General | 34-15 | 33-4 | 38-30-105 | AB 594 |
| - Tax Sale: General | 29.45.300s | 48-1596 | 39-11-110 |  |
| --- Redemption | 29.45.470 | 1832 |  |  |
| - Probate Code: General | Title 13 | Title 14-3 | Title 15 |  |
| - Foreclosure: General | 34.45.005 | 33-725 | 38-38-101 | 1277 |
| - Adverse Possession | 9-45 | 12-525 | Probate Code |  |
| Recording |  |  |  |  |
| - General | 40-17 | 11-480 | 38-35-109 |  |
| ***Oil*** and Gas |  |  |  |  |
| - Leasing: General | 38-05-132- | 38-43 |  |  |
| --- Terms of Lease | 38-05-184 | 27-272 | 38-30-107.5 |  |
| - Releasing: General | 33-707 | 38-42-104 |  |  |
| - Royalties: General | 38.05.135 | 27-234 | 34-60-118.5(2) |  |
| --- Penalties | 34-60-118.5(4) |  |  |  |
| - Commission: General | 31.05.005 | 27-514 | 34-60-104 Mod: HB07 | AB 2778 |
| --- Authority/Powers | 27-515 | 1341 |  |  |
| Abandonment |  |  |  |  |
| - Abandoned Minerals | 38.05.265 | SB 483 |  |  |
| - Abandoned Property | 34-45 | 44-300s | 38-13 | AB 1854 |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| STATES | LA | MT | ND | NM |
| Title Transfer |  |  |  |  |
| - Conveyance: General | 70-21 | 47-10 | 47-1-4 |  |
| - Tax Sale: General | 38.1637 | 15-17-122 | 57-20 | 7-38-65 |
| --- Redemption | 47.2183.1 |  |  |  |
| - Probate Code: General | 72-3 | Title 30.1 | Chapter 45 |  |
| - Foreclosure: General | 48.872 | 71-1-222 | 35-22 | 39-5 |
| - Adverse Possession | 47-06-03 | 37-1-22 |  |  |
| Recording |  |  |  |  |
| - General | 9.2941.1 | 70-21 | 47-19 | 14-8 |
| ***Oil*** and Gas |  |  |  |  |
| - Leasing: General | 82-10-200s | 38-11 | 19-10 |  |
| --- Terms of Lease | 30.806 | 82-1-200s |  |  |
| - Releasing: General |  |  |  |  |
| - Royalties: General | 30.806 | 82-10-103 | 38-09-09 | 19-10-11 |
| --- Penalties | 30.136 | 47-16-39.1 |  |  |
| - Commission: General | 31.121 | 2-15-3303 | 38-08-04 | 70-2-4 |
| --- Authority/Powers | 30.209 | 38-08-04 | 70-2-6 |  |
| Abandonment |  |  |  |  |
| - Abandoned Minerals | 38.18.1-06 |  |  |  |
| - Abandoned Property | 9.16s | 70-9-803 | 47-30.1 | 7-8A |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| STATES | NV | OK | TX | UT |
| Title Transfer |  |  |  |  |
| - Conveyance: General | 10-133.110 | 58-429 | 5.001 | 57-1 |
| - Tax Sale: General | 32-361-5648 -- | Title 68 | Title 1-34 | 59-5-102 |
| --- Redemption | 32-361-620 |  |  |  |
| - Probate Code: General | 12-136 | Title 58 | Probate Code | Title 75 |
| - Foreclosure: General | Ch. 106, various | 46-43 | Prop Code: Title 5 | 59-2 |
| - Adverse Possession | 11.100s | 16-72 |  |  |
| Recording |  |  |  |  |
| - General | 20-247 | 19-298 | Title 3-12 | 17-21 |
| ***Oil*** and Gas |  |  |  |  |
| - Leasing: General | 149.09 | 64-40564-285 | NRC Title 02-52 | 65A-6-4 |
| --- Terms of Lease |  |  |  |  |
| - Releasing: General | 46-15 | 41-40 |  |  |
| - Royalties: General | 46-522.113 | 52-570 | 52.131 | 40-6-9 |
| --- Penalties |  |  |  |  |
| - Commission: General | 46-514 | 52-288 | NRC Title | 40-6-4 |
| --- Authority/Powers | 02-53, 02-34 |  |  |  |
| Abandonment |  |  |  |  |
| - Abandoned Minerals | 84-271.1 | 03-89 | 67-4a-201 |  |
| - Abandoned Property | 120A | Prop Code Title 6 | 67-41-201 |  |

|  |  |
| --- | --- |
| STATES | WY |
| Title Transfer |  |
| - Conveyance: General | Title 34 |
| - Tax Sale: General |  |
| --- Redemption |  |
| - Probate Code: General | Title 2 |
| - Foreclosure: General | 34-4-103 |
| - Adverse Possession | 34-1-112 |
| Recording |  |
| - General | 36-1-102 |
| ***Oil*** and Gas |  |
| - Leasing: General | 36-6 |
| --- Terms of Lease |  |
| - Releasing: General |  |
| - Royalties: General | 36-6-01 |
| --- Penalties |  |
| - Commission: General | 30-5-103 |
| --- Authority/Powers | 30-5-014 |
| Abandonment |  |
| - Abandoned Minerals | 34-24-17 |
| - Abandoned Property | 34-24 |

as of August 2007

**Addendum 2b: Internet Resources <para>**

**</para>**

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| LINKS | AK | AZ | CA | CO |
| Official State Site | www.state.ak.us/ | www.azsos.gov/ | www.ca.gov/ | www.colorado.gov/ |
| Secretary of State | www.commerce.state.ak.us/occ/ | az.gov/webapp/portal/ | www.sos.ca.gov/ | www.sos.state.co.us/ |
| ***Oil*** and Gas Commission | www.state.ak.us/admin/ogc/homeogc.shtml | www.azogcc.az.gov/ogcc\_publist.htm | www.energy.ca.gov/oll/index.html | ***oil***-gas.state.co.us/ |
| Association of Counties | www.azcounties.org/home/index.cfm | www.csac.counties.org/ | www.ccionline.org/links.htm |  |
| Vital Records | www.hss.state.ak.us/dph/bvs/ | www.azdhs.gov/vitalrcd/ | www.dhs.ca.gov/hisp/chs/OVR/default.htm | www.cdphe.state.co.us/certs/ |
| BLM | www.blm.gov/ak/st/en.html | www.blm.gov/az/st/en.html | www.blm.gov/ca/st/en.html | www.blm.gov/co/st/en.html |
| Additional Misc. Links |  |  |  |  |
| KS | LA | MT | ND |  |
| Official State Site | www.accesskansas.org/index.php | www.louisiana.gov | mt.gov/ | www.nd.gov/ |
| Secretary of State | www.kssos.org/ | www.sos.louisiana.gov/ | sos.mt.gov/ | www.nd.gov/sos/ |
| ***Oil*** and Gas Commission | www.kcc.state.ks.us/conservation/index.htm | http://dnr.louisiana.gov/min/ | bogc.dnrc.state.mt.us/ | www.dmr.nd.gov/oilgas/ |
| http://dnr.louisiana.gov/cons/ |  |  |  |  |
| Association of Counties | www.kansascounties.org/ | www.lpgov.org/ | maco.cog.mt.us/ | www.ndaco.org/ |
| Vital Records | www.kdheks.gov/vital/ | www.dhh.louisiana.gov | dohhs.mt.gov | www.health.state.nd.us/vital/ |
| BLM | www.blm.gov/nm/st/en.1.html | www.blm.gov/mt/st/en.html | blm.gov/mt/st/en/fo/north\_dakota\_field.htm |  |
| Additional Misc. Links | Register of Deeds: www.ksrods.org/ | LOGA: www.loga.la | NDRIN: http://www.ndrin.com/ |  |
| NM | NV | OK | TX |  |
| Official State Site | www.newmexico.gov/ | www.nv.gov/ | www.ok.gov/ | www.state.tx.us |
| Secretary of State | www.sos.state.nm.us/ | sos.state.nv.us/ | www.sos.state.ok.us/ | www.sos.state.tx.us |
| ***Oil*** and Gas Commission | www.emnrd.state.nm.us/ocd/ | minerals.state.nv.us/ | www.occ.state.ok.us/Divisions/OG/Og.htm | www.rrc.state.tx.us/divisions/og/og.html |
| Association of Counties | www.nmcounties.org/counties.html | www.nvnaco.org/ | www.okacco.com/ | www.county.org/ |
| Vital Records | www.vitalrec.com/nm.html | health2k.state.nv.us/forms/formindex.htm | www.health.state.ok.us/program/vital/brec.html | www.dshs.state.tx.us/vs/default.shtm |
| BLM | www.blm.gov/nm/st/en.1.html | www.blm.gov/nv/st/en.html | www.blm.gov/nm/st/en.html | www.blm.gov/nm/st/en.1.html |
| UT | WY |  |  |  |
| Official State Site | www.utah.gov/ | wyoming.gov/ |  |  |
| Secretary of State | soswy.state.wy.us/ | soswy.state.wy.us/ |  |  |
| ***Oil*** and Gas Commission | ogm.utah.gov/oilgas/ | wogcc.state.wy.us/ |  |  |
| Association of Counties | www.uacnet.org/ | www.wyo-wcca.org/ |  |  |
| Vital Records | health.utah.gov/vitalrecords/ | www.vitalrec.com/wy.html |  |  |
| BLM | www.blm.gov/ut/st/en.html | www.blm.gov/wy/st/en.html |  |  |
| Additional Misc. Links | Petrol Assoc of WY: www.pawyo.org/facts.html |  |  |  |

**Addendum 2c: Top Producing Counties with on-line Access to Public Records <para>**

**</para>**

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| AK | AZ | CA | CO |  |
| Greenlee, La Paz, Navajo, Santa | Mesa: |  |  |  |
| Cruz: www.thecountyrecorder.com | http://apps.mesacounty.us/ |  |  |  |
| Garfield: |  |  |  |  |
| Searchable |  |  |  |  |
| Counties: | Not Searchable | Other Searchable Counties: | ***Kern***: recorder.co.***kern***.ca.us/ | http://www.garcoact.com/clerk/ |
| Coconino, Gila, Graham, Pina, | Weld: |  |  |  |
| Pinal, Yavapai, Maricopa | http://icris.co.weld.co.us/icris/documentSearch.jsp |  |  |  |
| KS | LA | MT | ND |  |
| Searchable |  |  |  |  |
| Counties: | Not Searchable | Unkown/Undetermined | Not Searchable | Multiple Counties: |
| www.ndrin.com |  |  |  |  |
| NM | NV | OK | TX |  |
| Carter, Stephens, Osage, Grady, |  |  |  |  |
| Garvin: | Ector, Scurry, Midland, Upton: |  |  |  |
| Searchable | Not Searchable | Eureka: eurekacounty.net:1403/cgi-bin/diw200 | www.okcountyrecords.com/ | www.texaslandrecords.com/txlr/controller |
| Counties: |  |  |  |  |
| Creek: www.countyrecords.com/crcreek.html |  |  |  |  |
| UT | WY |  |  |  |
| Uintah: www.co.uintah.ut.us/ |  |  |  |  |
| Searchable |  |  |  |  |
| Counties: | Summit: | Not Searchable |  |  |
| www.summitcounty.org/records/recordation.html |  |  |  |  |
| as of August 2007 |  |  |  |  |

**Topics**

· Helpl The rig is standing by: Business risks vs. legal requirements

· To waive or not to waive, that is the question

· When a curative instrument doesn't cure: revisiting company practices

· In an abundance of caution: When the title attorney leaves you scratching your head

· What do you mean I could lose my job? The importance of understanding what the title attorney is telling you

**Help! The rig is standing by: Business risks vs. legal requirements**

**Introduction**

█ Correcting deficiency in title to real property

█ Landman's title memo

█ Title attorney's title opinion

█ No limitation on complexity

█ Purpose:

█ Practical approaches to evaluating and managing curative requirements

█ Address issues that create serious challenges to managing the curative process, including internal practices

█ Planning process:

█ Review and reduce to a project plan

█ Classify -- then prioritize -- the requirements

█ Communicate plan to involved parties

**Classifying Requirements by Risk**

█ First priority after the plan is developed

█ Classification categories:

█ Critical -- must be done now

█ Necessary -- should be done before drilling if time and expense allow

█ Temporarily waivable -- can be waived pending the outcome of drilling

█ Waivable -- can probably be disregarded, after further evaluation

█ Demote-able: critical and necessary requirements demoted from drillsite to division order by informed decision of the operator.

█ Prioritize -- add the element of time

**To waive or not to waive, that is the question**

**... it depends**

█ Requirements that should NOT be waived

█ Critical requirements

█ Necessary requirements

█ Waive-worthy requirements *depend* on:

█ Financial risk of waiving the requirement

█ Probability that waiving would be the wrong choice

█ The Process

█ Evaluate all obtainable information about the requirement

o What is the nature and extent of the financial impact of waiving the requirement when it should not have been

o What's the probability that "yes, waive" is the wrong answer

█ Get input from all appropriate parties (e.g. Land, Finance, Exploration)

█ Document the agreement on how to proceed

**When a curative instrument doesn't cure.**

**Revisiting Company Practices**

**The Problem of the Affidavit of Death and Heirship**

█ Not all commonly used curative instruments "cure" the problem

█ Useful as interim measures

█ Final resolution is needed before drilling or revenue payments

█ Example: The Affidavit of Death and Heirship

█ Facts

o Helpful for information gathering

o Does not transfer title

█ Practice

o Support payment of royalties from producing properties

█ Re-evaluate company practices vis-à-vis curative bi-annually -- especially blanket waivers and temporary curative solutions

**In an abundance of caution**

**When the title attorney leaves you scratching your head**

***"In an abundance of caution..." "for greater certainty of title..." "It would ??..."* and their ??**

█ Not lawyer-speak for "waive this sucker"

█ In the best application

█ Risk and probability *may* be low; however,

█ Something about the situation remains uncertain

█ The opening for a challenge has not been closed

█ A judgment call by the operator is required

█ On the other hand ...

█ Title attorneys have been known to use this as a broad broom to catch any fly specks that might have been missed

█ Used appropriately, this language has value

█ Overuse or abuse may foster an expectation that it really does mean "waive this sucker" ... not good.

***What do you mean I could lose my job?***

**The importance of understanding what the title attorney is telling you**

**So you think you want to be a title curative landman?**

█ Essential to Understand the Risks

█ Acknowledge the gravity of the problem presented

█ Identify the reasonably foreseeable repercussions

█ Weigh the potential consequences

█ Manage curative process to a Plan

█ Classify requirements by significance

█ Assign priorities

█ Assess the possibility of temporary waivers, waivers and demotions optimize time and resources

█ Communicate and document solutions

█ Follow-up with the Title Attorney as needed

█ Consider implementing *Best Practices* as part of the company's procedures

**Help is at Hand**

█ *In the absence of time*... the following resources have been provided in the Paper accompanying this presentation:

█ List of commonly used curative documents

█ 15 *Best Practices* that can be implemented immediately

█ Industry publications dealing with curative and curative issues

█ Pertinent State Statutes

█ Helpful Internet Resources

█ Top-producing counties in the Western U.S. that provide some level of on-line access to public records

Alfson Energy Land Services

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**End of Document**

1. 1In her paper *Curing Title Defects Pursuant to Title Opinions*, AAPL **The Landman** Jan/Feb 1993, Nicola L. Maddox provides the following definitions for these classifications:

   *critical requirements* -- "those ... that must be resolved to the satisfaction of the examining attorney or the consequences will be severe in terms of either miscalculated ownership interests or the addition or deletion of certain parties to the ownership tabulation."

   *Necessary requirements* -- "those ... that should be resolved prior to the conduct of the operation and can be done within the practical parameters of time and expense."

   *Temporarily waivable requirements* -- "those ... that can be temporarily waived pending the outcome of the proposed operation as they are relatively low risk and will only be resolved if the drilling operation is successful." [↑](#footnote-ref-2)