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## **Same Title, Different Opinion**

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## SAME TITLE, DIFFERENT OPINION

### I. INTRODUCTION.

During the life of an oil and gas prospect, the need for some level of title review is constant. For our purposes, imagine Blackacre, a location in Texas that may be productive for oil and gas. Once Blackacre has been deemed worthy of initial exploration, an initial leasehold examination is done to determine if it is available for lease. Once a lease is taken for Blackacre, a rig is secured and drilling operations can begin. Next, prior to, or while drilling operations are conducted full title is run on Blackacre in order to ensure that the proper parties are leased; and that the operator has the right to conduct their surface operations on the proposed drillsite. From that title, an original drilling title opinion is prepared that outlines Blackacre's ownership and any possible issues that could arise related to the operator's surface operations or leasehold interests. Then, once drilling and production operations have commenced, and prior to or after production being obtained, a division order title opinion is prepared in order to properly pay all interest owners.

In conjunction with all of the above, there are industry personnel and groups who are performing their own due diligence in contemplation of buying mineral or leasehold interests in Blackacre from the current owners. Furthermore, the operators and/or potential buyers are trying to pay for their acquisition of interests in Blackacre using various financing instruments, with those underwriters or lenders sometimes requiring their own title analysis. In short, without some form of title examination showing solid title to Blackacre, none of these projects will get very far. While the title for Blackacre examined by these different parties will be the exact same, the parties intended uses all differ. So, one type of title opinion does not make sense for all of them. As such, title examiners have created several categories of title opinions, each tailored to the end client. As detailed below, although all covering the same title, each of these different types of opinions provides the necessary coverage for the intended recipient. This paper will attempt to highlight and describe the various types of title investigations and title opinions used in all phases in the life of a prospect or well as well as discuss how opinion have changed as a result of horizontal drilling.

### II. TITLE EXAMINATION GENERALLY.

#### A. WHY EXAMINE OIL AND GAS TITLE

A discussion of the various types of title review and the associated title opinions produced are predicated on what we mean when we use the term title. Title generally is viewed as a bundle of rights that constitute ownership of property.<sup>1</sup> The term title may also used to designate the means by which property owners may evidence their ownership in property. In summary, title can mean the act of ownership itself or the means by which ownership came to be (act, instruments or records).<sup>2</sup> Moreover, since no paper discussing oil and gas title is official without mentioning the "bundle of sticks", the propensity for mineral or mineral leasehold

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<sup>1</sup> See generally Luckel v. White, 792 S.W.2d 485,489 (Tex. App. – Houston [14<sup>th</sup> Dist.], rev'd on other grounds, 819 S.W.2d 459 (Tex. 1991).

<sup>2</sup> Joseph Shade, Petroleum Land Titles: Title Examination & Title Opinions, 46 Baylor L. Rev. 1008, 1014, (1994).

ownership to become split up makes a written determination of ownership all the more valuable. Mineral fee ownership whether executive right, bonus, royalty or delay rentals can be partitioned in innumerable portions in perpetuity or for some limited term. Likewise, leasehold working interests and overrides can be held, or vest in a number of scenarios based on the party's contributions to the venture, or the well's performance. The various vesting scenarios give rise to a need to have a detailed analysis done on who owns what.

It is important to note that title examination does not change ownership; it merely reports and provides analysis as to the status of title at a certain time. Normally the time is based on a "certification date" of when research of the records stopped.

#### B. WHAT IS A TITLE OPINION?

For the course of this paper, the use of the term title opinion is in reference to a written formal statement of opinion regarding the ownership of the mineral and leasehold estate deducted from all instruments relating to the desired estate prepared by an attorney. The title opinion provides a statement of ownership and advises of any irregularities or defects that may pose problems. The basic principle behind them is to provide assurances to the company or individual contemplating that their action (to acquire, to drill, to provide financing, to lease) is legally supportable.

#### C. IS THERE ANOTHER WAY?

There are several ways to provide assurances that contracting parties end up getting what they bargained for. First, the common warranty provisions found in many deeds provide that the parties are conveying the exact interest described in the deed. In the event they do not, the buyer is left with a means to pursue the seller under a breach of warranty claim. In some countries there are "Torrens" systems where title is transferred through title certificates, as opposed to deeds. In those systems, the register of lands is maintained by the government and title to lands included in the registry is guaranteed by the government. These systems are commonly found in the British Commonwealth countries.

The most commonly used type of title assurance, in an above-ground word, is title insurance. Title insurance policies specifically exclude pre-determined defects, liens and encumbrances in the title chain. The goal of the title policy is to negate title risks and to make the policy holder whole if something, other than the permitted encumbrances, is wrong with their title. The policies only insure the buyer up to a definitive amount of loss, thereby protecting the buyer in the event of a title failure. At their essence they are an indemnity agreement based on the value of the property insured. Most title insurance policies expressly exclude minerals from the policy coverage and do not cover mineral title ownership. Even if title policies were to cover the mineral estate, in most instances the stated coverage limitation is not going to rescue the modern mineral transaction.<sup>3</sup> Typically, the policy coverage will not make a shortchanged mineral buyer whole. In essence, a title opinion is not an insurance policy because it does not

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<sup>3</sup> Carleton, Elaine C. and Comer, Robert D., "Securing the Corpus—An Introduction to the History and Business Purpose for Mineral Development Title Opinions," Mineral Title Examination, Paper No. 1, Page No. 2 (Rocky Mt. Min. L. Fdn. 2012).

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