

**A BRIEF OVERVIEW OF TITLE EXAMINATION
& COMMON EXAMINER PITFALLS**

Part 1:

ARE YOU SURE YOUR LESSOR OWNS THE MINERALS?

A REVIEW OF TITLE EXAMINATION

Caroline K. Akers

Part 2:

COMMON PITFALLS FOR TITLE EXAMINERS EXAMINING NORTH TEXAS TITLE

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REPRESENTATIVE EXPERIENCE

- Worked as an associate in house counsel at an oil and gas exploration company specializing in developing minerals in an urban environment.
- Prepare numerous drilling and division order title opinions for active operators.
- Examine documents recorded with county clerks, the bureau of land management, the general land office, and the commissioner of public lands for preparation of drilling, division order, and acquisition title opinions covering fee, federal, and state lands.
- Draft curative oil and gas title documents, including stipulations of interest, subordination agreements, amendments, and ratifications.
- Review and draft leases, deeds, and pipeline rights-of-way.
- Review purchase and sale agreements and assignments.
- Advise large and independently owned oil and gas companies regarding legal issues related to exploration and development.
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PROFESSIONAL ACTIVITIES, MEMBERSHIPS, & AFFILIATIONS

- Admitted, State Bar of Texas (2004)
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- Tarrant County Bar Association Energy Section, Secretary (2008)
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REPRESENTATIVE EXPERIENCE

- Examined documents recorded with county clerks, the bureau of land management, the general land office and the commissioner of public lands for preparation of drilling, division order and acquisition title opinions covering fee, federal and state lands.
- Performed numerous "Standup" title examinations.
- Drafted curative oil and gas title documents, including stipulations of interest, assignments and ratifications.
- Reviewed purchase and sale agreements, operating agreements and pooling agreements.
- Represented clients involved in complex royalty litigation and surface damage disputes.
- Worked for a New Mexico and Texas law firm specializing in natural resources.
- Worked as an adjunct professor instructing a business law course covering business formations, contracts, employment law, bankruptcy and real estate.

PROFESSIONAL ACTIVITIES, MEMBERSHIPS, & AFFILIATIONS

- Admitted, State of Texas (2001).
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EDUCATION

- 2001 - J.D., Southern Methodist University Dedman School of Law
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I. INTRODUCTION

The preparation of title opinions should be done carefully, thoroughly, and with great concentration. Title examination is a daunting and exacting project. Because of different nuances with each title project, no one opinion is ever the same. An examiner always strives to make an opinion as complete as possible but there are very few examiners that do not question whether all issues were identified. To endeavor to explain all the intricacies involved with title examination is beyond the scope of this paper. The author hopes this paper gives a broad overview of title examination and possible traps for a title examiner.

II. A BRIEF OVERVIEW OF TITLE EXAMINATION

A. Title Examination

Title examination is the review of documents, records, deeds, abstracts, affidavits, and other reliable materials in order to form a legal opinion as to the title of property.¹ The examiner may review instruments provided in an abstract prepared by an abstract/title company, landman's abstract, or title run sheet.² An examiner may also examine title by standing up at the courthouse and reviewing documents as identified in a title run sheet, also referred to as "Standup Examination." The documents reviewed must be legally sufficient to ensure the examiner is satisfied with the status of title.³ Once all documents are reviewed, the examiner will formalize an opinion as to title of property in a title opinion. The opinion should advise the client of irregularities, defects, and encumbrances⁴ that affect or impair marketability of title or whether the client may be exposed to litigation or adverse claims.⁵ Usually, an examiner's opinion will cover the entire chain of title starting from the date title passed from the sovereign to present.⁶ In other words, an opinion gives a "history" on the status of title to land. In certain instances, an examiner may limit the opinion to a shorter time period for the chain of title, but it is important to advise the client of the risks involved with not examining the entire chain of title.

¹ Texas Property Code – An Appendix following Title 2. Conveyances 7.

² For further discussion regarding types of examination, the author refers you to George A. Snell, III, Preparing Oil and Gas Title Opinion – How Title Standards Can Help, 34th Annual Ernest E. Smith Oil, Gas and Mineral Law Institute Houston, Texas, April 4, 2008.

³ *Id.*

⁴ These remarks are often referred to as title comments and requirements or exceptions to title.

⁵ *Id.*

⁶ *Id.*

B. Texas Title Examination Standards

The Council of the Section of Real Estate, Probate and Trust Law of the State Bar of Texas created a committee (now known as Title Standards Joint Editorial Board), which eventually was co-sponsored by the Oil, Gas and Mineral Law Section of the State Bar of Texas (now known as Oil, Gas and Energy Resources Law Section) to develop title examination standards in 1989. After the State Bar of Texas Convention on June 27, 1997, the first 33 standards were adopted by the Section of Real Estate, Probate and Trust Law and the Oil, Gas and Mineral Law Section. It is the author's opinion that the Texas Title Examination Standards are a useful tool to help oil and gas title examiners address title issues. The Standards may be found in the below sources:

1. Texas Property Code – An Appendix following Title 2. Conveyances. (Volume 1 of the hard copy.)
2. Volume 3A of Texas Practice Series (2005 Thomson/West) – Leopold, Land Titles and Title Examination (pages 116-228).
3. <http://west.thomson.com/pdf/texas/PropT2App.pdf> (The website allows Owen Anderson, the Editor of Texas Title Examination Standards Joint Editorial Board, to post revisions to the Standards immediately upon adoption by the Editorial Board).⁷

It is important to note that the Standards do not reflect current case law and statutes. The Standards are also subject to disclaimers as set out in the instrument. There may be a lapse in time between the Standards and changes in the law. It is upon the examiner to make sure there are no changes in the law in conflict with the Standards.

C. Types of Title Opinions

There are various types of title opinions and each one is requested for a specific purpose. Regardless of the purpose of the opinion, the opinion format should basically be the same in the different types of opinions, except security title opinions. Clients normally request: (1) lease acquisition title opinions; (2) drilling title opinions; (3) division order title opinions; (4) security title opinions; or (5) supplemental title opinions.

1. Lease Acquisition Title Opinions

Prior to payment of bonus or acquisition money, a client will request a lease acquisition opinion. The opinion is useful to the client because it advises of the marketability of a fee mineral interest and whether there are any outstanding mineral interests or outstanding leasehold interests which he or she may want to purchase.

⁷ *Id.*

2. Drilling Title Opinions

When a client intends to drill a well on a particular tract of land, he or she will request a drilling title opinion. A drilling title opinion advises a client of the marketability of title for current leasehold interests. It alerts the client to possible business risks associated with drilling on a tract of land or pooled lands. This type of opinion is often combined with a lease acquisition title opinion.

3. Division Order Title Opinions

A client requests a division order title opinion to report marketability of title as to all interests that will participate in production from a well. Lease analysis is often shortened for this type of opinion and more emphasis is placed upon analysis of agreements that affect production and pooling of interests participating in the well. For complex ownership calculations, an examiner may attach an exhibit to the opinion reflecting the calculations required to arrive at the final unit net revenue interest.

4. Security Title Opinions

A client will request a security title opinion when borrowing substantial sums to drill a well and gives a mortgage or deed of trust and security agreement to a lender on the company leasehold interest. The format of this opinion is different from previously discussed opinions because it only reports interests and comments for producing property. The form used for this opinion may also be used in a purchase and sale situation.

5. Supplemental Title Opinions

A client may request a supplemental title opinion after the preparation of any of the previously discussed opinions. This type of opinion is required if additional materials and curative documents are provided to satisfy title requirements or change title to interests included in a previously examined opinion. If a client requests an opinion to supplement a previous opinion prepared by another examiner, the examiner should include a disclaimer in the opinion that the examiner has not reviewed the documents provided for the previous opinion. Due to changes in the law and the fact that the examiner has not reviewed all of the instruments that comprise the examined land, the examiner should advise the client of the risks associated with relying on a previous title opinion prepared by another examiner.

D. Title Opinion Layout

A title opinion generally includes and describes: (1) lands under examination; (2) leases covering examined lands; (3) materials examined; (4) surface, mineral, royalty, and leasehold ownership; (5) chain of title; (6) title comments and requirements; (7) mortgages and deeds of trust; (8) liens; (9) easements; and (10) pre-existing oil and gas

leases. As discussed earlier, most opinion formats are basically the same, except security title opinions. Title opinion format sounds fairly simple, but it is often difficult for the examiner to present an opinion to a client in a manner that is organized, acceptable, and easily understood. It is advisable to meet with a client prior to drafting an opinion to discuss the format of the opinion so that the examiner will have a clear understanding of the client's desired format.

1. Lands Covered by Opinion

Each opinion should contain a detailed and accurate description of the lands under examination. It is important to include patent and survey information in the legal description of examined lands. The examiner should also include the subdivision, county, and state information when describing the lands under examination. Although this information is presumed to be included in an opinion, the author emphasizes the importance of making this information as accurate as possible because many clients use descriptions in opinions to prepare leases and other curative documents. Often, an opinion covers numerous surveys and there are surveys with the same name but different survey numbers. In the urban environment, subdivisions may include different phases within a subdivision.

2. Lease and Assignment Analysis

An opinion should describe and analyze all the leases and assignments covering the lands under examination. Lease and assignment analysis should include pertinent instruments in the chain of title to leasehold interest, such as assignments, joint operating agreements, and purchase and sale agreements. The examiner should pay special attention to pooling provisions and pooling designations to determine whether the size of the well or unit complies with lease pooling provisions. Any special provisions in the lease that may limit drilling operations on the examined land should be noted in the lease analysis section of the opinion. In the event there is a depth severance or limitation, it is important the examiner note and except the severance or limitation in the legal description of the lands under examination.

3. Materials Examined

The opinion should list the materials relied upon for title examination. The examiner will usually rely on a title run sheet, along with documents attached thereto, prepared by a landman on behalf of a client. The title run sheet should include a certification date and detailed description of lands covered by the title run sheet. The certification date should specify the beginning date and end date for title research covering the examined lands. The end time for research should reflect the index date as listed by the county clerk's office for the examined lands.

4. Surface, Mineral, Royalty, and Leasehold Ownership

The title opinion should list and analyze the surface, mineral, royalty, and leasehold ownership for examined lands. The examiner should describe the following in a title opinion:

i. Surface and Mineral Ownership

The opinion should list the surface and mineral owners. For complex surface and mineral ownership, it is helpful for the client and the examiner, especially when required to draft a later division order title opinion, to list the calculations required to arrive at surface and mineral ownership in the opinion itself or as an attached exhibit.

ii. Royalty Interest

An interest retained by a mineral owner is a “royalty interest.” A non-participating royalty interest owner is a royalty interest that is carved out of the mineral estate.

iii. Net Revenue Interest

Net revenue interest or revenue interest of the working interest partners is the revenue attributable to working interest owners for their share of the well less the royalty interest burden.

iv. Working Interest, also referred to as Leasehold Interest

The working interest is the portion attributable to working interest partners that are responsible for all costs involved in exploration, production, and completion of a well. It is essentially the rights to the mineral interest acquired by an oil and gas lease.

5. Chain of Title

Depending on the client’s needs and the type of opinion, an examiner may be required to describe the chain of title for examined lands. The chain of title is a useful tool to describe and analyze title defects in the chain of title but can also increase the cost of a project due to additional time spent describing the chain of title. The examiner should talk to the client prior to beginning a title project to determine whether to include a chain of title.

6. Title Comments and Requirements

An opinion should include a title comments and requirements, also referred to as exception to title, section that explains title defects and recommendations for such defects. It is essential for the examiner to draft title comments and requirements that are understandable and useful for the client.

7. Mortgages and Deeds of Trust

An examiner should list all valid mortgages and deeds of trust in an opinion. In many instances, an examiner may ignore certain mortgages and deeds of trust because the statute of limitations has passed. A person must bring a suit for recovery of real property under a real property lien or the foreclosure of a real property lien not later than four years after the day the cause of action accrues.⁸ A sale to foreclose or a non-judicial foreclosure under a power of sale must be made not later than four years after the maturity date of the last installment of the note or obligation.⁹ On the expiration of the four-year limitations period, the real property lien and a power of sale to enforce the real property lien become void.¹⁰ It is important to note there are exceptions to the four year statute of limitations: (1) Section 16.062 of the code provides for suspension in the event of death; (2) Section 16.036 of the code provides for recorded extensions of real property liens.¹¹ For mortgages and deeds of trust that have a maturity date that has not expired or the expiration has not passed, plus the statutory limitations period, an examiner should require a release or subordination agreement for those instruments.

When reviewing mortgages and deeds of trust, an examiner should pay special attention to provisions that may: (1) accelerate the note based upon the borrower leasing the property without written consent from the lender; or (2) require written permission for removal of minerals. In the event a mortgage or deed of trust contains such provisions, you should advise the client to include a waiver in the subordination wherein the lender waives or releases such provisions insofar as it relates to the borrower executing an oil and gas lease on the examined land.

8. Liens

i. Federal Tax Liens

A title opinion should list federal tax liens. A federal tax lien attaches to property once a demand is made for taxes.¹² Unless another date is specifically fixed by law, the lien imposed shall arise at the time the assessment is made and shall continue until the liability for the amount assessed is satisfied or becomes unenforceable by reason of lapse of times.¹³ A lien becomes unenforceable by lapse of time ten years after the assessment of the tax, but the government may bring a suit within ten years after the assessment and

⁸ Tex. Civ. Prac. & Rem. Code §16.035(a).

⁹ Tex. Civ. Prac. & Rem. Code §16.035(b).

¹⁰ Tex. Civ. Prac. & Rem. Code §16.035(d).

¹¹ Tex. Civ. Prac. & Rem. Code §16.035(c).

¹² 26 U.S.C. § 6323.

¹³ 26 U.S.C. § 6322.

obtain a judgment, thus “the life of the lien is extended indefinitely.”¹⁴ The priority of a lien may be preserved by refilling within a time described as the “required refilling period.”¹⁵ It is important to note that the Internal Revenue Service is allowed to grant subordination agreements in the event it may recoup unpaid taxes.¹⁶ An examiner should require a release or subordination agreement for a federal tax lien.

ii. State Tax Liens

An examiner should list and request releases for all state tax liens in an opinion. The Texas Tax Code provides that all taxes, fines, interest and penalties due by a person to the state are secured by a lien on all of the person’s property that is subject to execution.¹⁷ No tax imposed may be assessed after four years from the date the tax becomes due and payable.¹⁸ At any time within three years after deficiency or jeopardy determination has become due and payable within three years after the last recording of a lien, the comptroller may bring an action in the courts of this state, or any other state, or of the United States in the name of the people of the State of Texas to collect the amount delinquent together with penalties and interest.¹⁹ Section 113.105 of the Texas Tax Code provides the state a tax lien on personal property and real estate until taxes secured by the lien are paid. While a suit to collect taxes must be brought within a three year period, a state lien on real estate remains for taxes until paid.

iii. Ad Valorem Taxes

An examiner must determine whether ad valorem taxes are paid on examined lands. Oil and gas are realty and subject to a tax lien for unpaid ad valorem taxes.²⁰ The surface owner is responsible for ad valorem taxes prior to production. Once produced, oil and gas are personal property, and not subject to a tax lien for unpaid ad valorem taxes.²¹ The author recommends that the examiner advise the client to ensure that future ad valorem taxes are paid as well. An examiner should examine tax certificates from the county tax office to determine if taxes are paid.

¹⁴ Christopher D. Thompson and Louis J. Davis, Selected Title Examination Issues, Review of Oil and Gas Law XV, Dallas Bar Association, Energy Law Section Dallas, Texas, August 17-18. See also *Markham v. Fay*, 74 F.3d 1347, 1353 (1st Cir. 1996).

¹⁵ *Id.* See also 26 U.S.C. § 6323(g).

¹⁶ *Id.* See also 26 U.S.C. § 6325(d)(2).

¹⁷ Tex. Tax Code § 113.001.

¹⁸ Tex. Tax Code § 111.201.

¹⁹ Tex. Tax Code § 111.202.

²⁰ *Hill v. Enerlex, Inc.*, 969 S.W.2d 120, 138 (Tex. App–Eastland, April 1998); Tex. Tax Code §§ 32.01 and 32.02.

²¹ *Id.*

iv. Abstracts of Judgment

A title opinion should list all abstracts of judgment. A judgment itself does not create a lien against property. However, if a judgment creditor obtains an abstract of judgment recorded and indexed in the real property records in the county of the examined lands, a lien attaches to the property. An abstract of judgment lasts for ten years from the date recorded and indexed in the real property records.²² If an abstract of judgment was recorded less than ten years ago, the examiner should treat it as a valid lien and require a release.

v. Mechanic's Lien

A title examiner should list all recorded and valid mechanic's liens in an opinion. There are two types of mechanic's liens: (1) constitutional; and (2) statutory.

(a) Constitutional Liens

Art. 16 § 37 of the Texas Constitution entitles subcontractors and contractors who contract with an owner to obtain liens on real property.²³ In order to obtain a lien, the claimant must follow procedures as set out in the statute. The statute of limitations for a constitutional lien is four years.²⁴

(b) Statutory Liens

Section 53 of the Texas Property Code entitles subcontractors and contractors to obtain liens on real property.²⁵ In order to obtain a lien, the claimant must follow procedures as set out in the statute. A suit must be brought to foreclose a statutory lien within two years after the last day a claimant may file a lien affidavit under Section 53.052 of the Texas Property Code or within one year after completion, termination or abandonment of the work under the original contract which the lien is claimed, whichever is later.²⁶ For a claim arising from a residential construction project, suit must be brought to foreclose the lien within one year after the last day a claimant may file a lien affidavit under Section 53.052 of the Texas Property Code or within one year after completion, termination or abandonment of the work under the original contract which the lien is claimed, whichever is later.²⁷

²² Tex. Prop. Code § 52.006.

²³ Tex. Prop. Code § 53.02

²⁴ Tex. Civ. Prac. & Rem. Code § §16.004(a)(3) and 16.051.

²⁵ Tex. Prop. Code § 53.02

²⁶ Tex. Prop. Code § 53.158

²⁷ *Id.*

9. Easements and Rights-of-Way

A title opinion should list all recorded easements and rights-of-way. The examiner should advise the client to become familiar with the location of the rights-of-way and ensure that operations will be conducted in a manner that does not interfere with the rights of the owners of the easements and rights-of-way.

10. Pre-existing Oil and Gas Leases

An examiner should disclose to the client the existence of prior unreleased leases so that a determination can be made whether the leases have expired. When determining whether the leases are still in effect, the client should determine if: (1) the primary term has expired; and (2) there is operations or production on the lands under examination or lands pooled therewith. An examiner should request a release or affidavit of non-production for any unreleased prior leases.

E. Use and Occupancy

One requirement that should always be included in a title opinion is the affidavit of use and possession, or as it is sometimes referred to, the affidavit of use and occupation.²⁸ Often, title to the examined lands is irregular in the early chain of title with gaps in the chain of title, defective legal descriptions and other defects. Accordingly, the only way to “cure” such gaps in the chain of title and title defects is to rely on limitations of title to the examined lands.²⁹

The affidavit should be obtained prior to any drilling operations. You should obtain it from two or more disinterested and credible persons stating in detail the nature and character of the use, occupancy and possession of the examined lands for at least the past twenty-five years. An affidavit should contain full and complete information as to:

Boundaries

- Whether fenced, cross-fenced areas, or boundary markers
- Known boundary disputes

Possession

- Names of individuals in possession of the land for the past twenty-five years
- Whether anyone claims title past or present through adverse possession

Structures and Improvements

²⁸ This is a requirement the author advises should not be waived.

²⁹ Section 16.030 of the Texas Civil Practice and Remedies Code provides that when a limitation of title by a person having peaceful and adverse possession is perfected, the claimant has the full or fee title precluding all claims, the same as if such title had been conveyed by deed in writing by the record owner.

- When built
- Present state of repair
- Whether presently occupied

Land Use

- Whether or not any agricultural activities have taken place
 - i. If so, amount of land used and length of time used
 - ii. Have there been any hunting, grazing or other types of leases
 - iii. Has there been forestry or timber activities

Exploration and Production

- Whether oil and gas operations and production took place

When examining an affidavit of use and possession, it is important for an examiner to determine the validity of the affidavit.³⁰ While an affidavit of use and possession is not a cure, it is often the only way to overcome breaks in the early chain of title. The final decision whether to accept the facts in an affidavit as accurate or pursue trespass to try title litigation is made by the client.

F. Heirship

An examiner will review documents that indicate an owner died either testate, with a will, or intestate, without a will. In many instances, there is a gap in the chain of title that may be due to death of an owner in another county or state. If an owner died outside the county or state where the examined lands are located, a landman may be required to contact that particular county or state to determine whether the owner's estate was probated.

1. Probate

Upon an owner's death, title to property vests immediately in devisees under his or her will.³¹ However, a will cannot pass title until it is probated.³² All applications for the grant of letters testamentary or letters of administration must be filed within four years after the death of decedent, subject to exceptions as set out in the statute.³³ An examiner should carefully review all probate documents necessary in order to be satisfied that title has passed as set out in the will. If a will is probated outside the county or state where the examined lands are located, the examiner may rely on Section 95 of the Texas Probate Code that allows wills to be probated in Texas. The Texas Probate Code also provides that a will

³⁰ For more in depth discussion of affidavits, the authors refer you to Terry E. Hogwood, Title Examination: Curing Title with Affidavits, Advanced Oil, Gas & Energy Resources Law Course Houston, Texas, September 25-26, 2008.

³¹ Tex. Prob. Code § 37.

³² Tex. Prob. Code § 94.

³³ Tex. Prob. Code § 74.

probated in another county or state filed with the county clerk's office where the property is located is sufficient to pass title.³⁴

In order for title to vest, it is not necessary to have a conveyance to a devisee.³⁵ Usually, a certified copy of the Order Admitting Will to Probate and will are recorded with the county clerk's office where the examined lands are located. In some case involving complex estates it may be necessary to execute a distribution deed in order to adequately describe the property being distributed to devisees.

2. Affidavits of Heirship

It is often the case when examining title that individuals have died intestate and affidavits of heirship become required to fill in gaps.³⁶ Upon an owner's death, title to property vests immediately in his or her heirs at law and such vesting is subject to debts and taxes.³⁷ It is not necessary to have a conveyance for title to vest in an heir at law.³⁸ Both attorneys and landmen have historically relied upon affidavits of heirship to "cure" or fill in gaps in the chain of title due to intestate succession. In a perfect world, the chain of title would include recorded affidavits attesting to heirship for a decedent. The reality is that there are usually no recorded affidavits of heirship.

Section 52 of the Texas Probate Code sets out the requirements for an affidavit to be considered as prima facie evidence:

A statement of facts concerning the family history, genealogy, marital status, or the identity of the heirs of a decedent shall be received in a proceeding to declare heirship, or in a suit involving title to real or personal property, as prima facie evidence of the facts therein stated, if the statement is contained in either an affidavit or any other instrument legally executed and acknowledged or sworn to before, and certified by, an officer authorized to take acknowledgments or oaths as applicable, or any judgment of court of record, and if the affidavit or instrument has been of record for five years or more in deed records of any county in this state in which such real or personal property is located at the time the suit is instituted, or in the deed records of any county of this state in which the decedent had his domicile or fixed place of residence at the time of death. If there is any error in the statement of facts in such recorded affidavit or instrument, the true facts may

³⁴ Tex. Prob. Code Ann. § 96

³⁵ *Miller-Vidor Lumber Co. Schreiber*, 298 S.W. 154 (Tex. Civ. App. Beaumont 1927), writ ref'd.

³⁶ Texas law governs the passage of title by intestate succession. See Tex. Prob. Code § 45 (Community Property) and Tex. Prob. Code § 38 (Separate Property) It is important to note there was a change in community property law on September 1, 1993 (See Tex. Prob. Code § 45 Commentary).

³⁷ Tex. Prob. Code § 37.

³⁸ *Miller-Vidor Lumber Co. Schreiber*, 298 S.W. 154 (Tex. Civ. App. Beaumont 1927), writ ref'd.

be proved by anyone interested in the proceeding in which said affidavit or instrument is offered into evidence.

When examining an affidavit of heirship, it is important for an examiner to determine the validity of the affidavit. While an affidavit of heirship is not an absolute cure, it is sometimes the only way to obtain facts to explain a gap. The client is the one that decides whether to accept the facts in an affidavit as accurate.

G. Disclaimer Provisions

An examiner should include disclaimers in the title opinion that limit the scope of the opinion. These provisions are for the benefit of the examiner by giving the client parameters for the materials examined for the opinion. An examiner should include the following limitations:

- Disclose the opinion is based upon examination of documents referred to as materials examined, whether by review of an abstract, a prior title opinion, or stand up examination;
- Make known that the examiner has not reviewed any other documents other than those described as materials examined;
- Include a limitation upon the parties who may rely on the opinion;
- State the examiner rendered the opinion in accordance with the law as it existed at the time of the opinion and is not responsible to notify parties of changes in the law;
- State the examiner is not responsible for bankruptcy filings that do not appear in the chain of title as recorded in the county clerk's records.

III. CONCLUSION

Hopefully, this paper will provide a beginning reference point for title examiners. As mentioned earlier, no one title project is the same, thus there is no way this paper can cover all the title issues that an examiner may encounter. It is important for the examiner to communicate with the client prior to beginning a title project to make sure the title opinion addresses the needs of the client. By drafting a reliable, useful, and understandable title opinion, the examiner gives the client the reassurance to answer the question, "Are you sure your lessor owns the minerals?"

Part 2:
COMMON PITFALLS FOR TITLE EXAMINERS EXAMINING NORTH TEXAS TITLE
James D. Jeffers

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I. INTRODUCTION

The goal of this paper is to identify common pitfalls to title examiners examining title to North Texas lands. The title issues presented in this paper are merely a handful of the many title issues that might be confusing to or overlooked altogether by inexperienced title examiners. It would be impossible to set forth every dangerous area a title examiner may encounter, and this paper does not attempt to identify every possible scenario. Rather, identified in this paper are a few of the more common but potentially fatal issues creating problems for title examiners of North Texas lands.

II. SPECIFIC TITLE ISSUES

A. Patents¹

The patent is perhaps the most important instrument examined in the chain of title, because adverse possession does not apply against the State of Texas.² Consequently, if the patent is defective, then title possibly remains in the state regardless of the private ownership chain of title.

There are four possible sources of patents in Texas: Spain, Mexico, the Republic of Texas and the State of Texas. From approximately 1727 to 1821, Texas was a province of New Spain, subject to the Spanish monarchy. Approximately 20,000,000 acres of land were granted while Spain was the sovereign of Texas.³ Most of the Spanish land grants occurred along the Gulf of Mexico and the Rio Grande River. Texas became part of Mexico when Mexico declared independence from Spain on September 27, 1821. Texas remained part of Mexico until March 2, 1836. Mexico issued approximately 7,000,000 acres of land during this period. As every proud Texan knows, the Republic of Texas declared independence from Mexico on March 2, 1836.⁴ The Republic of Texas existed until it joined the United States of America on December 29, 1845.

The State of Texas recognizes all valid titles granted under the laws of Spain, Mexico and the Republic of Texas. Furthermore, the State of Texas determines the validity of the grants according to the laws of the prior sovereigns existing when the grants were made.⁵

¹ For an excellent in-depth review of patents, see John R. Ray, *Patents and Classification in Mineral Title Examination*, Advanced Oil, Gas & Energy Resources Law Course, October 11-12, 2001.

² *Smith v. Power*, 23 Tex. 30, 34-35 (1859).

³ Thomas K. McElroy, *Selected Materials on Texas Land Titles* 3 (1950).

⁴ On November 13, 1835, the provisional government of Texas, called by its representatives prior to Texas' declaration of independence on March 2, 1836, adopted its "Plans and Powers" and declared that all Mexican authorities concerned with land grants should cease their operations. 3 Fred A. Lange & Aloysius A. Leopold, *LAND TITLES AND TITLE EXAMINATION* (Texas Practice), 2nd ed., § 1. The Texas Supreme Court later held that all titles issued after November 13, 1835 by the Mexican government were void. *Rivers v. Foote*, 11 Tex. 662 (1854).

⁵ *Harris v. O'Connor*, 185 S.W.2d 993, 997 (Tex.Civ.App. – El Paso 1944, writ ref'd, w.o.m.).

Perhaps more important than the source of the patent, however, is the period of time when the patent was issued. The period of time largely determines whether the sovereign reserved minerals to the patented lands.

1. Prior to September 1, 1895

In 1783, Spain promulgated the Spanish Mining Ordinance, which reserved to the Crown all minerals on all lands under Spanish control, including Texas.⁶ Following its independence from Mexico, the Texas Congress passed legislation expressly reserving minerals in lands granted by the Republic of Texas.⁷ Minerals were continually reserved until 1866, when the Constitution of 1866 included a provision in which the state released to the owners of the soil all mines and mineral substances.⁸ A series of legislation ending with the General Mineral Release Act of 1895, which became effective September 1, 1895, released the minerals to the owners of lands previously owned by Texas and its prior sovereigns. The Supreme Court of Texas ultimately held that the releases of minerals were present releases of the minerals to the owners at the time the constitutional and statutory provisions became effective.⁹ Accordingly, it is generally accepted that as to patents and grants issued prior to September 1, 1895, the State of Texas has no interest in the mineral estate underlying the lands unless the patent or grant contains an express mineral reservation.¹⁰

2. September 1, 1895 to May 29, 1931

Patents issued between September 1, 1895 and May 29, 1931 are subject to the Relinquishment Act of 1919.¹¹ During this period, all minerals were reserved by the State of Texas in lands that were either classified by the General Land Office as having valuable mineral deposits or containing mineral reservations in the instruments of sale.¹² Although most of the classified lands are located in West Texas where there was heavy production of oil and gas, there are classified lands located throughout Texas, including North Texas.

Under the Relinquishment Act of 1919, as clarified in *Greene v. Robinson*,¹³ the surface owner acts as the State of Texas' agent for leasing its oil and gas interest. As consideration for this service, the surface owner divides on an equal basis with the State all compensation derived from the oil and gas development. The surface owner's right to act as agent on behalf of the State is appurtenant to ownership of the surface at the time of the

⁶ Ray, *supra* note 1.

⁷ *Id.*

⁸ TEX. CONST. of 1866, art. VII, § 39.

⁹ *Cox v. Robison*, 150 S.W. 1149, 1151 (Tex. 1912).

¹⁰ Ray, *supra* note 1.

¹¹ TEX. NAT. RES. CODE ANN. §§ 51.171 -- 52.190 (Vernon 2001).

¹² *Schendell v. Rogan*, 63 S.W. 1001, 1005 (Tex. 1901).

¹³ *Greene v. Robinson*, 8 S.W.2d 655, 658-659 (Tex. 1928).

lease. The surface owner of mineral classified lands does not own the minerals underlying the lands.¹⁴ As such, he or she cannot sell or reserve the mineral estate.

When executing a lease under lands subject to the Relinquishment Act, you must use the state's oil and gas lease form. Failing to use the state's form of lease will result in an invalid lease.

3. *May 29, 1931 to Present*

The Sales Act of 1931 applies to lands sold or contracted to be sold by the State of Texas after May 29, 1931.¹⁵ Under the Sales Act, the State of Texas reserved a free royalty of one-eighth on sulphur and one-sixteenth on oil and gas from sales of its lands. Effective September 1, 1983, Section 51.054(a) of the Texas Natural Resources Code amended the Sales Act to allow the School Land Board to set the state's mineral reservation at *not less* than one-eighth on sulphur and one-sixteenth on oil and gas on sales of its lands.¹⁶ In addition, Section 51.054(a) states that an oil and gas lease on lands in which the State reserved a mineral or royalty interest is not effective until a certified copy of the recorded lease is filed in the General Land Office.¹⁷

B. Defective Property Descriptions

A defective legal description contained in a conveyance is one of the most frequent causes of title failure in North Texas and everywhere else in Texas. A conveyance of real property must contain a sufficient description of the property to be conveyed.¹⁸ "The description must be so definite and certain upon the face of the instrument itself, or in some other writing referred to, that the land can be identified with reasonable certainty; otherwise, the instrument is void under the Statute of Frauds".¹⁹ Ideally, the description of the property conveyed will contain a metes and bounds legal description. However, one is not required to pass title as long as the instrument contains within itself or by reference to some other existing writing the means or data by which the land can be identified.²⁰

The description must be sufficient to identify the property with reasonable certainty. The legal description does not have to be mathematically certain.²¹ The description is sufficient if a surveyor can go upon the land and mark out the designated

¹⁴ *McDonald v. Dees*, 15 S.W.2d 1075, 1077 (Tex.Civ.App. – El Paso 1929, no writ).

¹⁵ TEX. NAT. RES. CODE ANN. §§ 51.011 et seq. (Vernon 2001).

¹⁶ *Id.* at §§ 51.054(a).

¹⁷ *Id.* at §§ 51.054(e).

¹⁸ *Greer v. Greer*, 191 SW.2d 848, 849 (Tex. 1946)

¹⁹ *Id.*

²⁰ *Morrow v. Shotwell*, 477 S.W.2d 538 (Tex. 1972).

²¹ *Templeton v. Dreiss*, 961 S.W.2d 645, 659 (Tex.App. – San Antonio 1998, pet. denied).

land.²² In addition, typographical errors and similar obvious errors and omissions generally do not render a legal description invalid.²³ Courts will attempt to correct errors to give effect to deeds where there is an evident mistake in the description.²⁴

Title instruments covering North Texas lands, especially those located in urban areas, often contain two common questionable legal descriptions: (1) tax tract numbers and (2) street addresses.

1. Tax Tract Descriptions

The Texas Supreme Court recently held that a description that references a tax tract map may be valid. The court in *AIC Management v. Crews*²⁵ examined the validity of a Tax Judgment and a Constable's Deed that described the property as "TR 12 AB 659 T S Roberts * situated in Harris County, Texas." The trial court granted summary judgment by declaring the Constable's Deed void because the legal description contained an insufficient description to allow one to locate the property with certainty. The Court of Appeals affirmed the trial court. The Texas Supreme Court held the description referenced Harris County Appraisal District tax tract maps, which might assist a surveyor in locating the property.²⁶ Accordingly, the record did not conclusively demonstrate that the property descriptions were inadequate to convey title.

Unfortunately, there is little other legal authority addressing the validity of legal descriptions that use only tax tract references. Although *AIC Management* suggests that a tax tract reference might be valid, I surmise that most title examiners are not willing to pass title to legal descriptions using only tax tract references.

2. Street Addresses

A street address or a commonly-known name for property may be a valid property description if there is no confusion.²⁷ For instance, a street address is sufficient if when considered with extrinsic evidence it is shown that only one tract of land can meet the

²² *Wilson v. Fisher*, 188 S.W.2d 150, 152 (1945).

²³ *Reserve Petroleum Co. v. Harp.*, 226 S.W.2d 839, 841 (Tex. 1950).

²⁴ See *Montgomery v. Carlton*, 56 Tex. 431 (1882) (description was valid even though metes and bounds description was missing one call because missing call can be supplied by reference to other calls and instruments in the chain of title); *Overand v. Menczer*, 18 S.W.301 (1892) (description was valid notwithstanding deed's reference to incorrect volume and page because it was clear what instrument the parties intended to refer to); and *Turner v. Sawyer*, 271 S.W.2d 119 (Tex. Civ. App. – Eastland 1954, writ ref'd n.r.e.) (description was valid where a call made to the southeast corner of a survey but the northeast corner was obviously intended).

²⁵ *AIC Management v. Crews*, 246 S.W.3d 640 (Tex. 2008).

²⁶ *Id.* at 648-649.

²⁷ *Butler v. Benefield*, 589 S.W.2d 778, 780 (Tex. Civ. App. – Dallas 1979, writ ref'd n.r.e.).

description.²⁸ “When, however, from the description given, it is reasonably possible to locate more than one tract of land fitting that description, the statute of frauds is not satisfied.”²⁹

In *Hoover v. Wukasch*,³⁰ the Texas Supreme Court examined whether a lease contained a valid legal description. The lease covered “that parcel of land located at 2270 Guadalupe Street, in the City of Austin, County of Travis, and being the same property now occupied by lessee herein as tenant of lessors.” The court held that the expression “and being the same property now occupied by lessee herein as tenant of lessors” provided the means or data by which the property could be located. The court stressed that the phrase was a “vital point of distinction” between this case and other cases involving street addresses.³¹

The Dallas Court of Appeals in *Apex Financial Corp. v. Garza*³² held that a quitclaim deed conveying “2330 Hardwick, Dallas, Tx 75208” provided the means by which the property could be located with certainty. The court noted, though, that there was no evidence that there is more than one tract of land fitting the description in the quitclaim deed. In addition, the court noted that there was no evidence that the vendor owned any other property nearby.³³

A legal description is a sufficient description if there is no confusion. Generally, extrinsic evidence is used to show there is no confusion by demonstrating only one tract of land can satisfy the description. Even in the event extrinsic evidence exists that clarifies any confusion, the materials examined by the title examiner likely will not include such extrinsic evidence. Accordingly, most title examiners probably will not pass a title instrument that includes only a street address for a legal description.

C. Roads

Ownership of the mineral estate underlying roads is perhaps the biggest source of confusion for title examiners in the Barnett Shale. Confusion generally stems from one of the following two areas: (1) whether a conveyance grants a right-of-way or fee simple; and (2) whether the strips and gore doctrine applies to a particular strip.

²⁸ *Henderson v. Priest*, 591 S.W.2d 635, 636 (Tex. Civ. App. – Dallas 1979, writ ref’d n.r.e.).

²⁹ *Butler*, 589 S.W.2d at 780; see also *Friedlander v. Christianson*, 320 S.W.2d 404 (Tex. Civ. App. – Houston 1959, no writ) (description insufficient where street address listed and vendor owned other property nearby).

³⁰ *Hoover v. Wukasch*, 254 S.W.2d 507 (Tex. 1953).

³¹ *Id.* at 510.

³² *Apex Financial Corp. v. Garza*, 155 S.W.3d 230 (Tex.App. – Dallas 2004, pet. denied).

³³ *Id.* at 237.

1. *Fee Simple Conveyance or Right-of-Way?*

The state often acquires the minerals underlying a road or highway when a landowner grants the state fee title in connection to the construction of the road or highway. Confusion often arises, though, concerning whether the conveyance to the state is a fee or a right-of-way.

Most landowners typically grant the state an easement across the surface of their land for highway purposes. However, in some instances, usually seen in older documents, landowners mistakenly convey fee title to the state. These instances are usually due to poor drafting of conveyancing instruments. Generally, where a granting clause grants and conveys a tract or strip of land, a court will hold that fee title to the tract is conveyed.³⁴ This applies even if the instrument (regardless of whether it is titled Deed or Right-of-Way) includes subsequent clauses referring to the conveyance as a right-of-way or limiting the use of the land to road or highway purposes.³⁵ However, a granting clause that grants and conveys to the grantee a “right-of-way” in or over a tract of land conveys only an easement.³⁶

Applying the rule set forth above, the Texas Supreme Court held a granting clause that conveyed “the following described piece or parcel of land” followed by a metes and bounds description of a strip of land was a fee simple conveyance even though the conveyance later recited “this deed is made as a right-of-way deed”.³⁷ In addition, a granting clause that conveyed “a strip of (200) Two Hundred feet in width of land over the tracts of land particularly described as follows...” was a fee conveyance notwithstanding the fact that the conveyance subsequently referred to the strip as a right-of-way.³⁸

The Texas Supreme Court in *Right-of-Way Oil Co. v. Gladys City Oil*³⁹ held a granting clause that conveyed “for the purpose of constructing, operating and maintaining its railroad, the right-of-way...” was a conveyance of a right-of-way, not fee simple. Furthermore, a granting clause that conveyed “a right-of-way” was a conveyance of a right-of-way even though the conveyance included a warranty clause consistent with those found in fee conveyances.⁴⁰

³⁴ *Texas Electric Ry. Co. v. Neale*, 252 S.W.2d 451, 454-456 (Tex. 1952).

³⁵ *Id.*

³⁶ *Id.*; see also *Right-of-Way Oil Co. v. Gladys City Oil*, 157 S.W. 737, 740 (Tex. 1913).

³⁷ *Texas Electric Ry. Co. v. Neale*, 252 S.W.2d 451 (Tex. 1952).

³⁸ *Brightwell v. International-Great Northern Railroad. Co.*, 49 S.W.2d. 437 (Tex. 1952).

³⁹ *Right-of-Way Oil Co. v. Gladys City Oil*, 157 S.W. 737 (Tex. 1913).

⁴⁰ *Boles v. Red*, 227 S.W.2d 310 (Tex.Civ.App. – Eastland 1950, writ ref'd).

2. Strips and Gore Doctrine

Under the strips and gore doctrine when a deed conveys land abutting a street, public highway or railroad right-of-way, a presumption exists that title to the center of the street, public highway or railroad right-of-way also passes under the deed.⁴¹ The doctrine also applies to the dedication of streets and alleys in a platted subdivision.⁴² Generally, the doctrine requires the strip: (1) to be small in comparison to the land conveyed; (2) to be adjacent to or surrounded by the land conveyed; (3) to belong to the grantor at the time of the conveyance; and (4) to be of insignificant or little practical value.⁴³ As with every general rule of law, there are several modifications and exceptions to the strips and gore doctrine.

i. Doctrine Does Not Apply if Strip is Larger and/or More Valuable than Tract Conveyed

The most common instance when the strips and gore doctrine does not apply to a strip of land is where the strip is large and/or valuable relative to the strip of land conveyed. Texas courts have generally held that the strips and gore doctrine does not apply if the strip of land is larger and/or more valuable than the tract of land conveyed. Courts have held that the doctrine did not apply where a railroad right-of-way tract was larger and potentially more valuable than the adjoining lot specifically described in the conveyance.⁴⁴ In addition, the strips and gore doctrine did not apply where the strip of land and the tract of land specifically conveyed were approximately the same size.⁴⁵ The “larger and more valuable” exception applies at the time of the conveyance; that is, if the strip of land is larger and more valuable than the conveyed tract at the time of conveyance, then the conveyance probably does not include the strip of land. It is uncertain as to how much larger and/or more valuable the tract conveyed must be compared to the strip of land for application of the strips and gore doctrine.⁴⁶

⁴¹ *Cox v. Campbell*, 143 S.W.2d 361, 362 (Tex. 1940); *State v. Williams*, 335 S.W.2d 834, 836 (Tex. 1960).

⁴² *Lackner v. Bybee*, 159 S.W.2d 215 (Tex. Civ. App. – Galveston 1942, writ ref’d w.o.m.).

⁴³ *Glover v. Union Pacific Railroad Co.*, 187 S.W.3d 201, 212 (Tex.App. – Texarkana 2006, pet. denied).

⁴⁴ *Angelo v. Biscamp*, 441 S.W.2d 525, 526-27 (Tex. 1969).

⁴⁵ *Haby v. Howard*, 757 S.W.2d 34, 39-40 (Tex.App. – Tyler 1988, writ denied).

⁴⁶ See *Pebsworth v. Behringer*, 551 S.W.2d 501, 504 (Tex.Civ.App. – Waco 1977) (strip and gore doctrine applied where strip was 3.905 acres and the tract conveyed was 6.25 acres); *Krenek v. Texstar North America, Inc.*, 787 S.W.2d 566, 568-69 (Tex.App. – Corpus Christi 1990, writ denied) (strip and gore doctrine applied where strip was 12 acres and the tract conveyed was 105.03 acres); *Reagan v. Marathon Oil Co.*, 50 S.W.3d 70, 77-80 (Tex.App. – Waco 2001, no pet.) (strip and gore doctrine applied where strip was 7.058 acres and the tract conveyed was 55.25 acres); *Moore v. Energy States, Inc.*, 71 S.W.3d 796, 799-800 (Tex.App. – Eastland 2002, pet. denied) (strip and gore doctrine applied where strip was between 10 and 25 acres and the tract conveyed was 580.7 acres); *Glover*, 187 S.W.3d at 212 (strip and gore doctrine applied where strip was 6 acres and the tract conveyed was 165 acres).

ii. Doctrine Might Not Apply if Grantor Owns Both Sides of Strip

The strips and gore doctrine might not apply where the grantor owns land abutting both sides of the road. In *Couch v. Texas & Pacific Railway Co.*,⁴⁷ the Texas Supreme Court held that the strips and gore doctrine does not apply to railroad rights-of-way because a railroad is not a public highway in the sense of a public road or street. The court further justified its holding by noting that the grantor owned land on both sides of the right-of-way. The holding that the strips and gore doctrine does not apply to railroad rights-of-way was later overruled in *Rio Bravo Oil Co. v. Weed*.⁴⁸ However, the court in *Rio Bravo Oil Co.* distinguished *Couch* by noting that the grantor in *Rio Bravo Oil Co.* did not own the land on the opposite side of the right-of-way. Because *Rio Bravo Oil Co.* did not approve or disprove the exception in *Couch*, the majority of courts have noted that the exception might still be valid.⁴⁹ Notwithstanding, the court in *Reagan v. Marathon Oil Co.*⁵⁰ expressly rejected the exception created in *Couch*. The court in *Reagan* based its reasoning on the fact that the grantors in two cases⁵¹ decided by the Supreme Court of Texas owned the land on both sides of the strips in question and the Supreme Court of Texas in both cases held the strips and gore doctrine applied.⁵² Accordingly, it appears as though the exception created in *Couch* (i.e. that the strips and gore doctrine does not apply where the grantor owns the land on both sides of the strip in question) may no longer be valid.

iii. Multiple Easements Treated as One Easement

Where multiple easements exist side-by-side, it has been held that such easements will be treated as one strip under application of the strip and gore doctrine.⁵³ The Supreme Court of Texas in *Haines v. McLean* awarded the west half of three adjacent rights-of-way to one party and the east half of said rights-of-way to a different party.⁵⁴ In doing so, the court treated the three rights-of-way as one right-of-way.

iv. Entire Strip Conveyed if Located on Margin of Grantor's Land and Entirely on Grantor's Land

If the strip in question is located entirely on the grantor's land and runs along the margin of the grantor's tract, a deed that conveys the tract with a legal description that does not include the right-of-way but rather refers to the near edge of the right-of-way as a

⁴⁷ *Couch v. Texas & Pacific Railway Co.*, 90 S.W. 860, 860-61 (Tex. 1906).

⁴⁸ *Rio Bravo Oil Co. v. Weed*, 50 S.W.2d 1080 (Tex. 1932).

⁴⁹ See *Krenek*, 787 S.W.2d at 568-69.

⁵⁰ *Reagan v. Marathon Oil Co.*, 50 S.W.3d 70, 77-80 (Tex.App. – Waco 2001, no pet.).

⁵¹ *Cox v. Campbell*, 143 S.W.2d 361, 361-62 (Tex. 1940); *Haines v. McLean*, 276 S.W.2d 777, 778-79 (Tex. 1955).

⁵² *Reagan*, 50 S.W.3d at 77-80.

⁵³ *Haines*, 276 S.W.2d at 783.

⁵⁴ *Id.*

boundary, conveys all of the land covered by the right-of-way.⁵⁵ The conveyance covers the entire right-of-way, rather than just conveying to the center of such right-of-way.

v. Frustrating Doctrine for Title Examiners

The strips and gore doctrine can often be a frustrating concept for title attorneys and their clients. Because a strips and gore analysis requires an examination of the size of the strip in question and the size of the tract conveyed, one cannot determine whether the doctrine applies without examining all of the title documents affecting the strip and its abutting tracts of land. Unfortunately, much to the disappointment of clients, one cannot assume that a conveyance of a tract of land, which is located adjacent to a road, automatically extends to the center of the road.

3. *Leasing City Streets*

Section 253.005(b) of the Texas Local Government Code recites that a municipality may not lease a street, alley or public square in the municipality.⁵⁶ Under this statute, it was customary to acquire oil and gas leases covering city streets from the Texas General Land Office.⁵⁷ Effective June 19, 2009, however, the Texas legislature passed House Bill 2333, which amended Section 253.005(b) to provide “[a] municipality may lease under this section a street, alley, or public square in the municipality if the lease prohibits the lessee from using the surface of the land for drilling, production, or other operations. In this subsection, ‘public square’ does not include a dedicated public park.”⁵⁸ It is important to note that House Bill 2333 does not specify that one must obtain a lease covering a city street from the city, not the General Land Office. Consequently, it is uncertain who the proper party is to issue oil and gas leases on city streets – the city, the General Land Office, or both.

D. Ownership of Minerals Underlying Rivers

As with the other title issues examined under this paper, title to the mineral estate underlying rivers is difficult to determine.⁵⁹ However, determining ownership of rivers is critically important to title examiners and their clients.

⁵⁵ *Cantley v. Gulf Production Co.*, 143 S.W.2d 912, 916 (Tex. 1940).

⁵⁶ TEX. LOC. GOV'T CODE ANN. § 253.005 (2005).

⁵⁷ See *Mission v. Popplewell*, 294 S.W.2d 712, 715 (Tex. 1956) (“legal title to city streets belongs to the state, which has full control and authority over them”).

⁵⁸ Act of June 19, 2009, 81st Leg., R. S., H.B. 2333 (to be codified at TEX. LOC. GOV'T CODE ANN. § 253.005(b)).

⁵⁹ For an excellent in-depth review of ownership of minerals underlying rivers, see John L. Beckham, *Ownership and Leasing of Oil and Gas Under Roads, Highways, Riverbeds and Streams*, 18th Annual Oil, Gas & Mineral Law Institute, March 27, 1992.

1. Grants Made Prior to December 14, 1837

For grants of land made prior to December 14, 1837, the State of Texas owns the beds of all perennial streams – i.e. a stream that flows most of the year.⁶⁰ However, the state’s ownership is subject to the Small Bill, which is discussed below. The abutting landowners own to the center of the stream for streams that were classified as torrential – i.e. a stream that flows only after substantial rainfall.⁶¹

2. Grants Made After December 14, 1837

On December 14, 1837, the Republic of Texas enacted the “30-foot statute.” It provides that a stream that has an average width of at least thirty feet from the mouth up shall be considered a navigable stream.⁶² Under the 30-foot statute, the State of Texas is the owner of the streams that are navigable in law.⁶³ In addition, the State of Texas also owns the beds of streams that are navigable in fact.⁶⁴

Determining whether a stream bed has an average width of at least 30 feet is a difficult undertaking. The bed of the stream is that portion of the soil which may be alternately increased or decreased by a water supply which is adequate to contain an average and mean stage during the entire year.⁶⁵ In other words, the bed of the stream is that portion of the terrain between its fast land banks.⁶⁶ Unfortunately, there is no single methodology to measure the width of a stream for determining whether a stream falls within the confines of the 30-foot statute.⁶⁷ However, the width of the bed is most commonly measured along the particular survey in question.⁶⁸

In 1925, four years before the Texas Legislature passed the “Small Bill,” which is discussed below, it passed Article 7467a.⁶⁹ By this statute, the State of Texas relinquished, quitclaimed, and granted to all cities having a population of 40,000 inhabitants or more

⁶⁰ *Manry v. Robison*, 56 S.W.2d 438 (1932).

⁶¹ *Motl v. Boyd*, 286 S.W.2d 458 (1926).

⁶² TEX. NAT. RES. CODE ANN. § 21.001(3) (Vernon 2001).

⁶³ *Manry v. Robison*, 56 S.W.2d 438 (1932).

⁶⁴ Streams that are used, or susceptible of being used, in their natural and ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water; the stream in its natural and ordinary condition affords a channel for useful commerce. *Taylor Fishing Club v. Hammett*, 88 S.W.2d 127 (Tex. Civ. App. – Waco 1939, writ dismissed) citing *United States v. Holt State Bank*, 270 U.S. 49 (1926).

⁶⁵ *Motl v. Boyd*, 286 S.W.2d 458, 467 (1926).

⁶⁶ *Id.*

⁶⁷ *Hix v. Robertson*, 211 S.W.3d 423 (Tex. App. – Waco 2006, pet. denied)

⁶⁸ K. Roberts, Title and Boundary Problems Relating to Riverbeds, 36 TEXAS L. REV. 299, 315 (1958).

⁶⁹ TEX. REV. CIV. STAT. ANN. Art. 7467a.

(according to the 1920 census) all of the stream beds within the present or future corporate limits of such town insofar as the riverbeds were claimed as property of the State of Texas.⁷⁰

The Texas legislature then enacted the “Small Bill” in 1929.⁷¹ Pursuant to the Small Bill the State of Texas relinquished to the patentees whose title was issued at least ten years prior to enactment of the Act title to that portion of a river bed and the minerals thereunder where the river crosses a Survey (i.e. the river does not form a border to the Survey). However, the river bed and the minerals thereunder are relinquished under the Small Bill only if the acreage in the river bed is necessary to fulfill the total number of acres issued in the original grant.⁷² For example, if the patentee was granted 320 acres and the acreage within the grant including the riverbed acreage exceeds 320 acres, the excess remains in the State of Texas.

Unfortunately, when examining title within a city it is possible that the Small Bill conflicts with Article 7467a. It is uncertain whether the Small Bill applies retroactively or prospectively. If it is retroactive, then the abutting landowners’ ownership of the minerals underlying the river dates back to the patent. In that circumstance, then Article 7457a does not apply because the state did not own the minerals and, therefore, had nothing to convey, when Article 7457a became effective. However, if the Small Bill applied prospectively, then qualifying cities own the minerals underlying the streams via application of Article 7467a.⁷³

E. Community Property and Homestead Rights

Real property acquired during marriage is presumed to be the community property of both spouses regardless of whether the property is acquired in the name of one spouse or both.⁷⁴ Property acquired before marriage and property acquired during marriage by gift, devise or descent is separate property.⁷⁵ Community property is all property that is not separate property.

If property is acquired in the name of both spouses, then a subsequent conveyance of the property must be executed by both spouses, unless the conveyance was made by the husband before January 1, 1968.⁷⁶ Property acquired in the name of one spouse is presumed to be subject of his or her sole management, and a subsequent conveyance is not

⁷⁰ *Id.*

⁷¹ TEX. REV. CIV. STAT. ANN. Art. 5414a (Vernon 1962).

⁷² *Strayhorn v. Gilbert*, 300 S.W.2d 623 (Tex. 1957).

⁷³ *Compare State of Texas v. Bradford*, 50 S.W.2d 1065 (Tex. 1932) with *State v. Heard*, 103 S.W.2d 728 (Tex. 1937).

⁷⁴ TEX. FAM. CODE ANN. § 3.002 (Vernon 2006).

⁷⁵ *Id.* at § 3.001(2).

⁷⁶ *Id.* at § 3.102(c); TEX. REV. CIV. STAT. ANN. Art. 4619 (amended 1967, repealed 1969).

required to be executed by both spouses, unless the property was conveyed solely by the wife before January 1, 1968.⁷⁷

There is no presumption of marriage. An examiner is not required to inquire whether a person who acquired property solely in his or her name is married.⁷⁸ However, if the materials examined disclose that the grantor was married when he or she acquired the property, or the materials examined reveal facts that would lead a prudent person to inquire and thereupon discover the grantor was married, then the property is subject to attack from the former spouse.⁷⁹

Regardless of whether property is community or separate, if it is the homestead of married persons then both spouses must execute the conveyance.⁸⁰ This requirement is not limited to deeds; it extends to oil and gas leases, deeds of trust and any other instrument that conveys a real property interest.

Homesteads extend to the unsevered minerals underlying the homestead. Accordingly, both spouses must execute oil and gas leases covering homestead property where they own the surface and mineral estates of the homestead property.⁸¹ However, the homestead requirement does not extend to a severed mineral interest where the owners do not have a right to occupy the surface other than for mineral development.⁸²

A conveyance (other than a deed of trust or mortgage) of homestead by one spouse alone does not render the conveyance void.⁸³ If the record title is in the name of the spouse who executed the conveyance, then the conveyance is inoperative while the property is the non-executing spouse's homestead.⁸⁴ However, a deed of trust or mortgage that grants a lien on homestead property is absolutely void unless both spouses execute the instrument.⁸⁵

It is always best to assume that a tract of land that includes surface ownership is homestead property, and to require a showing that the property is not the couple's homestead. An Affidavit of Homestead should be used to resolve questions of uncertainty concerning a couple's homestead.

⁷⁷ *Id.* at § 3.102, 3.104

⁷⁸ *Hill v. Moore*, 62 Tex. 610 (1884); Title Standard 14.80.

⁷⁹ *Hill v. Moore*, 62 Tex. 610 (1884); *Myers v. Crenshaw*, 116 S.W.2d 1125, 1130 (Tex. Civ. App. – Texarkana 1938), *aff'd*, 137 S.W.2d 7 (Tex. 1940); and *First State Bank v. Zeanon*, 169 S.W.2d 735, 739 (Tex. Civ. App. – Waco 1943, writ *ref'd w.o.m.*).

⁸⁰ TEX. FAM. CODE ANN. § 5.001 (Vernon 2006).

⁸¹ *Gulf Production Company v. Continental Oil Co.*, 132 S.W.2d 553 (Tex. 1939).

⁸² Title Standard 14.90 Comment.

⁸³ *Grissom v. Anderson*, 79 S.W.2d 619, 621 (Tex. 1935).

⁸⁴ *Id.*

⁸⁵ *Inge v. Cain*, 65 Tex. 75 (1885).

F. Restrictive Covenants and Surface Use Restrictions

A sizable portion of North Texas lands are located in high-density populated areas. Consequently, title examiners must pay particular attention to restrictive covenants and surface use restrictions. Most, but not all, plat and dedications filed more than twenty years ago do not contain drilling restrictions. It is not uncommon, though, for more recent plat and dedications, especially those filed within the last five years, to contain limitations severely limiting or altogether restricting drilling operations. Furthermore, although older restrictive covenants occasionally limit drilling operations in areas covered by the covenants, newer restrictive covenants almost always restrict or limit drilling operations in those areas.

Deeds that sever the mineral estate from the surface estate more frequently contain provisions wherein the mineral owner agrees to waive all use of surface estate in the development of the mineral estate. In addition, it seems more often than not, oil and gas leases contain clauses either prohibiting use of the surface or severely restricting use of the surface. These provisions often provide that the lessee will not conduct any operations on the surface of the leased premises, but the lessee may recover oil and gas from the leased premises by directional or horizontal drilling or pooling.

Title examiners must carefully review plats and dedications, restrictive covenants and severance deeds to report whether drilling operations are limited on the tract of land under examination. Failure to report a surface restriction may leave your client both surprised and angry.

III. CONCLUSION

This paper by no means includes an exhaustive list of all title issues faced by title examiners. Due to the never endless supply of title instruments and the multiple areas of law affecting title, compiling such a list is practically impossible. This paper simply highlights a few of the more common title issues likely to be encountered by examiners of North Texas lands.