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## Current and Emerging Issues in Oil and Gas Title Examination

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# ONE J

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## CURRENT AND EMERGING ISSUES IN OIL AND GAS TITLE EXAMINATION

TIMOTHY C. DOWD\*

In examining a section of land, a title examiner will undoubtedly encounter title issues. Typically, the issues are not unique or they can be resolved through a number of standard tools for resolving title defects. However, sometimes unique issues do arise. Until the courts (or less likely, the legislature) resolve the unique issues, a title examiner has to identify and make a judgment on the issue, subject to a title requirement.

This paper deals with some unique and, in some circumstances, unanswered questions.

### *I. Wellbore Assignments.*

Assignments of oil and gas leases that reference a well continue to give title examiners concerns as to whether the assignment is of the assignor's interest in the leases (on a tract basis), or whether the assignment is limited to the wellbore of a described well.

#### *A. Principles of Contract Interpretation.*

Conveyances of interests in oil and gas leases are subject to the same general rules of interpretation as contracts.<sup>1</sup> The primary goal in construing

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an assignment or any conveyance is to determine the intent of the parties as expressed in the conveyance.<sup>2</sup> Often referred to as the “four corners” doctrine, a court will look at the conveyance in its entirety,<sup>3</sup> with effect given to every part of the conveyance.<sup>4</sup> Generally, if an instrument is clear and unambiguous on its face, then extrinsic evidence will not be admitted to determine the intent of the parties.<sup>5</sup> Whether a contract or a conveyance is ambiguous is a question of law for the court to decide.<sup>6</sup>

There are two basic approaches to contract interpretation. They are often referred to as the traditional rule and the modern rule. Under the traditional rule, contract interpretation is treated as a question of law for the court to decide based on the four corners of the instrument by applying rules of construction. Only after a court determines that the intent of the parties cannot be determined from the document itself (*i.e.*, that it is ambiguous) will a court allow extrinsic evidence to determine the intent of the parties.<sup>7</sup>

According to the modern rule, as contract interpretation seeks to determine what the parties actually intended, the fact that the parties dispute intent makes the conveyance ambiguous.<sup>8</sup> A conveyance is ambiguous if it is “reasonably and fairly susceptible of different constructions”<sup>9</sup> or contains “an intrinsic uncertainty.”<sup>10</sup>

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1. *Miller v. Schwartz*, 354 N.W.2d 685, 688 (N.D. 1984); *Comet Energy Services, LLC v. Powder River Oil & Gas Ventures LLC*, 185 P.3d 1259, 1261 (Wyo. 2008) (citing *Hickman v. Groves*, 71 P.3d 256, 258 (Wyo. 2003)).

2. 1 JOYCE PALOMAR & ROBERT WILCOX, *PATTON AND PALOMAR ON LAND TITLES*, § 202 (3d. ed. 2003).

3. *Messner v. Moorehead*, 787 P.2d. 1270, 1272 (Okla. 1990).

4. 1 JOYCE PALOMAR & ROBERT WILCOX, *PATTON AND PALOMAR ON LAND TITLES*, § 202 (3d. ed. 2003); *Petro Pro Ltd. v. Upland Resources, Inc.*, 279 S.W.3d 743, 748 (Tex. App. 2007); N.D. Cent. Code § 9-07-06.

5. *Petro Pro, Ltd. v. Upland Resources, Inc.*, 279 S.W.3d 743, 749 (Tex. App. 2007). *But see* *Chisos, Ltd. v. JKM Energy, L.L.C.*, 258 P.3d 1107, 1110 (N.M. Ct. App. 2011) (“A court may hear evidence of the circumstances surrounding the making of the contract in order to determine if it is unclear.”).

6. *Miller v. Schwartz*, 354 N.W.2d 685, 688 (N.D. 1984); *Chisos, Ltd. v. JKM Energy, L.L.C.*, 258 P.3d 1107, 1110 (N.M. Ct. App. 2011); *Plano Petroleum, LLC v. GHK Exploration, L.P.*, 250 P.3d 328, 330 (Okla. 2011).

7. Randall H. Warner, *All Mixed Up About Contract: When is Contract Interpretation a Legal Question and When is it a Fact Question?*, 5 Va. L. & Bus. Rev. 81, 85-86 (2010).

8. *Id.*

9. *Chisos, Ltd. v. JKM Energy, L.L.C.*, 258 P.3d 1107, 1110 (N.M. Ct. App. 2011) (quoting *Mark V, Inc. v. Mellekas*, 845 P.2d 1232, 1235 (N.M. 1993)).

10. *Messner v. Moorehead*, 787 P.2d. 1270, 1273 (Okla. 1990).

In specifically eschewing the four corners rule, New Mexico allows extrinsic evidence in order to determine whether a conveyance is ambiguous, even though it treats the question of whether a contract is ambiguous as a question of law.<sup>11</sup> It is also a rule of construction that a conveyance will be construed most strongly against the grantor.<sup>12</sup>

In theory, a title examiner would apply the same rules of contract interpretation that a court would, especially in a situation where there is no extrinsic evidence of intent of the parties. In practice, a title attorney would consider outside factors in construing an instrument regardless of whether the instrument seems unambiguous. Frequently, two parties will argue that an instrument unambiguously supports each party's claim, only to have a court decide that the instrument is ambiguous.<sup>13</sup> Thus, it is difficult for a title examiner to determine what a court would decide is ambiguous. Further, a title examiner may be advised that a client claims a certain interest as a result of a conveyance. Whether or not the conveyance is ambiguous, the title examiner will likely credit his or her client with the interest claimed, subject to a title requirement to obtain some sort of stipulation or other curative. Thus, the cautious approach for a title examiner is to err on the side of finding ambiguity, consider all available evidence as to the intent of the parties, and draft an appropriate requirement.

Given that construing wellbore assignments is so heavily fact-based, and that courts have interpreted cases in some surprising ways, it is instructive to look at some cases in further detail.

#### *B. Case Law.*

##### *1. Petro Pro, Ltd. v. Upland Resources, Inc.*

*Petro Pro, Ltd. v. Upland Resources, Inc.*<sup>14</sup> is probably the seminal case construing a wellbore-only assignment. The King "F" No. 2 Well was completed on a tract that was later pooled to create a 704-acre gas unit producing from the Cleveland Formation between 6,500 and 6,600 feet, but also including the Brown Dolomite Formation between 3,400 and 3,600

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11. C. R. Anthony Co. v. Loretto Mall Partners, 817 P.2d 238, 242-43 (N.M. 1991).

12. Key Production Company, Inc. v. Quality Operating, Inc., 2013 WL 1286672 (Tex. App. 2013) (mem.) (citing Commerce Trust C. v. Lyon, 284 S.W.2d 920, 921 (Tex. Civ. App.-Fort Worth 1955)).

13. See, e.g. Plano Petroleum, LLC v. GHK Exploration, L.P., 250 P.3d 328, 330 (Okla. 2011).

14. 279 S.W.3d 743 (Tex. App. 2007).

feet. KCS Medallion Resources (“KCS”) and MB Operating Co., Inc. (“MB”) were the owners of this unit. In November 1998, KCS and MB conveyed to L & R Energy (“L & R”):

All of Seller’s right, title and interest in and to the oil and gas leases described in Exhibit “A” attached hereto and made a part hereof (“Subject Leases”) insofar and only insofar as said leases cover rights in the wellbore of the King “F” No. 2 Well.<sup>15</sup>

Beginning in May 2003, Upland Resources (“Upland”), pursuant to a farmout agreement with KCS, drilled three wells in the Brown Dolomite Formation: the Skeeterbee No. 1 and Skeeterbee No. 2 Wells, both horizontal wells, and the Skeeterbee No. 3, a vertical well.

In April 2004, L & R assigned its interest in the King “F” No. 2 Well to Petro Pro, Ltd. (“Petro Pro”).<sup>16</sup> Upon inquiry, Petro Pro determined that KCS and Upland were treating the interest of Petro Pro as a wellbore-only interest in the King “F” No. 2 Well.<sup>17</sup>

In September 2004, Petro Pro filed suit seeking to quiet title to the entire 704-acre pooled unit, from the surface to a depth of 6,800 feet.<sup>18</sup> Several royalty owners intervened, seeking damages for alleged breach of implied covenants and for tortious interference with existing contracts.<sup>19</sup> The royalty owners argued that Petro Pro’s lawsuit and claims of ownership prevented Upland from fully developing the lease from drainage from adjacent wells.<sup>20</sup>

In cross motions for summary judgment, Upland contended that Petro Pro’s interest was limited to production and enhancement of production from the Cleveland Formation from the confines of the King “F” No. 2 Well.<sup>21</sup> The royalty owners contended that Petro Pro “had the right to produce from any formation subject to governmental regulations” limiting Petro Pro’s horizontal rights to forty acres surrounding the King “F” No. 2 wellbore.<sup>22</sup> Petro Pro contended “they were the exclusive owners of any portion of the leasehold estate that could reasonably be reached and

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15. *Id.* at 746.

16. *Id.*

17. *Id.*

18. *Id.* at 746-47.

19. *Id.* at 747.

20. *Id.*

21. *Id.*

22. *Id.*

produced through the King “F” No. 2 wellbore.”<sup>23</sup> At trial, the court found the assignment unambiguous and granted Upland’s motion for summary judgment.<sup>24</sup>

The court of appeals found that the judgment entered by the trial court failed to resolve the rights conveyed by the assignment.<sup>25</sup> The court of appeals construed the limitation to “rights in the wellbore” as limiting the assignment to production from the wellbore of the King “F” No. 2 Well at the depth it existed at the time of the conveyance.<sup>26</sup> This meant that Petro Pro’s rights included the right to produce from shallower formations, including the Brown Dolomite, but not the right to extend the wellbore vertically or horizontally, and not the right to share in production from any other well that may be drilled on the lease.

Important points in this case are that the court relies on Texas’ ownership-in-place theory to support its finding that the assignment was unambiguously limited to the gas that may be produced from the wellbore of the King “F” No. 2 Well. Thus, the court effectively gave some guidance on how to interpret an assignment limited to a wellbore absent greater definition. The only geographical area conveyed and owned by Petro Pro was that required to operate and produce the King “F” No. 2 Well, and the depths conveyed to Petro Pro are the depths (both horizontally and vertically) penetrated by the existing wellbore. Further, Petro Pro had the right to use the wellbore to produce from any uphole formations.

2. *Key Production Company, Inc. v. Quality Operating, Inc.*

*Key Production Company, Inc. v. Quality Operating, Inc.*<sup>27</sup> follows *Petro Pro* in finding that the language “insofar and only insofar as” described is a limitation on the grant but neither reserves nor conveys any interest.<sup>28</sup>

In *Key Production Company, Inc. v. Quality Operating, Inc.* the Texas Court of Appeals construed a purchase and sale agreement, an assignment, ~~and~~ an amendment of the assignment, a joint operating agreement, and a declaration of unit in order to determine the intent of the parties.<sup>29</sup> Exxon was an owner of an interest in the Pearline Perkins, et al., Smackover Gas

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23. *Id.*

24. *Id.*

25. *Id.* at 747-48.

26. *Id.* at 748-53.

27. 2013 WL 1286672 (Tex. App.) (mem.).

28. *Id.* at \*6.

29. *Id.*

Unit, when it conveyed the same to Gasoven, Key's predecessor in title.<sup>30</sup> The Assignment describes three leases comprising 359.5 acres, and specifically reserves the "deep rights," being depths below 11,680.<sup>31</sup> An amendment was subsequently executed in which Exxon further reserved the Henry Williams, et al., Pettit Gas Unit, which was located at a depth between 6,898 feet and 6,900 feet.<sup>32</sup>

Exxon subsequently created the Henry Williams Cotton Valley Gas Unit, which covered depths between 10,142 feet and 10,340 feet, and was covered by the same leases as the Pearline Perkins, et al., Smackover Gas Unit.<sup>33</sup> Around the same time, the Pearline Perkins Well stopped producing and was reworked to produce from the Cotton Valley Gas Unit and, upon completion, was renamed the Henry Williams No. 2 Well.<sup>34</sup> Exxon conveyed its interest to Quality Operating, and Gasoven conveyed its interest to Key, and a dispute arose as to ownership of the gas being produced from the Henry Williams No. 2 Well.<sup>35</sup> Key claimed all interest in all three leases, except for those specifically reserved in the assignment and amendment (depths below 11,680, and the Pettit Gas Unit from a depth between 6,898 feet and 6,900 feet).<sup>36</sup> The trial court found the Assignment was ambiguous, and that Key's predecessor had only acquired the leases in the Pearline Perkins, et al., Smackover Gas Unit and only in the Smackover formation from a depth of 10,980 feet to 11,680 feet.<sup>37</sup> The grant in the assignment included:

All leases or wellbores or contract rights INsofar AND ONLY INsofar AS set out in Exhibit A being attached to this Assignment and Bill of Sale and made a part hereof for all purposes, INsofar AND ONLY INsofar AS these leases or wellbores or contract rights are contained in the units described and set out in the particular Exhibit A, and INsofar AND ONLY INsofar AS these leases or wellbores or contract rights are subject to the contracts described in Paragraph 2 below or in the particular Exhibit. Assignor excepts from this Assignment and reserves unto itself all other right, title, and interest,

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30. *Id.* at \*1.

31. *Id.*

32. *Id.* at \*2.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at \*3.

37. *Id.*

including but not limited to any reservation by Assignor of any kind of interest (such as overriding royalty, depths, formations, contractual rights, etc.) from any conveyance or agreement, whether recorded or not, executed or effective prior to the execution of this Assignment, as specified herein.<sup>38</sup>

The Exhibit “A” contained a page titled “Pearline Perkins, et al., Smackover Gas Unit” that described the three leases being conveyed.<sup>39</sup> Important to the court’s analysis was the fact that the Pearline Perkins, et al., Smackover Gas Unit had been created by a Designation of Unit that had been filed of record in the deed records of Freestone County.<sup>40</sup> The Designation of Unit described the Smackover Gas Unit as including the Smackover formation at a subsurface depth of between 10,980 feet and 11,680 feet.<sup>41</sup> The assignment referred to the recorded Designation of Unit.<sup>42</sup>

Key argued that reading the assignment as a whole and interpreting the assignment as conveying only rights in the Smackover formation would negate specific reservations to the deep rights in the assignment and the Pettit formation in the amendment.<sup>43</sup> Key further argued that the description of the unit and the limitation to the leases “contained in the unit” was intended to be a limitation of the geographic surface area and not a limitation of the depth.<sup>44</sup>

The court sided with Quality, finding that the limitation “INSOFAR AND ONLY INSOFAR AS these leases or wellbores or contract rights are contained in the units described,”<sup>45</sup> taken together with the definition of the Pearline Perkins, et al., Smackover Gas Unit as found in the recorded designation of unit, unambiguously limited the assignment to the Smackover formation.<sup>46</sup>

It should be noted that the court of appeals held the assignment unambiguous.<sup>47</sup> Thus, the court was not looking at extrinsic evidence of

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38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at \*4.

44. *Id.*

45. *Id.* at \*3.

46. *Id.* at \*5.

47. *Id.* at \*6 (stating that it was erroneous of the trial court to determine that the assignment and amendment was ambiguous).



intent when it factored in the unrecorded agreements referred to in the assignment, including the amendment, the joint operating agreement, the purchase and sale agreement, and the recorded designation of unit.

3. *Comet Energy Services, LLC v. Powder River Oil & Gas Ventures, LLC*.

*Comet Energy Services, LLC v. Powder River Oil & Gas Ventures, LLC* is a case that came before the Wyoming Supreme Court twice. In *Comet I*,<sup>48</sup> the Supreme Court of Wyoming was asked to interpret an assignment of a federal oil and gas lease. Powder River claimed the entire 760-acre federal lease based on a 1998 assignment of:

1. The oil and gas well(s) described on Exhibit “A” attached hereto (“Wells”), together with all equipment and machinery associated therewith;
2. The leasehold estate created by the lease(s) upon which the Wells are located and/or pooled/unitized therewith (“Leases”) and all licenses, permits and other agreements directly associated with the Wells and/or Leases;

The Exhibit “A” described, in table form, the State and County, Location (4-53N-75W), Well/Unit Name (the Federal 44-4) and the Field. The Exhibit “A” header stated:

This Exhibit “A” contains the description of the wells/units with such description intended to incorporate all of Seller’s/Assignor’s interest in such wells/units and is not intended to be limited to Assignor’s/Seller’s interest in the geographic boundaries of the specific spaced/drillsite unit description therein.<sup>49</sup>

The trial court found that the assignment unambiguously granted Powder River the entire 760-acre lease upon which the well sat.<sup>50</sup> On appeal, the parties main dispute involved the meaning of the term “leasehold estate.”<sup>51</sup> Powder River argued that leasehold estate referred to the entire lease, and Comet argued that absent a legal description of the underlying lease, “leasehold estate” referred to the 40-acre unit on which the Federal 44-4

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48. 185 P.3d 1259 (Wyo. 2008).

49. *Id.* at 1263.

50. *Id.* at 1261.

51. *Id.*

well was situated.<sup>52</sup> The Wyoming Supreme Court concluded that it was impossible to determine the intent of the parties from the four corners of the assignment, specifically with regard to the term “leasehold estate” which the court found to be ambiguous, and therefore remanded the case to the trial court.<sup>53</sup>

On remand, the trial court admitted testimony from the land manager at Forcenergy (Powder River’s Assignor) who testified that it was Forcenergy’s intent at the time of the conveyance to convey all interest in the lease associated with the Federal 44-4 Well.<sup>54</sup> The land manager further testified that the lease itself had not been described because Forcenergy obtained the interest through a series of mergers and did not have records of the lease itself.<sup>55</sup> Further, spending the money to do the title work would not add any value for Forcenergy at the time of the sale. The trial court again found in favor of Powder River, and Comet appealed, arguing that the testimony of the land manager was inadmissible evidence of the subjective intent of the parties.<sup>56</sup>

In *Comet II*,<sup>57</sup> the Wyoming Supreme Court ruled that a party’s subjective intent is not relevant or admissible and that Wyoming uses an objective approach to contract interpretation.<sup>58</sup> Upon determining that a contract or one or more of the terms of a contract are ambiguous, Wyoming allows objective evidence of the circumstances surrounding the formation of the contract, but does not allow evidence of the subjective intent of the parties.<sup>59</sup> The objective approach allows extrinsic evidence of the relationship of the parties, subject matter of the contract, and the parties’ purpose in making the contract.<sup>60</sup> The Supreme Court affirmed the trial court, holding that the testimony of the land manager “explaining Forcenergy’s reason for offering the twenty-six assignments at the 1998 auction, the process by which the assignments were drafted and why the property descriptions were limited to well descriptions, rather than well and

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52. *Id.* at 1262.

53. *Id.* at 1263.

54. 2009 WL 6046871 (Wyo.Dist.) (Trial Order).

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56. 2009 WL 6046871 (Wyo.Dist.) (Trial Order).

57. 239 P.3d 382 (Wyo. 2010).

58. *Id.* at 387.

59. *Id.* (citing *Omohundro v. Sullivan*, 202 P.3d 1077, 1084 (Wyo. 2009)).

60. *Id.* (citing *Ecosystem Res., L.C. v. Broadbent Land & Res., L.L.C.*, 158 P.3d 685, 688 (Wyo. 2007)).

lease descriptions, was the sort of evidence this Court contemplated when we remanded the case for resolution of the term ‘leasehold estate.’”<sup>61</sup>

*Comet II* does not exactly address a wellbore-only assignment, as it is at least clear that the assignment intended to convey the entire unit on which the well was producing (40 acres) However, *Comet* is a cautionary tale to title examiners that even where language appears inclusive, a court might find an ambiguity where the assignment describes only the well and not the lease, or describes less than the entire tract covered by the lease.

If there is anything to be gathered from the cases discussed thus far, it is that courts appear to be willing to aggressively interpret limitations on grants. While paying lip service to the rule of construction that a deed is to be most strongly construed against the grantor, it appears that courts are frequently willing to find in favor of grantors by interpreting limitations broadly and language of grant narrowly. Perhaps there is an unspoken policy at work here. It is often an assignee of the remaining interest who claims that a prior assignment was wellbore-only, or limited to specific depths, or limited to particular geographic tract that is less than the entire lease. It is these subsequent assignees who are attempting to develop new depths or new acreage, and frequently the assignees of the limited interests who are simply producing existing wells. This sort of policy would tend to encourage development by those who take a risk on new depths, or new horizontal drilling.

#### 4. *Plano Petroleum, LLC v. GHK Exploration, L.P.*

In *Plano Petroleum, v. GHK Exploration, L.P.*,<sup>62</sup> Plano claimed the 320-acre Newell lease as a result of an assignment of:

All right, title and interest in and to that certain wellbore, all leasehold, limited in depth from the surface of the earth to the base of the Tonkawa Formation, and all surface and subsurface equipment and materials thereon and therein, more particularly described as the Claude E. Newell # 1 well. Said leases and well located in the northwest quarter of Section 23-17N-25W, Roger Mills County, Oklahoma, which wellbore, leases and associated equipment and materials so specified are hereinafter referred to as “SAID WELL.”<sup>63</sup>

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61. *Id.* at 390.

62. 250 P.3d 328 (Okla. 2011).

63. *Id.* at 330.

GHK, the successor to the Assignor in that assignment, claimed all right in the Newell Lease except for production of the Claude E. Newell No. 1 Well.<sup>64</sup> Plano filed suit seeking to quiet title to the entire 320-acre lease.<sup>65</sup> The trial court found that the assignment unambiguously conveyed the entire 320-acre lease to Plano's predecessor.<sup>66</sup> The Oklahoma Supreme Court found that there was a patent ambiguity in the use of the phrase "all leasehold" without a legal description of the lease itself.<sup>67</sup> The court issued/found five possible interpretations of the assignment, including:

(1) the instrument was a wellbore only assignment of the Newell # 1 well, as GHK argued, and the "all leasehold" language refers to leasehold rights insofar as the Newell # 1 well and production therefrom is concerned; (2) it assigned the entire 320 acre Newell Lease, as Plano argued and the lower courts held; (3) it assigned a leasehold of 80 acres in the quarter section which contains the Newell # 1 well; (4) it assigned a leasehold of 80 acres in the quarter section which contains the Newell # 1 well limited in depth to the base of the Tonkawa Formation; or (5) it assigned the entire Newell Lease limited in depth to the base of the Tonkawa Formation.<sup>68</sup>

The case was remanded for the trial court to consideration of extrinsic evidence of the intent of the parties.<sup>69</sup>

5. *Chisos, Ltd. v. JKM Energy, L.L.C.*

*Chisos, Ltd. v. JKM Energy, LLC*<sup>70</sup> is a dispute between an Assignor (Chisos) and an Assignee (JKM), with Chisos claiming it intended to assign a wellbore-only interest in the Stetson Well, and JKM claiming it intended to purchase the entire leasehold interest of Chisos in the west half of Section 2, which unbeknownst to JKM, included a second well, the HL2.<sup>71</sup> Upon learning that the HL2 well had stopped producing, Chisos sent a crew

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64. *Id.* at 329.

65. *Id.* at 330.

66. *Id.*

67. *Id.* at 331.

68. *Id.*

69. *Id.*

70. 258 P.3d 1107 (N.M. Ct. App. 2011).

71. *Id.* at 1109.

out to frac the well, and was informed by JKM's president that they were trespassing.<sup>72</sup> Chisos filed suit, and the trial court found in favor of JKM.<sup>73</sup>

Although New Mexico courts follow the rule that "[t]he existence of ambiguity is an issue of law that we review de novo,"<sup>74</sup> it also allows extrinsic evidence of the circumstances surrounding the contract formation in order to determine if the deed is ambiguous.<sup>75</sup> The court quotes, "[w]ithout a full examination of the circumstances surrounding the making of the agreement, ambiguity or lack thereof cannot properly be discerned."<sup>76</sup> Interestingly, The Court of Appeals barely mentioned the language of the assignment and focused heavily on the circumstances surrounding the assignment. In determining that the assignment was ambiguous, the court relied heavily on the testimony of expert witnesses finding the assignment ambiguous.<sup>77</sup>

Upon determining that a contract is ambiguous, New Mexico applies the Restatement (Second) of Contracts § 201 (1981):

Where the parties have attached different meanings to a promise or agreement or a term thereof, it is interpreted in accordance with the meaning attached by one of them if at the time the agreement was made

(a) that party did not know of any different meaning attached by the other, and the other knew the meaning attached by the first party; or

(b) that party had no reason to know of any different meaning attached by the other, and the other had reason to know the meaning attached by the first party.<sup>78</sup>

In *Chisos*, the court found that Chisos, who claimed the assignment was a wellbore only assignment, knew or had reason to know that the JKM did not know or have reason to know that Chisos intended the assignment to be wellbore-only.<sup>79</sup>

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72. *Id.* at 1110.

73. *Id.*

74. *Id.* (quoting *Mark V, Inc. v. Mellekas*, 845 P.2d 1232, 1235 (N.M. 1993)).

75. *Id.* (quoting *C.R. Anthony Co. v. Loretto Mall Partners*, 817 P.2d 238, 242-43 (N.M. 1991)).

76. *Id.* (quoting *Mark V, Inc. v. Mellekas*, 845 P.2d 1232, 1235 (1993)).

77. *See id.* at 1111.

78. *Id.*

79. *Id.* at 1114.

The application of the Restatement to wellbore assignments is one approach that may not bring certainty to litigants, but could lead to resolution of more of these cases at the trial level. It is unlikely that ambiguous wellbore assignments will stop being litigated anytime soon. The Restatement approach punishes the side that attempts to take advantage of ambiguity at the drafting stage, thus encouraging better drafting to start with. North Dakota has a similar statutory rule: If the terms of a promise in any respect are ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed at the time of making it that the promisee understood it.<sup>80</sup>

### *C. Drafting considerations.*

As there are no widely used or standardized forms for wellbore assignments, as a general approach, the drafter should expressly address as many points of potential conflict as possible. As limitations in an assignment are considered neither grants nor reservations,<sup>81</sup> it is in the interest of the parties to expressly convey or reserve any interest owned by the assignor in order to avoid ambiguity.<sup>82</sup>

#### *1. Legal description*

Careful attention should be given to the difference in the description of the location of the well and the description of the premises conveyed. A true wellbore-only assignment should clearly state that the legal description is included for location purposes only, and that it is the intent of the assignor to reserve all interest in the lease(s) covering any lands described. It is not advised that a drafter omit a legal description entirely. In a state that employs tract indices, the absence of a legal description does not provide notice to third parties of the interest of the assignee, as the assignment will not appear in the chain of title.<sup>83</sup>

#### *2. Description of the Leases.*

A wellbore-only assignment may purport to convey the leases or leasehold interest insofar and only insofar as it relates to the borehole and production from the borehole. In the alternative, a wellbore-only

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80. N.D. Cent. Code § 9-07-14.

81. *Petro Pro, Ltd. v. Upland Resources, Inc.*, 279 S.W.3d 743 (Tex. App. 2007).

82. Kurt M. Petersen, *Wellbores: Shedding Light on a Transactional Black Hole*, 48 Rocky Mt. Min. L. Inst. 13-30 (2002).

83. *Plano Petroleum, LLC v. GHK Exploration, L.P.*, 250 P.3d 328, 331-32 (Okla. 2011).

assignment may not describe or purport to convey any interest whatsoever in the leases or leasehold interest.<sup>84</sup> For title purposes, if the grant is effectively limited to production from specific tracts, depths, and boreholes, including a description of the underlying leases should not affect the interest conveyed. If the assignment is to be the narrowest of wellbore assignments, the assignment should clearly recite that any leases described are for information purposes only, and that assignor reserves all interest in the leases except as required to operate and produce from the wellbore assigned. Further, the object of the granting language should be the wellbore described, and not the leases or leasehold described.

The terms “leasehold estate” and “leasehold” with no accompanying legal description have been held to render an assignment ambiguous.<sup>85</sup> The North Dakota Supreme Court has said that the term “working interest” is generally synonymous with the term “leasehold interest”, and has held that a conveyance of “working interest,” when combined with a description of the underlying lease, unambiguously conveys the underlying leases.”<sup>86</sup>

### 3. *Rights in a drilling and spacing unit or in a voluntary unit.*

The assignment should clearly state the interest of the assignor and assignee in any pooled unit or drilling or spacing unit. In the narrowest wellbore-only assignment, the assignor should reserve the right to drill new wells or replacement wells on the same lease tract or unit. Alternatively, the assignment should specifically grant these rights to the assignee if it is the intent to convey the entire lease or the entire drilling and spacing unit. The Assignment should clearly set forth the rights of the parties if new drilling and spacing units are formed, or if existing spacing units are respaced, despaced, or increased density wells are authorized.<sup>87</sup> In Texas, the assignment should include acreage necessary to ensure compliance with applicable Railroad Commission Rules.<sup>88</sup> There is evidence that the term

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84. Lawrence P. Terrell, *Limited Assignments—Who Gets What?*, 35 Rocky Mt. Min. L. Inst. 17-6 (1989).

85. *Comet Energy Services, LLC v. Powder River Oil & Gas Ventures, LLC*, 185 P.3d 1259, 1264 (Wyo. 2008); *Plano Petroleum, LLC v. GHK Exploration, L.P.*, 250 P.3d 328, 331 (Okla. 2011).

86. *Miller v. Schwartz*, 354 N.W.2d 685, 689 (N.D. 1984).

87. Lawrence P. Terrell, *Limited Assignments—Who Gets What?*, 35 Rocky Mt. Min. L. Inst. 17-7 (1989).

88. George A. Snell and Ana Maria Marsland-Griffith, *Legal Descriptions—A Little Background and a Few New Issues*, State Bar of Texas, Oil, Gas and Energy Resource Law Section, Section Report, 28 (2011).

“wellbore rights” in Oklahoma is considered ambiguous if the well is drilled on a drilling and spacing unit.<sup>89</sup>

#### 4. *Depths.*

In the context of horizontal wells in particular, it is important to distinguish between measured depth and vertical depth. Measured depth can be determined from the length of the drillpipe and includes the entire length of the lateral, while vertical depth is the perpendicular depth from the surface to a certain point beneath the surface. If the wellbore is intended to include only certain formations, it is a good idea to identify those formations with reference to both footage and formation in the actual logs of the wellbore assigned or a control well (i.e. limited to the stratigraphic equivalent of the top/bottom of a specific formation as found in a specific well).<sup>90</sup> While Texas has found that a wellbore-only assignment unambiguously conveys the rights to uphole formations but not the right to extend the lateral vertically or horizontally, other states may find a wellbore-only assignment ambiguous as to these rights.<sup>91</sup> As such, the assignment should specifically address whether the assignee has the right to recomplete the well in a different formation (uphole or downhole), as well as whether the Assignee has the right to sidetrack, extend the lateral vertically, or extend the lateral horizontally.

#### 5. *Tangible Personal Property.*

As an assignment of a wellbore would typically involve personal property, including fixtures and equipment, such fixtures and equipment should be described with as much specificity as possible. If there is more than one well within the area of the well being conveyed, the fixtures and equipment should be described with enough specificity to determine which equipment is being reserved, and which is being conveyed.<sup>92</sup>

#### 6. *Intangible personal property and references to other contracts.*

It should be noted that a court will construe an assignment along with other contracts or unrecorded agreements to which the assignment refers or is explicitly made subject. Thus, the drafter should harmonize any potential

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89. *Cox v. Kaiser-Francis Oil Co.*, 152 P.3d 274 (Okla. Civ. App. 2006).

90. Lawrence P. Terrell, *Limited Assignments—Who Gets What?*, 35 Rocky Mt. Min. L. Inst. 17-10 (1989).

91. *Petro Pro, Ltd. v. Upland Resources, Inc.*, 279 S.W.3d 743 (Tex. App. 2007).

92. Kurt M. Petersen, *Wellbores: Shedding Light on a Transactional Black Hole*, 48 Rocky Mt. Min. L. Inst. 13-28 (2002).



inconsistencies between the assignment and contracts related to the assignment. For example, if a wellbore assignment is pursuant to and subject to a purchase and sale agreement, the drafter should make every attempt to harmonize the two and specify which agreement controls in the event of a conflict of any of the terms. As noted above in the discussion of *Key Production Company, Inc. v. Quality Operating, Inc.*, the court used a definition of the Smackover Unit found in a recorded designation of unit. As the assignment referenced the designation of unit, the court was free to interpret the assignment in the light of the designation of unit without finding the assignment ambiguous and admitting extrinsic evidence.<sup>93</sup> The drafter should be aware of any terms in the assignment which may be defined by reference to another agreement and, if necessary, expressly disclaim the use of terms from an outside agreement to define terms in the assignment.

As a practical matter, even if the assignment does not refer to or is not expressly subject to outside agreements, the parties should anticipate the possibility that a court would hold the assignment ambiguous, in which case the court would consider the circumstances surrounding the negotiation and drafting of the assignment.<sup>94</sup>

#### *7. Warranties.*

As the Uniform Commercial Code implies certain warranties with regard to the personal property conveyed, special care should be taken to expressly disclaim any express warranties and any implied warranties of merchantability or fitness for a particular purpose. Further, the assignment should address whether and to what extent the assignor warrants title to the real property. Either the assignor should expressly warrant title to the property, warrant title to the property by or through the assignor but not otherwise (a “special warranty”), or expressly disclaim any warranty of title.<sup>95</sup>

#### *D. Conclusion.*

In interpreting wellbore assignments, the title examiner should keep one overarching concern in mind: the assignment is more likely than not to be ambiguous. Any ambiguous assignment will likely require curative.

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93. 2013 WL 1286672 (Tex. App.-Waco 2013).

94. Kurt M. Petersen, *Wellbores: Shedding Light on a Transactional Black Hole*, 48 Rocky Mt. Min. L. Inst. 13-25 (2002).

95. Kurt M. Petersen, *Wellbores: Shedding Light on a Transactional Black Hole*, 48 Rocky Mt. Min. L. Inst. 13-31 (2002).

## *II. Commencement of Operations from Off-Unit Sites.*

Typically, a modern oil and gas lease has a commencement of operations clause. A common commencement clause in an oil and gas lease recites:

If at the expiration of the primary term, Lessee is engaged in operations for the drilling, testing or reworking of any well on the lands covered by this lease or on lands spaced or unitized herewith, this lease nevertheless shall continue in force and effect so long as the operations for drilling or reworking of any well are being conducted thereon, and this lease shall remain in force so long as operations are prosecuted with no cessation of more than 60 consecutive days.

This clause has consistently been held to allow a lessee to start surface operations, such as surveying, roadwork, drilling, and the placing of materials on location prior to the end of the primary term. These preliminary surface activities allow the lessee to extend the oil and gas lease past the primary term without the lease terminating. However, the remainder of the drilling operations must be diligently and timely prosecuted.

### *A. General Issue.*

With the advent of horizontal drilling, Oklahoma oil and gas lessees have frequently sought to increase production (and lower costs) by drilling off-unit to the north or south of a unit. Other times a lessee will commence a well in one section which extends horizontally into an adjacent section (multiunit well). This allows the lessee to utilize extremely long laterals.

An issue may arise where an operator commences operations on lands located outside the drilling and spacing unit, and in the process of drilling does not pierce the drilling and spacing unit/section until after the primary term of a lease in the unit has expired. As an example, Operator prepares a surface location in the very southern part of Section 36 with the intent to drill vertically, and ultimately, horizontally into Sections 1 and 12. Further, there are circumstances where Sections 1 and 12 become a horizontal multiunit under an Oklahoma Corporation Commission Order and the well is commenced in Section 1, but does not pierce Section 12 until after the primary term of one or more of the leases. If the lease allows the commencement of operations on a lease tract to extend the primary term, does this proposition still hold true when the surface operations are outside the lease or unit tract? The issue of whether these leases has expired is one that title examiners should be aware of.

*B. Case Law.*

There is no Oklahoma law dealing with this issue, and due to the uniqueness of Oklahoma's multiunit shale reservoir scheme, there are no cases from other jurisdictions which are on point. However, there are three cases that have dealt with the issue of the commencement of operations off-unit in which the drilling well does not pierce or cross into the lease tract (or unit) until after the expiration of the primary term.

The initial case that dealt with this fact situation is the Kansas case of *A&M Oil, Inc. v. Miller*.<sup>96</sup> In *A&M v. Miller*, the lessee filed a declaratory judgment action asking the trial court to declare that he had properly commenced drilling operations extending three leases under the commencement of operations clause in each lease.<sup>97</sup>

The facts are that prior to the end of the primary term of the leases, A&M received a license from the City of Stockton to directionally drill the well from an adjacent vacant lot.<sup>98</sup> Two days prior to the end of the primary term, A&M also received a permit from the Kansas Corporation Commission authorizing the directional drilling.<sup>99</sup> Four days prior to the termination of the two leases, the drilling site was prepared and the drilling rig was erected and an 88-foot hole was drilled.<sup>100</sup> The case recites that drilling progressed and that on April 11, three days after the primary term, the drill bit penetrated the vertical plane of the drilling unit and resulted in a producing well.<sup>101</sup> The lessors argued that the property line was not penetrated until after all three leases had expired.<sup>102</sup>

The *A&M* lease recites:

Notwithstanding anything in this lease contained to the contrary, it is expressly agreed that if Lessee shall commence operations for drilling at any time while this lease is in force, this lease shall remain in force and its term shall continue so long as such operations are prosecuted and, if production results therefrom, then as long as production continues.<sup>103</sup>

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96. 11 Kan. App. 2d 152, 715 P.2d 1295 (1986).

97. *Id.*

98. *Id.* at 1296.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

The court said there was no dispute that the operations, in general, would have satisfied the commencement obligation.<sup>104</sup> Further, the court held that there was no language in the commencement clause to require that the Lessee must commence operations on the surface of the unit.<sup>105</sup>

The court stated that when construing oil and gas leases, they were guided by the intent of the parties.<sup>106</sup> The court, without much explanation, noted that A&M's preliminary actions to obtain authorization for slant drilling as well as the commencement of slant drilling occurred within the lease period.<sup>107</sup> The court recited:

We cannot agree with the landowners in their assertion that A&M must conduct some physical activity on the leased property in order to commence drilling operations. The leases are unambiguous and cannot be read to require physical entry. The trial court's finding that the leases were extended under the drilling operations clause is correct.<sup>108</sup>

The second case that dealt with this issue is the case of *Manzano Oil Corporation v. Chesapeake Operating, Inc.*<sup>109</sup> Manzano, a top lessee, sued the base lessee, Chesapeake, asserting that the underlying three-year lease executed on August 3, 1995 lapsed.<sup>110</sup> The facts show that the drilling well was spud on July 27, 1998 on a three-acre parcel adjoining the subject lease.<sup>111</sup> The drill bit penetrated the subsurface of the leased tract on August 12, 1998, nine days after the scheduled expiration of the primary term.<sup>112</sup>

The court held that Chesapeake had essentially pooled the leased tract with the three-acre tract underlying the lease.<sup>113</sup> The court held that the intent of the parties in the totality of the lease permitted the drilling of the horizontal well and allowed the extension of the lease under these circumstances.<sup>114</sup>

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104. *Id.*

105. *Id.* at 1297.

106. *Id.* at 1296-97.

107. *Id.* at 1297.

108. *Id.*

109. .178 F. Supp. 2d 1217 (D.N.M. 2001).

110. *Id.* at 1217.

111. *Id.* at 1219.

112. *Id.*

113. *Id.* at 1220.

114. *Id.*

The United States District Court for the District of New Mexico rejected the argument that the drilling had to actually be on the leased tract.<sup>115</sup> The court held that to hold that would be to negate the pooling provision of the lease.<sup>116</sup>

As the Oklahoma Corporation Commission typically establishes drilling and spacing units, it is not likely that an Oklahoma court would agree that the three-acre tract was “pooled” with the other tract.

The *Manzano* court also relied on Chesapeake’s commencement of operations. The court said that it was undisputed that Chesapeake timely began drilling operations on the property adjacent to the property covered by the lease.<sup>117</sup> The court cited *A&M Oil, Inc. v. Miller* in holding that the intent of the parties, as manifested in the totality of the lease provisions and in the actions of the parties, permits the drilling of the horizontal well and allows for the extension of the lease under the circumstances presented.<sup>118</sup>

There is one contrary case out of Pennsylvania. The case of *Neuhard v. Range Resources – Appalachia, LLC*.<sup>119</sup> In *Neuhard*, the property owners brought an action against Range.<sup>120</sup> Range created a 395-acre production unit comprised of nine separately owned parcels of land.<sup>121</sup> Further, the facts show that Range obtained several mandatory permits from state and local regulatory agencies, including drilling, zoning and development permits.<sup>122</sup> Range then commenced a well on acreage that it mistakenly believed was unitized with the leased premises prior to the expiration of the primary term.<sup>123</sup> However, the drilling tract was not unitized due to limiting language in the lease involved.<sup>124</sup>

The court held that commencement on the tract outside the lease was not adequate because the wording of the commencement clause stated that the Lessee shall commence a well on the “Leased Premises” or in a spacing unit containing a portion of the leased premises.<sup>125</sup> The Pennsylvania Court interpreted the commencement clause literally.<sup>126</sup> In this case, the court held

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115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. 29 F. Supp. 3d 461 (M.D. Pa. 2014).

120. *Id.* at 464.

121. *Id.* at 465.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 470.

126. *See id.*

that since Range did not commence operations on the leased premises or on the surface of a spacing unit containing the leased premises, then the commencement was not sufficient to extend the lease as the lease was written.<sup>127</sup>

### *C. Multiunit Wells.*

Another issue arises as to wells which are drilled in multiunits, or wells in which the OCC determines that two adjoining sections allow for a multiunit well, under the Oklahoma Shale Reservoir Development Act.

For simplicity sake, let's assume two separate scenarios:

1. The lessee drills from a surface location in Section 36 and does not pierce the vertical plane of Section 1 and/or Section 12 for a multiunit well until after the primary terms of one or more leases in Sections 1 and 12.
2. The lessee drills a well from a surface location in Section 1 and does not pierce Section 12 under a horizontal multiunit well until after the expiration of the primary term of one or more leases in Section 12.

In our scenarios, we can also assume that an interim order for a multiunit well would have been obtained showing the location of the drilling pad and showing that the well would be drilled into Sections 1 and 12.

The issue is whether the drilling bit actually needs to cross the section line before the lease expires in order to perpetuate the lease or will operations in the initial section perpetuate the lease. Although one cannot be certain based upon the lack of Oklahoma law, it would appear that Oklahoma courts could look to the language in the *A&M and Manzano* cases for guidance. If so, then the leases in Sections 1 and 12 would be extended.

Although *A&M* and *Manzano* do not go into great detail as to why the courts ruled the way they did, an important factor in both cases is the fact that the lessees obtained the regulatory permits for the drilling of the well on the off-unit tract that would pierce the leased land. The primary holding of both these cases is that commencement need not be on the leased land.<sup>128</sup> Therefore, based upon the language in both cases, the answer would appear

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127. *Id.* at 476.

128. *See* 11 Kan. App. 2d 152, 715 P.2d 1295 (1986); *see also*, 178 F. Supp. 2d 1217 (D.N.M. 2001).

to be that the operations in the heel section (Section 1) would presumably perpetuate the lease in the toe portion (or Section 12) even if the drilling bit did not cross over into Section 12 until after the primary term.

One Oklahoma case where the court could look for precedence is the case of *Kuykendall v. Helmerich & Payne, Inc.*,<sup>129</sup> *Kuykendall* held that where a lessee was effectively prevented from drilling a well on the lessor's property, because of the pendency of a spacing application, that the lessee's spacing application was, in essence, a commencement operation.<sup>130</sup> The court allowed that the action of the spacing application extended the term of the primary term and that the "commencement" was the actual filing of the application with the Corporation Commission.<sup>131</sup> Therefore, it would appear, although one cannot be certain, that an application for a multiunit well would be analogous to the *Kuykendall* case. However, the actual surface operations would also be necessary.

As to the contrary view, the *Neuhard* case that did not allow the extension of the leases by virtue of the commencement of operations off-unit held that the commencement of the well must strictly comply with the lease language. Further, it could be argued that the creation of multiunit wells under the Shale Reservoir Development Act is a method of allocation of the proceeds, but does not create a 1280-acre drilling and spacing unit. Therefore, the well was not drilled into a drilling and spacing unit.

From a lessee's standpoint, if the commencement clause in the lessee's lease had the same language as that in the *A&M* case, then in the event of litigation, the lessee could assert that this is the identical language used in the *A&M* case which upheld the off-unit commencement. Further, it removes the issue of whether the lease commencement required operations on the leased land.

### *III. Term Assignments.*

A "term assignment" is considered to be a type of a farmout agreement. Like any farmout agreement, a term assignment conditions the perpetuation of the assignee's interest on some objective, usually the establishment of oil or gas production or at least the commencement of operations within a specified period of time and continuous production or operations thereafter. The principal difference of a term assignment from a farmout agreement is that a term assignment is not an executory contract. The term assignment

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129. 741 P.2d 869 (Okla. 1987).

130. *Id.* at 874.

131. *Id.*

conveys legal title to the interest the assignee may perpetuate or "earn" by conducting operations, usually in the form of a recorded conveyance.

Term assignments, like oil and gas leases, are for a specified (primary) term of days, months, or years, and so long thereafter as oil or gas is produced. If properly drafted from the assignee's perspective, they also include the same kind of savings provisions found in oil and gas leases, such as provisions for extension of the term by the assignee's drilling or other operations across the end of the fixed primary term before production has been established or by conducting additional drilling or reworking operations upon cessation of production. If a commencement of operations clause is not included in the term assignments, then this may be an issue if the assignee commences operations which continue over the end of the primary term and production is not secured prior to the expiration of the primary term.

Except where a relatively small tract is involved, term assignments almost always provide, like oil and gas leases executed by sophisticated mineral owners, for partial termination at the expiration of the primary term or when continuous development has ceased thereafter, with the assignee retaining only developed land and, very often, only depths above those drilled or made productive. Term assignments do not usually contain a specific requirement for the nature and extent of the operations that the assignee must conduct in order to maintain or "earn" its interest as are common in farmout agreements, thus providing the assignee some flexibility over a traditional farmout agreement. A title examiner should be concerned with most of the same factors, and should consider examining the same kind of items in the context of farmout agreements.

Because legal title is vested in the assignee under the term assignment, title should be reported in the assignee even before any operation that may "earn" the interest has been performed or commenced. This is different from the manner in which an examiner may report a farmed-out interest. Because the term assignment interest is not indefeasibly vested, however, and because this may not be as easily perceptible to the reader of a title opinion as the fact that applicable leases may be subject to expiration in the absence of operations or productions, it is good practice for the title opinion to show that the interest is subject to reversion on termination of the assignment.

Once production has been established on land included in a term assignment, anyone thereafter examining title to the land must address the same kinds of concerns as are commonplace in considering whether oil and gas leases remain effective.



Title opinions on producing acreage subject to term assignments should advise the client to verify continuous production necessary to maintain the assignment in effect as to the assigned lease. Any other conditions to the assignment's continued effectiveness should be noted as well, and a requirement should be made to verify that those have been met. Conversely, if a term assignment is considered to have expired in whole or in part, a release by the record assignee, or a verification of the circumstances leading to the assignment's expiration, should be required.

#### *IV. Shut-In Clauses.*

In Oklahoma, it appears that operators (and title examiners) tend to be lackadaisical about whether shut in royalty payments are paid. One reason is the case of *Gard v. Kaiser*.<sup>132</sup> In *Gard*, the court said that under Oklahoma law marketing is not required for production and lessees have a reasonable time after discovery to market.

In *Gard*, the court determined that a relatively standard shut-in clause failed to create a special limitation.<sup>133</sup>

This examiner is seeing more special provisions which state the following:

This lease may not be maintained for a period of time longer than twenty-four (24) consecutive months beyond the primary term hereof solely by reason of a shut-in gas well or wells.

In *Blaser Farms, Inc. v. Anadarko Petroleum Corporation*,<sup>134</sup> the lease provided for a deadline on paying shut-in royalties.<sup>135</sup> However, the appellate court refused to terminate the lease even though the lessee was almost three months late in paying the shut-in royalty.<sup>136</sup> The 10<sup>th</sup> Circuit, interpreting Oklahoma law, distinguished *Gard* and found that the parties were successful in creating a special limitation on the lease.<sup>137</sup> However, based on the Oklahoma temporary cessation doctrine, the court concluded that Oklahoma law would relieve this lessee from application of the special limitation because of equitable considerations.<sup>138</sup>

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132. 582 P.2d 1311 (Okla. 1978).

133. *Gard*, 582 P.2d 1314-15.

134. 893 F.2d 259 (10th Cir 1990).

135. *Id.* at 260.

136. *Id.* at 261-62.

137. *Id.* at 262.

138. *Id.* at 264.

Therefore, an issue may arise where a shut-in period extends beyond two years. At that point, a court will need to determine whether the shut-in limitation period is a special limitation or whether this was a contractual covenant.

If this situation arises in Oklahoma, then an Oklahoma state appellate court will need to determine whether the 24-month period is i) a special limitation, and, if so, ii) whether equitable considerations exist to allow the lease to not be terminated.

Title examiners are not in a position to determine whether a clause is or is not a special limitation, and, certainly, whether equitable considerations exist to allow the continuation of the lease. Therefore, an examiner in the preparation of a Division Order Title Opinion needs to note the clause, the shut-in period, and ask for a ratification of the underlying lease.

#### *V. Affidavits of Pooling.*

On July 1, 1993, Oklahoma Statute 52 § 87.4 was enacted. The statute recites the following:

An affidavit evidencing any election for the drilling of a well under a pooling order issued pursuant to the proceedings set out in subsection (e) of Section 87.1 of Title 52 of the Oklahoma Statutes shall constitute constructive notice of the rights under the election claimed by the affiant when the affidavit is filed of record in the office of the county clerk for the county in which the lands described in the pooling order are located. The affidavit shall set out the name, addresses, if known, the election or deemed election for each pooled respondent included in the affidavit and shall have a copy of the pooling order attached. The affidavit may be filed by the operator designated in the pooling order or by any other interested party with knowledge of any election made. Filing of the affidavit shall not affect notice provided by virtue of pooling proceedings conducted by the Commission.<sup>139</sup>

Despite the fact that the statute recites that the affidavit constitutes constructive notice of the election under the pooling, many operators fail or decline to file the statutory pooling affidavit.

The impact of an applicant's failure to file an affidavit of pooling has not resulted in any reported decisions on the lack of constructive notice to a

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139. Okla. Stat. tit. 52 § 87.4 (1993).

subsequent purchaser, mortgagee, or creditor. One assertion is that the OCC proceedings are public record and, therefore, are notice to all parties. In a bankruptcy case decided by the Northern District of Texas, the plaintiffs asserted the filing of the affidavit under § 87.4 was required to establish constructive notice of a bank's liens on pooled acreage.<sup>140</sup> As the court had already determined that a recording of a blanket mortgage, which did not describe certain properties, did not constitute constructive notice, the court declined to address the assertion.<sup>141</sup>

The statute is deficient as to the timing when the OCC applicant should record the affidavit of pooling. A typical Oklahoma Corporation Commission Pooling Order allows respondents twenty days after the entry of the Order in which to make an election. If no election is made within the twenty-day period, then a respondent is deemed to have an election made for him under the terms of the order. An unanswered question is who prevails when an intervening claimant records his conveyance or claim on the 21st day following the entry of a Corporation Commission Order. It doesn't seem equitable that an intervening claimant could claim priority over a pooling applicant or other party affected by the pooling order.

#### *VI. Affidavits of Death and Heirship.*

In 1999, the Oklahoma Legislature enacted 16 O.S. § 67. Under 16 O.S. § 67, the statute recites that an owner of a severed mineral interest in real estate may be able to claim marketable title pursuant to an Affidavit of Death and Heirship recorded pursuant to 16 O.S. § 82 and 83. However, in order to be able to claim such an interest, it must satisfy 16 O.S. § 67(c).

Section 67(c) recites:

In order to establish marketable title pursuant to this section:

1. The affidavit or recital must state that the decedent died without a will, or if the decedent had a will, that the will was never probated in Oklahoma and a copy of the will is attached to the affidavit or recital, or if the will was probated that the severed mineral interest was omitted from the final decree of the decedent and a copy of the will and final decree is attached to the affidavit or recital;

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140. In re: Cornerstone E&P Company L.P., 435 B.R. 390 (Bankr. N.D. TX. 2010).

141. *Id.* at 410.

2. The affidavit or recital must list the names of the decedent's heirs and their relationship to the decedent;
3. The affidavit or recital must state that the maker is related to the decedent or otherwise has personal knowledge of the facts stated therein;
4. The affidavit or the title transaction that contains the recital must have been recorded for at least ten (10) years in the office of the county clerk in the county in which the real property is located; and
5. During the ten-year period following the recording of the affidavit or the title transaction that contains the recital, no instrument inconsistent with the heirship alleged in the affidavit or recital was filed in the office of the county clerk in the county in which the real property is located.<sup>142</sup>

However, Oklahoma Bar Association Title Examination Standard 3.2.D recites that certain other requirements are necessary. Title Standard 3.2.D.2 recommends that the affidavit contain sufficient factual information to make a proper determination of heirship.<sup>143</sup> Such information includes the death of the decedent, a copy of a death certificate, marital history of the decedent, names and dates of the death of all spouses, a listing of all children of the decedent including any adopted children, identity of the other parent of all children of the decedent, the date of death of any deceased children, and the identity of the deceased child's spouse and issue, if any.<sup>144</sup>

The Title Standard also recites that the statute is unclear as to the situation where unprobated Wills are attached to the affidavit and whether title is to pass to the intestate heirs or to the devisees under the Will. The Title Standard further recites that until such time as the Will is admitted to probate, it is ineffectual to pass title to real property. This statute, combined with the Title Standard is troublesome to title examiners. There is no guidance on what factors can be used and whether, for example, an unprobated Will can deny inheritance to an heir who was without notice (or due process) as to the recording of the Will. Further, it is the author's opinion, that based upon the statute and the Title Standard, it is a very rare

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142. Okla. Stat. tit. 16 § 67(c).

143. Oklahoma Bar Association Title Examination Standard 3.2.D.

144. *Id.*

circumstance that any recorded Affidavit of Death and Heirship can actually satisfy all of the requirements.