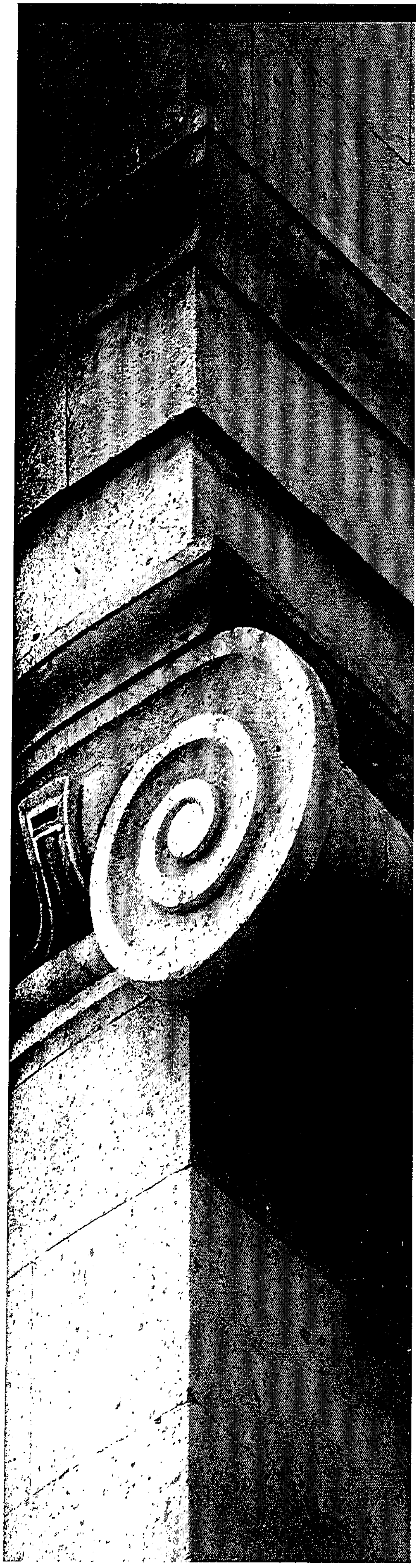

Oil & Gas Law
Nationwide Comparison of Laws on Leasing, Exploration and Production

COLORADO

Gregory R. Danielson • Davis Graham & Stubbs LLP
1550 Seventeenth St Ste 500 • Denver, CO 80202
(303) 892-9400 • greg.danielson@dgslaw.com
www.dgslaw.com

COLORADO

* Information on this topic was not provided. Please contact the contributor for further explanation.

COLORADO

I. CHARACTERISTICS OF THE MINERAL AND ROYALTY ESTATE

A. Definition of Oil, Gas and Casinghead Gas

Gas is a substance that exists in a gaseous or rarefied state under standard temperature and pressure conditions and includes non-hydrocarbon gases. *Hudgeons v. Tenneco Oil Co.*, 796 P.2d 21 (Colo. App. 1990). The Tenth Circuit Court of Appeals, considering a case on appeal from the U.S. District Court for the District of Colorado, concluded that the term "gas" within the meaning of the Agricultural Entry Act of 1914, 30 U.S.C. §§ 121-125, includes carbon dioxide deposits. *Aulston v. United States*, 915 F.2d 584 (10th Cir. 1990).

Colo. Rev. Stat. § 34-60-103 (2009), The Oil and Gas Conservation Act, defines gas and oil as follows:

5. "Gas" means all natural gases and all hydrocarbons not defined in this section as oil.
6. "Oil" means crude petroleum oil and any other hydrocarbons, regardless of gravities, which are produced at the well in liquid form by ordinary production methods, and which are not the result of condensation of gas before or after it leaves the reservoir.

In the context of oil, gas and mineral rights reserved or leased by counties, "oil and gas" means oil, gas, casinghead gas, condensate and hydrocarbons or any one or more of them. Colo. Rev. Stat. § 30-11-301 (2009). *See Farnik v. Board of County Commissioners of Weld County*, 341 P.2d 467 (Colo. 1959). The author is not aware of any Colorado cases defining the term "casinghead gas."

B. Elements of a Mineral Interest

"That oil and gas and other minerals may be severed from the realty and a separate estate created therein, is recognized in this jurisdiction," *Simson v. Langholf*, 293 P.2d 302, 306 (Colo. 1956); *see also Mull Drilling Co. v. Medallion Petroleum, Inc.*, 809 P.2d 1124 (Colo. App. 1991); *Pierce v. Marland Oil Co. of Colorado*, 278 P. 804 (Colo. 1929).

> Where the conveyance or reservation, as the case may be, consists of an interest in perpetuity to all the oil and gas minerals that may be extracted, the conveyance or reservation is a grantor reservation of the minerals in fee simple with the attributes and rights that go with such ownership, including the right to enter upon the land for exploration of oil, participation in delay rentals, bonuses and leasing. *Simson v. Langholf* at 307.

C. Conveyability

The owner of a mineral interest has a right to convey to another the executive right to lease such interest. The exclusive right to execute leases is not personal to the grantee but passes to his successors in interest. *Mull Drilling Co. v. Medallion Petroleum, Inc.*, 809 P.2d 1124 (Colo. App. 1991). In most jurisdictions, the rights to receive bonus payments, royalty payments and the reserved royalty are alienable or severable, in whole or part. Two decisions in Colorado, however, raise questions about the ability of a grantor to separately convey or reserve such interests in the mineral estate. These cases seem to hold, as a matter of property law and not as a rule of construction, that where a person owns the right to the profits or a share of the profits that a mineral fee estate might yield, such person owns the mineral fee estate itself. *Corlett v. Cox*, 333 P.2d 619 (Colo. 1958); *Simson v. Langholf*, 293 P.2d 302 (Colo. 1956); *see generally*, Phillip D. Barber, "Oil and Gas Practice in Colorado," 1B *Colorado Methods of Practice* 10.2 (Cathy S. Krendl, ed. 2004). The Colorado legislature addressed the ambiguity created by these cases by enacting Colo. Rev. Stat. § 38-30-107.5 (2009), which provides that any conveyance, reservation or devise of a royalty interest in minerals, whether of a perpetual or limited duration, contained in any instrument executed on or after July 1, 1991, creates a real property interest which vests in the holder the right to receive the designated royalty share of the specified minerals or the proceeds therefrom in accordance with the terms of the instrument. Subsequently, a Colorado Court of Appeals decision upheld the validity of a non-participating royalty created before 1991. *Keller Cattle v. Allison*, 55 P.3d 357 (Colo. App. 2002). This decision contains little discussion about the prior Supreme Court decisions and preserves the argument that a grantor in a conveyance prior to July 1, 1991, may be able to create a non-participating royalty interest in Colorado property.

D. Mineral or Royalty Interest for a Term of Years

There is little case law in Colorado regarding term mineral interests. An interest in minerals may be transferred for periods of time that are of a fixed term (for a definite period of years) or for a defeasible term (for a fixed period of time and an indefinite period thereafter). A conveyance of a mineral interest was to exist for 20 years and as long thereafter as there was continuous, commercial mineral production, has been held to be a determinable fee in which grantor also holds a possibility of reverter. *Appling v. Federal Land Bank of Wichita*, 816 P.2d 297 (Colo. App. 1991). Colorado does not have any cases addressing the extension of a term mineral interest. For guidance, we would look to the court's interpretation of the habendum clauses in an oil and gas lease. *See Hoff v. Girdler Corp.*, 88 P.2d 100 (Colo. 1939).

E. Leasehold and Overriding Royalty

Similar to a royalty, an overriding royalty is an interest in oil and gas produced at the surface, free of the expense of production, generally assessed in addition to the usual mineral owner's royalty; a non-risk and non-cost bearing interest. *Garman v. Conoco*, 886 P.2d 652 (Colo. 1994). An overriding royalty interest carved out of a working interest in an oil and gas lease is an interest in real property. *Page v. Fees-Krey, Inc.*, 617 P.2d 1188 (Colo. 1980); *Globe Drilling Co. v. Cramer*, 562 P.2d 762 (Colo. App. 1977). Thus, the Recording Act applies to an instrument creating such interest, 617

P.2d 1188. An overriding royalty conveyed by oil and gas lessees and severed from their working interest is limited to the duration and subject matter of the acquired leases and is not a perpetual fee interest in all minerals. *Globe*, 562 P.2d 762; *Grynberg v. Waltman*, 94 P.2d 473 (Colo. App. 1996).

F. Dormant Mineral Act, Marketable Title Act or Title Standards

Colorado does not have a dormant mineral act or a marketable title act. The most recent title standards in the State of Colorado were revised and effective July 1, 2006, and published by Attorneys' Title Guaranty Fund, Inc., located in Denver, Colo. *See* www.cobar.org/docs/2006titlestandards.pdf. These Title Standards are cited where applicable.

II. WHO CAN LEASE?

A. Marital Property

Jointly owned — Community property

Colorado is not a community property state. *In re Ellis*, 538 P.2d 1347 (Colo. App. 1975), *aff'd* 552 P.2d 506 (Colo. 1976). Colorado has adopted the Uniform Disposition of Community Rights at Death Act, Colo. Rev. Stat. §§ 15-20-101 to 15-20-111 (2009). This Act applies to the disposition at death of the following property acquired by a married person:

> All or the proportionate part of any real property situated in this state which was acquired with the rents, issues, or income of, the proceeds from, or in exchange for, property acquired as or which became, and remained, community property under the laws of another jurisdiction, or property traceable to that community property.Colo. Rev. Stat. § 15-20-101 (2009).

Upon death of a married person, one-half of the property to which the Act applies becomes the property of the surviving spouse and is not subject to testamentary disposition by the decedent or distribution under the laws of succession in this state. Colo. Rev. Stat. § 15-20-104 (2009).

Classification as either separate or marital property — Who must sign

Although not a community property state, property acquired during marriage in the name of one spouse may require, in certain circumstances, the execution of the non-owning spouse in order to convey such property:

a. Uniform Disposition of Community Rights at Death Act - where Colorado real property is acquired by a married person with the rents or proceeds from community property under laws in other jurisdictions (*see* II.A. above). Colo. Rev. Stat. §§ 15-20-101 to 15-20-111 (2009).
b. Pending dissolution of marriage under the Uniform Dissolution of Marriage Act, upon the filing and service of a petition for dissolution of marriage or legal separation, a temporary injunction is in effect restraining both parties from transferring, without consent of the other party or an order of the court, any marital property excepting in the usual course of business or for necessities of life. Colo. Rev. Stat. § 14-10-107 (2009). The Act defines marital property as follows:

   > Property acquired by either spouse subsequent to the marriage except: (a) property acquired by gift, bequest, devise or descent; (b) property acquired in exchange for property acquired prior to the marriage or in exchange for property acquired by gift, bequest, devise or descent; (c) property acquired by a spouse after a decree of legal separation; and (d) property excluded by valid agreement of the parties. Colo. Rev. Stat. § 14-10-113 (2009).

   A lis pendens must be recorded in the county records to place third parties on notice of the pending dissolution action and the restraint on alienation. Colo. Rev. Stat. § 38-35-109 (2009).
c. Augmented Estate. Colorado adopted a modified version of the Uniform Probate Code effective July 1, 1974. A surviving spouse of a decedent who dies domiciled in Colorado has the right to take an elective share not greater than one-half the value of the decedent's estate determined by the length of time the spouse and decedent were married. Colo. Rev. Stat. § 15-11-201 (2009). The Act restricts the application of the augmented estate to a strictly limited set of circumstances. As one commentator has pointed out, based upon,

   > the rarity of these special circumstances in the context of commercial mineral transactions, it appears that the risks of loss of title under the code are remote and fall into the realm of assumable risk if ignored altogether. Stephen J. Hull, "Spousal Joinder Requirements in the Rocky Mountain States," 29 *Rocky Mt. Min. L. Inst.* 13-560 (1983).

   Similarly, the Colorado Title Standards provide that the concept of augmented estate requires spousal joinder as follows:
   1. None where the conveyance was acknowledged before July 1, 1974;
   2. Joinder where the conveyance was acknowledged between July 1, 1974 and July 15, 1975; and
   3. None where the conveyance notes payment of the state documentary fee and is acknowledged after July 15, 1975.

Colorado Real Estate Title Standards, Section 11.3.2. (effective January 1, 2006).

Individual acknowledgment

STATE OF COLORADO)
) ss.
County of ______)

The foregoing instrument was acknowledged before me this _____ day of ________, 20____, by ________________. (if by natural person or persons, insert name or names; if by person acting in representative or official capacity or as attorney-in-fact, insert name of person as executor, attorney-in-fact, or other capacity or description; if by officer of corporation, insert name of such officer or officers as the president or other officers of such corporation, naming it). If acknowledgment is taken by a notary public, the date of expiration of his commission shall also appear on the certificate.
Witness my hand and official seal.

____
Title of Officer
See Colo. Rev. Stat. § 38-35-101 (2009).

B. Homestead

Definition of homestead rights

In Colorado, the homestead right consists of an exemption described as follows:

> Every homestead in the state of Colorado shall be exempt from execution and attachment arising from any debt, contract or civil obligation not exceeding in actual cash value in excess of any liens or encumbrances on the homesteaded property in existence at the time of any levy of execution thereon:
>
> a. the sum of $60,000.00 if the homestead is occupied as a home by an owner thereof or an owner's family;
>
> b. the sum of 490,000.00 if the homestead is occupied as a home by an elderly or disabled owner; or elderly or disabled spouse of an owner or an elderly or disabled dependent of an owner. Colo. Rev. Stat. § 38-41-201 (2009).

This homestead exemption automatically arises if the requirements for occupancy and the type of property are met. Colo. Rev. Stat. § 38 41-202(1) (2009).

Except as provided in § 38-41-202(3), to convey or encumber homesteaded property, the husband and wife shall execute the conveyance or encumbrance. Colo. Rev Stat. § 38 35-118 (2009). The exception under § 38-41-202(3), Colo. Rev. Stat., provides that homesteads claimed under the automatic provisions may be conveyed or encumbered by the owner of the property free and clear of the homestead rights unless the owner of the property or the spouse of such owner records in the county records an instrument describing such property, setting forth the nature and source of the owner's interest therein and stating that the owner or the owner's spouse is homesteading such property. Colo. Rev. Stat. § 38-41-202(3) and (4) (2009).

Types of homestead and whom they benefit

The homestead right extends to the owner and his or her family. Colo. Rev. Stat. § 38-41-201 (2009). When any person dies seized of a homestead leaving a surviving spouse and children, such surviving spouse and children are entitled to the homestead exemption. Colo. Rev. Stat. § 38-41-204 (2009).

Extent of possession necessary

The homestead exemption applies to property occupied as a home by the owner or his family. *Helkey v. Ashley*, 155 P.2d 143 (1945). The homestead may consist of a house and lot or lots or of a farm consisting of any number of acres. Colo. Rev. Stat. § 38 41 205 (2009).

Leasing homestead

If the mineral estate has not been severed and is part of the property claimed as a homestead, then any lease of the homestead property should be executed by both spouses (*see* II.B. *supra*). If no instrument has been recorded in the county records providing notice of the homestead in accordance with Colo. Rev. Stat. § 38-41-202(4), then the owner may lease the property free and clear of the homestead rights.

Colorado Real Estate Title Standards, Section 14.1.5., provides that where the conveyance is acknowledged between July 14, 1975, and May 27, 1977, and there is no declaration of homestead recorded in the county records, then there must be a joinder by the non-owner spouse or a recital in the conveyance or encumbrance that the owner is a single person or that the property is not occupied as a home by the owner or his family.

C. Business Entities

Corporations

A Colorado corporation may purchase, receive, lease and otherwise acquire, and own, hold, improve, use and otherwise deal with real or personal property or any legal or equitable interest in property. Colo. Rev. Stat. § 7-103-102(1)(d) (2009). A private corporation may convey or lease any of its real estate in the manner authorized by articles 30 to 44 of Title 38, Colo. Rev. Stat., or by instrument under its common seal subscribed by its president, vice president or other head officer. Colo. Rev. Stat. § 38-30-144(1) (2009). Any corporate instrument affecting title to real property, executed by the president, vice-president, or other head officer of the corporation, in the form required or permitted by law, shall be deemed to have been executed with proper authority in the usual course of business and shall be binding and conclusive on the corporation. Colo. Rev. Stat. § 38-30-144(2) (2009). Colo. Rev. Stat. § 38-30-144 does not prohibit any other mode of transfer, and it is entirely competent for a corporation to transfer its property through such agency as it may designate. *Bliss v. Harris*, 87 P. 1076 (Colo. 1906).

Pursuant to Colo. Rev. Stat. § 38-30-144(3) (2009), there shall be filed in the county clerk and recorder's office of each county where the corporation owns real property a certificate of incorporation for a domestic corporation or a certificate of authority for a foreign corporation. For a qualification by a foreign corporation accomplished prior to April 1, 1953, the document required to be filed was the certificate of business and agent authorized by Section 110, Chapter 41, C.S.A. 1935. Other corporate documents are required to be recorded in certain instances, e.g., where the articles of incorporation limit the duration of the corporate life to less than perpetual. The failure to file any of the documents does not affect or impair the validity of such document, but any corporation which is required to record documents in addition to the certificate of incorporation or the certificate of authority but which has not recorded such documents at the time any person acquires any interest in or lien upon real property from said corporation shall, as against such person and those claiming under him, be conclusively deemed to be an existing corporation qualified to exercise the powers described in § 7-103-102 C.R.S. Colo. Rev. Stat. § 38-30-144(4) (2009).

Colo. Rev. Stat. § 38-30-172 (2009) provides for the recordation of a "universal" statement of authority which provides *prima facie* evidence of the existence of an entity and the authority of one or more persons to act on behalf of the entity to convey, encumber or otherwise affect title to real property. This statement of authority is most useful where the authority to deal with real property is limited or the entity is such that it provides for other than customary management. For an ordinarily-managed corporation, evidence of the existence of the corporation and the authority of persons to act on behalf of the corporation is already provided for by statute. Therefore, a statement of authority would not be particularly useful nor required.

Title is marketable where an instrument affecting title to real estate has been of record for over 20 years in the office of the clerk and recorder of the county where such real estate is situated and contains a recital to the effect that the X company is a corporation in existence although no certificate of incorporation or appointment of agent has been filed for the X company in the county. Colorado Real Estate Title Standards, Section 6.1.1 (effective January 1, 2006), *citing* Colo. Rev. Stat. § 38-35-107. In addition, an instrument may be regarded as properly executed by "X Corporation" where: (a) the instrument recites in the body that it is executed by "X Corporation," is signed by "B.C., President," without the name of the corporation in the signature; (b) the corporate seal is attached to the instrument; and (c) the acknowledgment is "by B.C., as President of X Corporation." Colorado Real Estate Title Standards, Section 6.2.1 (effective January 1, 2006).

ACKNOWLEDGMENT

Any deed or other instrument relating to or affecting title to real property acknowledged substantially in accordance with the following form before a proper official shall be *prima facie* evidence of the proper execution thereof. Colo. Rev. Stat. § 38-35-101(2) (2009).

STATE OF ___________)
) ss.
COUNTY OF _________)

The foregoing instrument was acknowledged before me this _____ day of __________, 20__, by _______________________ (if by officer of corporation, insert name of such officer or officers as the president or other officers of such corporation, naming it).
Witness my hand and official seal.

____
Title of Officer

If the acknowledgment is taken by a notary public, the date of expiration of his/her commission shall also appear on the certificate.

General partnership

Partnerships existing prior to January 1, 1998. The Colorado Uniform Partnership Law, Colo. Rev. Stat. §§ 7-60-101 (2009), *et seq.*, governs general partnerships formed under Colorado law and existing prior to January 1, 1998, and all limited partnerships formed under Colorado law, to the extent that they are governed by general partnership law, unless they elect to be governed by the Colorado Uniform Partnership Act (1997), discussed below. Colo. Rev. Stat. § 7-60-108(3) (2009), provides that any estate in real property may be acquired in the partnership name. Title so acquired can be conveyed only in the partnership name. Any partner may convey title to real property in the partnership name by a conveyance executed in the partnership name. Colo. Rev. Stat. § 7-60-110 (2009). The partnership may recover the property unless the partner's act binds the partnership under Colo. Rev. Stat. § 7-60-109(1) or unless the property has been conveyed by the grantee to a holder for value without knowledge of the fact that partner has exceeded his authority. Colo. Rev. Stat. § 7 60 110 (2009).

Partnerships formed on or after January 1, 1998. The Colorado Uniform Partnership Act (1997), Colo. Rev. Stat. §§ 7-64-101 (2009), *et seq.*, became effective on January 1, 1998, and now governs all general partnerships, including limited liability partnerships, formed under Colorado law on or after the effective date and that are not continuing the business of a partnership dissolved under Article 60. Partnerships existing prior to January 1, 1998, may elect to be governed by the Colorado Uniform Partnership Law (1997). Colo. Rev. Stat. § 7-64-1205 (2009). Subject to the effect of a statement of partnership authority under § 7-64-303 C.R.S., partnership property, including real property, held in the name of the partnership may be transferred by an instrument of transfer executed by a partner in the partnership name. Colo. Rev. Stat. § 7-64-302 (2009). The statement of partnership authority which a partnership may file with the Colorado Secretary of State shall include the names of the partners authorized to execute an instrument transferring real property held in the name of the partnership. Where real property is involved, the statement of authority should also be recorded in the county recorder's office where transfers of that real property are recorded. Colo. Rev. Stat. § 7-64-303 (2009). Under the 1997 Law, a statement restricting authority that is filed in the recorder's office is constructive notice to third parties about a partner's authority to transfer real property. Colo. Rev. Stat. § 7 64 303(5) (2009).

ACKNOWLEDGMENT

See Colo. Rev. Stat. § 38-35-101 (2009).

Limited partnerships

Limited partnerships formed between April 11, 1931 and November 1, 1981; or before April 11, 1931. The Colorado Uniform Limited Partnership Law of 1931, Colo. Rev. Stat. §§ 7-61-101 (2009), *et seq.*, applies to limited partnerships formed between April 11, 1931, and prior to November 1, 1981, unless the partnership elects to be governed by the Colorado Uniform Limited Partnership Act of 1981 (discussed below) or the Colorado Uniform Partnership Law (1997) (discussed in Section II.C. regarding general partnerships above). A limited partnership formed under Colorado law prior to April 11, 1931, may become a limited partnership under Article 61 by complying with the provisions of Colo. Rev. Stat. § 7-61-130. A limited partnership formed prior to April 11, 1931, which does not become a limited partnership under Article 61, shall be governed by the prior existing law but will not be renewed. Colo. Rev. Stat. § 7-61-130(2) (2009).

Limited partnerships formed after November 1, 1981. The Colorado Uniform Limited Partnership Act of 1981, Colo. Rev. Stat. §§ 7-62-101 (2009), *et seq.*, applies to all limited partnerships formed on or after November 1, 1981, unless the partnership elects to be governed by the Colorado Uniform Partnership Law (1997) (discussed in Section II.C. above regarding general partnerships).

The conveyancing rules set forth in Article 64 apply to limited partnerships which have elected to be governed under Colo. Rev. Stat. §§ 7-64-101 (2009), *et seq.*; the rules set forth in Article 60 apply to limited partnerships which have not so elected. Those rules are discussed above under Section II.C. regarding Colorado general partnerships. *See* Colo. Rev. Stat. §§ 7-61-129 and 7-62-1104 (2009).

Principles applicable to both. Both of the above described Acts grant to general partners of a limited partnership all of the powers of a partner in a general partnership. Colo. Rev. Stat. §§ 7-62-

403(2)(a)(I) and 7-61-110(1) (2009). Therefore, the discussion under Colorado general partnerships above regarding partner authority would apply to the general partners of a limited partnership.

ACKNOWLEDGMENT

See Colo. Rev. Stat. § 38-35-101 (2009).

Limited liability companies and limited liability partnerships (LLCs and LLPs)

Limited liability companies. The Colorado Limited Liability Company Act was enacted in 1990. Colo. Rev. Stat. §§ 7-80-101 (2009), *et seq.* Each limited liability company organized and existing under the Colorado Limited Liability Company Act may, among other things, purchase, lease or otherwise acquire, own, hold, improve, use and otherwise deal in and with real property. Colo. Rev. Stat. § 7-80-104(1)(b) (2009). Real and personal property owned or purchased by a limited liability company shall be held and owned, and conveyance made, in the limited liability company name. If the articles of organization provide that management is vested in the managers, then instruments and documents providing for the acquisition, mortgage or disposition of property of the limited liability company shall be valid and binding upon the limited liability company if executed by one or more managers of a limited liability company. Colo. Rev. Stat. § 7-80-405 (2009). Similarly, if the articles of organization provide that management is vested in the members, then individual members have statutory authority to bind the company.

Limited liability partnerships. The addition of limited liability to a general partnership or a limited partnership does not change the authority of the agents of that partnership. *See* discussion in Sections II.B.

D. Attorney-In-Fact

General rules

Powers of attorney authorizing the agent to sell real estate are to be strictly construed. *Springer v. City Bank & Trust Co.*, 149 P. 253 (Colo. 1915). If the power of attorney contains a limited authority, instead of authorizing any act relating to real property, the agent cannot act outside of that authority. *See Springer*, 149 P. 253; *see also Nunally v. Hilderman*, 373 P.2d 940 (Colo. 1962) (power of attorney authorizing the agent to "sell" real property permits only the negotiation by the agent of a purchase contract to be signed by the principal and does not allow the agent to execute a binding agreement to sell, much less to convey the property).

Universal power of attorney

Colorado has adopted a statutory form power of attorney for property which may be used to grant an agent powers with respect to property, financial and other matters of the principal. Colo. Rev. Stat. § 15-1-1302 (2009). The statute does not bar any principal's use of any other or different form of power of attorney for property. Any non-statutory power of attorney for property must be executed by the principal and must designate the agent and the agent's powers but need not be acknowledged or conform in any other respect to the statutory power of attorney for property. The definitions and discussion regarding the statutory form indicate the broad power that may be conferred by the statutory form, including the power to act for the principal in any lawful way with respect to real property transactions (when properly recorded). In a statutory power of attorney, when properly recorded, the language granting power with respect to real property transactions empowers the agent to lease or otherwise acquire an interest in real property or a right incident to real property or quitclaim, release, develop, lease, sublease or otherwise dispose of an interest in real property or a right incident to real property among other things. Colo. Rev. Stat. § 15-1-1305 (2009). The section does not specifically empower the agent to execute oil and gas leases on behalf of the principal. The suggested statutory form is prepared in a check-the-box format that includes numerous optional powers the principal may confer and the option for the power of attorney to continue upon the incapacity, disability or incompetence of the principal. A power of attorney under this part 13 is durable so long as it contains language such as "this power of attorney will continue to be effective even though I become disabled, incapacitated, or incompetent." Colo. Rev. Stat. § 15-1-1303 (2009).

Necessity of recording power of attorney

In order that all conveyances which are executed by any attorney-in-fact may be seen to be executed with the assent of the grantor, the power of attorney of the attorney-in-fact, duly proved or acknowledged, shall be recorded in the same office in which the conveyances themselves are required to be recorded. Colo. Rev. Stat. § 38-30-123 (2009).

Curative necessary

The principal's death terminates the power of attorney. Colo. Rev. Stat. § 15-14-604(d) (2009). However, *see* section below regarding Colorado Durable Power of Attorney.

Durable power of attorney

A power of attorney legally sufficient under Colo. Rev. Stat. §§ 15-1-1301 to 1320 (2009) is durable to the extent that durable powers are permitted by any other law of Colorado and the power of attorney contains language, such as, "This power of attorney will continue to be effective even though I become disabled, incapacitated or incompetent," showing the intent of the principal that the power granted may be exercised notwithstanding later disability, incapacity or incompetency. Colo. Rev. Stat. § 15-1-1303 (2009).

Whenever a principal designates another his attorney-in-fact or agent by a power of attorney in writing and the writing contains the words "This power of attorney shall not be affected by disability of the principal," or "This power of attorney shall become effective upon the disability of the principal," or similar words showing the intent of the principal that the authority conferred shall be exercisable notwithstanding his disability, the authority of the attorney-in-fact or agent is exercisable by him as provided in the power on behalf of the principal notwithstanding later disability or incapacity of the principal at law or later uncertainty as to whether the principal is dead or alive. An affidavit, executed by the attorney-in-fact or agent, stating that he did not have at the time of doing an act pursuant to the power of attorney actual knowledge of the termination of the power of attorney by death is, in the absence of fraud, conclusive proof of the non-termination of the power at that time. If the exercise of the power requires execution and delivery of any instrument which is recordable, the affidavit when authenticated for record is likewise recordable. Colo. Rev. Stat. § 15-14-501 (2009).

The death, disability or incompetence of any principal who has executed a power of attorney in writing, other than a power as described in § 15-14-501, does not revoke or terminate the agency as to the attorney-in-fact, agent or other person who, without actual knowledge of the death, disability or incompetence of the principal, acts in good faith under the power of attorney or agency. Colo. Rev. Stat. § 15-14-502(1) (2009).

Acknowledgement

Any deed or other instrument relating to or affecting title to real property acknowledged substantially in accordance with the following form before a proper official shall be *prima facie* evidence of the proper execution thereof. Colo. Rev. Stat. § 38-35-101(2) (2009).

STATE OF __________)
) ss.
COUNTY OF ________)

The foregoing instrument was acknowledged before me this _____ day of _________, 20__, by _______________________ (if by attorney-in-fact, insert name of person as attorney-in-fact).
Witness my hand and official seal.

____
Title of Officer

If the acknowledgment is taken by a notary public, the date of expiration of his/her commission shall also appear on the certificate.

E. Estate of Resident Decedent

Rules of descent and distribution (intestate succession)

The Uniform Probate Code, as adopted by Colorado in 1974 with certain modifications and amendments, changed the former law primarily by enlarging the share of the spouse who also is the parent of the decedent's children and providing for per capita distribution if the persons are of equal kinship to the deceased but by representation if their kinship is unequal.

The rules of descent and distribution in Colorado, under the probate code as originally adopted in 1974 until amended in 1995, provided as follows:

a. Share of surviving spouse
   - i. If there is no surviving issue of the decedent, the entire intestate estate;
   - ii. If there are surviving issue, all of whom are also issue of the surviving spouse, the first $25,000 plus one-half the balance of the intestate estate;
   - iii. If there are surviving issue one or more of whom are not issue of the surviving spouse, one-half the intestate estate without the $25,000 preference.

b. Share of heirs other than surviving spouse: the part of the intestate estate not passing to the surviving spouse as described above or the entire intestate estate if there is no surviving spouse passes as follows:
   - i. To the issue of the decedent and if they are all of the same degree of kinship to the decedent, they take equally, but if of unequal degree, then those of more remote degree take by representation;
   - ii. If there is no surviving issue, to the decedent's parent or parents equally;
   - iii. If there is no surviving issue or parent, to the issue of the parents or either of them — if they are all of the same degree of kinship to the decedent, they take equally, but if of unequal degree, then those of more remote degree take by representation;
   - iv. If there is no surviving issue, parent or issue of the parent, but the decedent is survived by one or more grandparents or issue of grandparents, half the estate passes to the paternal grandparents if both survive or to the surviving paternal grandparent or to the issue of the paternal grandparents if both are deceased; the issue taking equally if they are all of the same degree of kinship to the decedent, but if of unequal degree, those of more remote degree take by representation; and the other half passes to the maternal relatives in the same manner; but if there be no surviving grandparent or issue of grandparent on either the paternal or maternal side, the entire estate passes to the relatives on the other side in the same manner as the half; and
   - v. If none of the relatives enumerated above is living, then to the nearest lineal ancestors and their issue, the issue taking equally if they are all of the same degree of kinship to the decedent, but if of unequal degree, then those of more remote degree take by representation.

In 1994 Colorado adopted substantial revisions to its probate code. Effective July 1, 1995 to July 1, 2010, the pattern of intestate succession is as follows:

a. Share of surviving spouse
   - i. If there are no surviving issue or parents or if all of the decedent's descendants are also descendants of the surviving spouse and the surviving spouse has no other surviving descendants, then the entire estate goes to the surviving spouse;
   - ii. If there are no surviving descendants but a parent survives, then the surviving spouse receives the first $200,000, plus three-fourths of the balance; the other one-fourth passes to the decedent's parents (effective July 1, 2010, the amount stated increases to $300,000);
   - iii. If all of the decedent's descendants are also descendants of the surviving spouse and the surviving spouse has descendants who are not descendants of the decedent, then the surviving spouse receives the first $150,000 plus one-half of the balance; the other one-half passes to the decedent's descendants (effective July 1, 2010, the amount stated increases to $225,000);
   - iv. If one or more of the decedent's surviving descendants are not descendants of the decedent's surviving spouse and all are adults, the surviving spouse receives the first $100,000 plus one-half of the balance; the other one-half passes to the decedent's descendants; if, however, in such case one or more of the descendants are minors, then the estate is divided one-half to the surviving spouse and one-half to the decedent's descendants (effective July 1, 2010, if one or more of the decedent's descendants are from a prior marriage, the surviving spouse receives the first $150,000 plus one-half of the balance).

b. Share of heirs other than surviving spouse: any part of the intestate estate not passing to the surviving spouse or the entire intestate estate if there is no surviving spouse passes in the following order to the individuals designated who survive the decedent:
   i. To a designated beneficiary who was designated by the decedent to be his or her beneficiary for purposes of intestate succession in accordance with Colo. Rev. Stat. § 15-22-101 to 112 (2009), or if the decedent has surviving children then the designated beneficiary receives one-half and the surviving children one-half (effective July 1, 2009);
   ii. To the decedent's issue, if any, per capita at each generation;
   iii. If none, to the decedent's parents equally if both survive or to the decedent's surviving parent;
   iv. If none, to the surviving descendants of the decedent's parents (i.e., the decedent's siblings), if any, per capita at each generation; if there is no surviving descendant, parent or descendant of a parent, then there is a series of provisions applicable to grandparents, birth child and birth children. You should consult the statute to evaluate these issues. The order of such distribution also changes effective July 1, 2010. Colo. Rev. Stat. § 15-11-101 to 114 (2009).

Lapse doctrine

The common law rules concerning lapse have been modified by Colorado's anti-lapse statute. Colo. Rev. Stat. § 15-11-603 (2009). This statute generally provides that if a devisee fails to survive the testator and is related to the testator as provided in the statute and the devise is not a class gift, the surviving descendants of the deceased devisee shall take per capita at each generation the property to which the devisee would have been entitled had the devisee survived the testator.

Administration of estate of intestate decedent

These proceedings are set forth in Colo. Rev. Stat. §§ 15-12-301 to 1009 (2009). The court appoints a personal representative to administer the estate proceedings by paying all creditors of the decedent and distributing any assets that remain to the persons entitled to the interest pursuant to the intestate descent and distribution laws as noted above. With respect to real property interests, the personal representative executes a deed of distribution which is conclusive evidence that the distributee has succeeded to the interest of the estate in the asset. Colo. Rev. Stat. § 15-12-908 (2009). During the pendency of the administration and prior to the delivery of a deed of distribution, the personal representative has the power and authority to execute oil and gas leases or otherwise deal with the property. Colo. Rev. Stat. §§ 15-12-715 and 15-1-804(g) (2009). If the administration is a formal administration, court approval must be sought.

Administration of estate of testate decedent

To prove the transfer of real property, a will must be admitted to probate. Colo. Rev. Stat. § 15-12-102 (2009). The person named in the will to be the personal representative (executor or administrator) has priority to serve as personal representative during the probate proceedings. Probate proceedings may be conducted informally without court supervision or formally with court supervision. Generally, in the absence of a contest, the proceedings will be conducted informally. The personal representative has the power and authority during the pendency of the probate proceeding and prior to executing and delivering a deed of distribution to execute oil and gas leases covering the mineral interest owned by the decedent and subject to probate administration. Colo. Rev. Stat. § 15-12-715 (2009). Generally, proceedings to probate a will must be commenced within three years of the date of death of the decedent. Colo. Rev. Stat. § 15-12-108 (2009).

Where no action has been brought for the probate of the estate within one year after the date of death of the decedent, any interested person may petition the court for an entry of a decree of heirship to transfer title as set forth in the decree. Colo. Rev. Stat. §§ 15 12 1301 to 1309 (2009).

For a detailed discussion of all aspects of Colorado probate law, *see* J. Wade, Colorado Law of Wills, Trusts and Fiduciary Administration (2001).

Rules relative to closing estate

The personal representative may close an estate by a sworn statement or formal order. If there are no pending issues, the personal representative may close an estate by a verified statement stating that the estate has been fully administered. Alternatively, a formal order closing the estate can be obtained, even if originally conducted informally, by giving notice to all interested parties. Following notice, the court will conduct a hearing and approve the distributions, may make a determination of heirship if applicable and discharge the personal representative. Where there is a desire for greater certainty, the formal closing is preferred since it estops and bars future claims against the personal representative. Colo. Rev. Stat. §§ 15-12-1001 to 1003 (2009). The personal representative is required to execute a deed of distribution distributing real property interests to those persons entitled to such assets, and the execution and delivery of such deeds is conclusive evidence of his succession to the interest of the decedent in that asset. Colo. Rev. Stat. § 15-12-908 (2009). Parties dealing with the distributee are provided protection from the claims and interests of third parties and may rely upon the deed of distribution. Colo. Rev. Stat. § 15-12-910 (2009).

Forced heirship statute

Colo. Rev. Stat. § 15-11-301 (2009) deals with the entitlement of a spouse to a share of the estate of a testator who executed a will prior to their marriage. Such a spouse is entitled to an intestate share of the decedent's estate with certain exceptions set forth therein. Colo. Rev. Stat. § 15-11-302 (2009) deals with children omitted from a testator's will. Subject to limited exceptions, the omitted after-born or after-adopted child may take an intestate share under the following conditions:

a. If the testator had no children when he or she executed the will, the omitted after-born or after-adopted child receives a share in the estate equal to that which a child would have received had the testator died intestate unless the will devised all or substantially all of the estate to the other parent of the omitted child and that other parent survives the testator and is entitled to take under the will; and

b. If the testator had one or more living children when he executed the will and the will devised property or an interest in property to one or more of the then living children, the omitted after-born or after-adopted child is entitled to a share of the testator's estate in accordance with the terms of the statutes. Colo. Rev. Stat. § 15-11-302((1)(b) (I to IV)).

F. Estate of Non-Resident Decedent

If ancillary probate of foreign will is not necessary

Ancillary proceedings providing for distribution of Colorado real property are required to obtain "marketable title." *See* Colorado Real Estate Title Standards, Section No. 11 (effective January 1, 2006).

If ancillary probate of foreign will is necessary

Colorado ancillary proceedings are generally necessary to affect the passage of marketable title through a nonresident decedent's estate to those persons entitled to share in the estate. Colorado Real Estate Title Standards, Section 11 (effective January 1, 2006).

Ancillary proceedings may take one of two forms. The first is an ancillary administration or probate proceeding wherein the Colorado court having jurisdiction appoints a personal representative in Colorado to administer the estate and probate the will. The proceedings are similar to regular probate proceedings for either formal or informal probates for a resident decedent. Colo. Rev. Stat. §§ 15-12-301 to 505 (2009). The second alternative applies where no local administration is pending in the state. A domiciliary foreign personal representative may file in the probate court or district court in the county where the decedent's property is located authenticated copies of his or her appointment. Colo. Rev. Stat. § 15-13-204 (2009). Upon the filing of the authenticated copies of the appointment, the domiciliary foreign personal representative may exercise as to all assets in the State of Colorado the powers of a local personal representative and may maintain actions and proceedings in Colorado. Colo. Rev. Stat. § 15-13-205 (2009).

Following completion of the ancillary proceedings, the letters testamentary from the foreign jurisdiction as filed and certified by the Colorado court, the personal representative's deed of distribution and a release of any Colorado estate or inheritance tax lien, if applicable, should be recorded in the county records. Also be aware that the distribution of property of an intestate or testate decedent domiciled in a foreign jurisdiction can also be determined pursuant to a decree of heirship under Colo. Rev. Stat. § 15-12-1301 (2009). *See* Section II.E.4. above.

Conflict of law rules

The law of Colorado governs intestate succession as to real property located in Colorado. The meaning of a governing instrument under the probate code is determined by the local law of the state selected by the transferor of the governing instrument unless the application of that law is contrary to the provisions relating to the elective share provisions provided for in Colo. Rev. Stat. § 15-11-201, the provisions relating to exempt properties and allowances described in Colo. Rev. Stat. § 15-11-401 or any other public policy of the state otherwise applicable to the disposition. Colo. Rev. Stat. § 15-11-703 (2009). As to the application of the community property laws of a foreign jurisdiction, *see* Uniform Disposition of Community Rights at Death Act, Colo. Rev. Stat. §§ 15 20 101 to 111 (2009) as discussed in Section II.A.1.

Use of affidavit of death and heirship

In many instances the heirs or devisees of a decedent owning small mineral, royalty, overriding royalty or other interests in the state of Colorado do not desire to undertake the expense of conducting probate proceedings. To maintain good relations with the landowner, companies are often willing to rely on a recorded Affidavit of Heirship. The Affidavit does not confer marketable title, but it does provide a road map for the examiner to trace the title in the county records where the real property is located. Where the value of the property is substantial, Colorado probate proceedings should be conducted. If an affidavit of heirship is secured, it should be sworn to by an independent third party having knowledge of the decedent and his or her heirs. Colo. Rev. Stat. § 38-35-113 (2009) provides that all statements relating to death, intestacy, heirship, relationship, age, sex, names and identities of persons contained in affidavits which remain of record for a period of 20 years in the office of the county clerk and recorder of the county where the real property affected by the facts stated in the affidavit is situated, shall be accepted as *prima facie* evidence of the facts stated in the affidavit insofar as those facts affect title to the real property.

G. Trustee

Power of trustee derived from the trust instrument

Colorado has adopted the Colorado Fiduciaries Powers Act (CFPA). Colo. Rev. Stat. §§ 15-1-801 to 807 (2009). A trustee has the powers conferred in the document creating the trust or by court rule or order. Colo. Rev. Stat. § 15-1-803 (2009). The trustee also has all powers conferred upon a fiduciary by the provisions unless those powers are limited by the language of the trust instrument expressing a clear intention that those powers be denied. Colo. Rev. Stat. § 15-1-803 (2009).

Powers of trustee derived from the trust statute

A trustee has all powers conferred upon a fiduciary by the provisions of the CFPA unless those powers are limited by the language of the trust instrument expressing a clear intention that those powers be denied. Colo. Rev. Stat § 15-1-803 (2009). The CFPA also provides that if a power specifically conferred upon the trustee in a trust instrument conflicts with any power conferred upon the trustee in the CFPA, the trustee is deemed to have only the power specifically conferred by the trust instrument. Colo. Rev. Stat. § 15 1-803 (2009). The CFPA grants very broad powers to the fiduciary including the right to explore for and remove mineral or other natural resources and in connection with mineral leases, to enter into pooling or unitization agreements, to encumber real property of the trust and to execute and deliver all legal instruments which are necessary or appropriate for administration of the trust. Colo. Rev. Stat. § 15-1-804 (2009). The CFPA applies to all trusts created after January 1, 1968, and to all trusts existing on January 1, 1968, that are amended to make the Act applicable. For third persons dealing with a fiduciary, the proper exercise of the trustee's powers is to be presumed, and the third party is not bound to make inquiry whether the trustee has power to act. Colo. Rev. Stat. § 15-1-805 (2009).

Title in trust but no trustee named; "blind" trust

Conveyance to trust. A trust may acquire, convey, encumber and lease real property in the name of the trust. Colo. Rev. Stat § 38-30-108.5 (2009). To evidence the existence of the trust and the authority of the trustee to act on behalf of the trust with respect to real property held in the name of the trust, the trustee may file a statement of authority in accordance with the Colo. Rev. Stat. § 38 30 172(2) (2009). The statement of authority means an instrument executed on behalf of the entity that contains the following:

i. The name of the entity;
ii. The type of entity and the state, country or other governmental authority under whose laws it was formed;
iii. A mailing address for the entity; and
iv. The name or position of the person authorized to execute instruments conveying, encumbering or otherwise affecting title to real property on behalf of the entity.Colo. Rev. Stat. § 38-30-172(2)(d) (2009).

The statement of authority may also set forth any limitation that exists upon the authority of the person named in the statement or holding a position described in the statement to bind the entity and any other matters concerning the manner in which the entity deals with any interest in real property. Upon recording, a statement of authority shall constitute *prima facie* evidence of the facts recited in the statement of authority insofar as the facts affect title to real property. Colo. Rev. Stat. § 38-30-172(5) (2009).

Conveyance to a trustee. Effective August 8, 2001, any instrument conveying real property in which the grantee is described as a trustee shall also describe the representative capacity of such trustee by one or more of the following means:

i. Naming the person so represented;
ii. Identifying the statute, the trust or other agreement or the court appointment under which the grantee is acting; or
iii. Referring, by proper description to book, page, document number, or file to an instrument, order, decree or other writing containing any such description of the representative capacity of the grantee that is recorded with the county clerk and recorder in the county where the real property is located. Colo. Rev. Stat. § 38-30-108 (2009).

If the representative capacity of the grantee is not described as provided in this section, the description of such grantee in such representative capacity in such instrument of conveyance shall be presumed to be a description of the person only and shall not be notice of the representative capacity of such grantee. The statute also contains a curative provision which allows for the recording of an affidavit executed by or on behalf of the grantee. The affidavit shall refer by book, page and document number or file to the recording information of such instrument of conveyance and shall contain one of the descriptions of the representative capacity of the grantee as described immediately above. After the recording of the affidavit, all persons shall have notice of the representative capacity of the grantee with respect to the interest in the real property conveyed.

Allocation of proceeds to principal and income

The trust instrument shall control the allocation of principal and income. If the trust instrument does not address the issue then the Uniform Principal and Income Act shall control. Colo. Rev. Stat. §§ 15-1-401 to 15-1-436 (2009).

Effective July 1, 2001, Colo. Rev. Stat. § 15-1-421 addresses the accounting for receipts from an interest in minerals or other natural resources under the Act. The trustee shall allocate these interests as follows:

a. If received as nominal delay rental or nominal annual rental on a lease, a receipt must be allocated to income.
b. If received from a production payment, a receipt must be allocated to income if and to the extent that the agreement creating the production payment provides a factor for interest or its equivalent. The balance must be allocated to principal.
c. If an amount is received as royalty, shut-in well payment, take or pay payment bonus or delay rental is more than nominal, 90 percent must be allocated to principal and the balance to income.
d. If an amount is received from a working interest or any other interest not provided for in paragraph (a), (b) or (c) above, 90 percent of the net amount received must be allocated to principal and the balance to income.

The section also provides that the Act shall apply whether or not a decedent or donor was extracting minerals or other natural resources before the interest became subject to the trust.

H. Life Tenant/Remainderman and Open Mine Doctrine

General rules

Although there are no Colorado cases directly on point, it is likely that a Colorado court would require an oil and gas lease to be executed by both the life tenant and the remaindermen unless the document creating the life estate authorizes the life tenant to execute an oil and gas lease. The prevailing rule is that the life tenant is entitled to the bonus and rental payments, but that royalty income, because it constitutes and relates to a part of the corpus, is the property of the remainderman subject to the life tenant's right to retain or to receive the income yield from such corpus during the life term. The suggested solution is to obtain a stipulation from the life tenant and remainderman setting forth the division. *See* Phillip D. Barber, "Oil and Gas Practice in Colorado," 1B *Colorado Methods of Practice* 11.2 (Cathy S. Krendl, ed. 2007). One should also be aware that Colorado has a special statutory provision for any devise of a life estate in property to a surviving spouse by a decedent spouse. Colo. Rev. Stat. § 15-1-1201 (2009). This statute provides that unless the instrument provides otherwise, the surviving spouse is entitled to (a) all income for life in the entire interest in or a specific portion of the property, payable annually or at more frequent intervals; (b) exclusive beneficial enjoyment of the property during his life including such income or use of the property as is consistent with the value of the property and its preservation; except that, during the surviving spouse's lifetime, no person other than the surviving spouse may receive any distribution of the property or its income; and (c) make the property productive or convert it into productive property within a reasonable time after the devise; except that the exercise of such power shall be subject to the degree of judgment and care which a prudent person would use if he were the owner of the property. The proceeds of any such conversion shall be reinvested by the surviving spouse in a form subject to the life estate and remainder rights created by the decedent. This statute applies to the estate of any person whose death occurred after December 31, 1981. There are no cases in Colorado which interpret how this statutory provision might apply to a mineral estate.

Open mine doctrine

Although there are no Colorado cases directly on point, we assume Colorado would follow the general rule for the open mine doctrine as recognized by the majority of jurisdictions.

I. Minors and Mental Incompetents

Minors

A minor is an unemancipated individual who has not attained 18 years of age. Colo. Rev. Stat. § 15-14-102(8) (2009).

If the grantor under a deed is a minor, the deed must be made by a guardian pursuant to court order or by a duly appointed conservator. The appointment of a conservator vests in him title as trustee to all property of the minor. Colo. Rev. Stat. § 15-14-421 (2009). A conservator has the power to convey such property or enter into a lease or arrangement for exploration and removal of minerals or other natural resources or enter into a pooling or unitization agreement. Colo. Rev. Stat. § 15-14-425 (2009). Contracts of minors which inure to their benefit are not void but voidable only at the election of the minor on arrival at maturity and for a reasonable time thereafter. *Fellows v. Cantrell*, 352 P.2d 289 (Colo. 1960).

Mental incompetents

If the grantor under a deed is under a disability such as legal incapacity, the deed must be made by a guardian pursuant to court order or by a duly appointed conservator. The appointment of a conservator vests in him the title as trustee to all property of the protected person. Section 15-14-102(5), C.R.S., defines "incapacitated person" as an individual other than a minor, who is unable to effectively receive or evaluate information or both or make or communicate decisions to such an extent that the individual lacks the ability to satisfy essential requirements for physical health, safety, or self-care, even with appropriate and reasonably available technological assistance. The powers of a conservator of an incapacitated person are the same as discussed above with respect to minors.

J. Mineral Owners Who Cannot be Located

Receivership for mineral owner who cannot be located

Except as provided in the section immediately below, Colorado has no specific statutory procedure for appointing a receiver for a mineral owner who cannot be located.

Receivership for contingent future interest

Colo. Rev. Stat. §§ 38-43-101 to 38-43-109 (2009) provide a statutory procedure for the appointment of a trustee to execute an oil and gas lease covering the contingent future interests, legal or equitable, arising by way of remainder, reversion, possibility of reverter, executory devise, upon the happening of a condition subsequent, or otherwise created by deed, will or other instrument.

Effect of force pooling on the above

Colorado's force pooling procedures are set forth under Colo. Rev. Stat. § 34-60-116(6) (2009). Neither the statute nor the regulations of the Colorado Oil and Gas Conservation Commission specifically address the force pooling of a mineral interest owner who cannot be located. The statutes provide that notice of the hearing can be served by service of process in accordance with Colorado Rules of Civil Procedure or by mailing a copy postage prepaid to the last known mailing address of the person to be given notice. Colo. Rev. Stat. § 34-60-108 (2009). There are no cases in Colorado determining whether service by mail to the last known mailing address would satisfy the due process requirements for force pooling an unlocatable mineral interest owner.

K. Public Entities

Cities, towns or other political subdivisions

The governing body of each municipality has the power to lease its real estate or any interest therein for oil and gas exploration and development upon such terms and conditions as may be prescribed and contracted by the governing body in the exercise of its best judgment and as such governing body deems to be in the best interests of the municipality. Colo. Rev. Stat. § 31-15-714 (2009). Any such lease of oil and gas rights shall be for a term not to exceed 10 years and as long as oil and gas is produced and the royalty shall not be less than 12.5 percent. Colo. Rev. Stat. § 31-15-714(1)(a) (2009). The statute also permits the municipality to enter into a pooling, unitization or consolidation of acreage covered by any such lease.

County and other unincorporated public entities

County. Colo. Rev. Stat. § 30-11-302 (2009) authorizes a county, acting through its board of county commissioners, to reserve the oil, gas and other minerals in the sale of any lands owned by the county. The county, acting by its board of county commissioners, may lease any real estate acquired and owned by the county under the laws relating to taxation or otherwise for exploration and development and production of oil and gas upon such terms and conditions as may be prescribed and contracted by the board of county commissioners in the exercise of its best judgment and as such board deems to be for the best interest of the county. Colo. Rev. Stat. § 30-11-303 (2009). Any such lease of oil and gas rights shall be for a term not to exceed five years and as long thereafter as oil and gas is produced and shall provide for a royalty of not less than 12.5 percent. Colo. Rev. Stat. § 30-11-303(2) (2009). Where the board of county commissioners agrees that no drilling shall occur on the lands covered by the lease, then the primary term may not exceed 10 years and so long thereafter. Colo. Rev. Stat. § 30-11-303(3) (2009). The county also has authority to enter into unit agreements providing for the pooling and consolidation of acreage covered by the oil and gas lease executed by the county. Colo. Rev. Stat. § 30-11-304 (2009).

School District. The real property of a school district may be leased for oil and gas exploration and development pursuant to Colo. Rev. Stat. § 22-32-112 (2009),

> A board of education of a school district has the power to lease any real property or any interest therein owned by the district for oil and gas exploration, development and production purposes, upon such terms and conditions as may be prescribed and contracted by the board in the exercise of its best judgment as the board deems to be for the best interests of the district.

Any lease of oil and gas rights shall be for a term not to exceed 10 years and as long thereafter as oil and gas is produced and shall provide for a royalty of not less than 12.5 percent of the oil and gas produced, saved and sold or the gross production value thereof.

The statute also permits the school district to enter into a unit agreement providing for the pooling, unitization or consolidation of acreage covered by the lease.

Minerals owned by the state

The Colorado State Board of Land Commissioners may lease all or any portion of State lands in Colorado at a rental to be determined by the Board. Mineral resources found upon State lands may be leased for the purpose of removing therefrom such resources for such length of time and conditioned upon the payment to the Board of such royalty upon the product as the Board may determine. Colo. Rev. Stat. § 36-1-113 (2009). Where the lands included within oil and gas leases are lands "granted to the state by the general government," they are lands over which the land commissioners have exclusive powers of disposal. Therefore, it does not lie within the power of the general assembly to place limitation or qualification upon the exercise of that power. *Sunray Mid-Continent Oil Co. v. State*, 368 P.2d 563 (Colo. 1963). However, the leasing powers of the board are subject to the implied limitation that it cannot lease state land already properly in the physical possession of others under the mining laws. *Dallas v. Fitzsimmons*, 323 P.2d 274 (Colo. 1958).

The Colorado State Board of Land Commissioners, also known as the State Land Board, is located at 1313 Sherman St, Ste 620, Denver, CO 80203, phone (303) 866-3454, fax (303) 866-3152. The Board is authorized to, and has, established a Mineral Section. In addition, there are several District Offices whose purview encompasses the various counties in the state. The Board maintains an internet website at http://trustlands.state.co.us/.

Highway rights of way

There is no specific statutory provision addressing the power of the Department of Transportation to execute an oil and gas lease covering lands acquired by the department for state highway purposes. However, the Department of Transportation has broad powers to sell and lease property owned by the department. Colo. Rev. Stat. §§ 43-1-106 and 43-1-210 (2009).

Quasi-public land — Cemeteries, churches and other unincorporated associations

Domestic and foreign religious and charitable corporations or associations operating within Colorado may hold and convey real property. Colo. Rev. Stat. § 7-50-107 (2009). Cemetery companies formed under Colo. Rev. Stat. § 7-47-101 (2009) may acquire title to real property. Similarly, a cemetery authority may acquire title to real property in accordance with Colo. Rev. Stat. §§ 12-12-101 to 12-12-115 (2009). We are not aware of any case law in Colorado determining whether properties owned as a cemetery can be leased for oil and gas purposes.

Any benevolent and fraternal society duly chartered by its grand body according to the laws, constitutions and usages of such fraternity and not wishing to become a corporate body may take and hold real estate for its use and benefit by purchase, grant, devise, gift or otherwise in and by the name and number of said body according to the respective registers of the grand body under which the same may be held. The presiding officer of such body together with the secretary thereof may make conveyances of any real estate belonging to such body when authorized by the body under the regulations of the society or its grand body. All such conveyances shall be attested by the seal of the subordinate body. Colo. Rev. Stat. § 38-30-146 (2009).

Pursuant to Colorado's Uniform Unincorporated Nonprofit Association Act, a nonprofit association in its name may acquire, hold, encumber or transfer an estate or interest in real or personal property. Colo. Rev. Stat. § 7-30-104 (2009).

Lands dedicated to a specific purpose cannot be used for any other purpose which is in conflict with the purpose of the dedication. *McIntyre v. Board of Comm. of El Paso County*, 61 P. 237 (Colo. App. 1900).

L. Riverbeds and Streams

Navigable streams or rivers

Upon admission to the Union, Colorado acquired title to all lands underlying the navigable waters within its boundaries. *Pollard's Lessee v. Hagan*, 44 U.S. 212 (1845). In 1953, Congress confirmed that the title to the beds of navigable rivers passed to states upon achieving statehood by enactment of the Submerged Lands Act, 43 U.S.C. § 1301 (1998). Federal case law and the Submerged Lands Act provide for certain exceptions to the general rule such as interests held by the United States for the benefit of an Indian Tribe. 43 U.S.C. § 1313. The lands beneath navigable waters are defined by the Act as,

> all lands within the boundaries of each of the respective states which are covered by non-tidal waters that were navigable under the laws of the United States at the time such state became a member of the Union ... up to the ordinary high watermark as heretofore and hereafter modified by accretion, erosion, and reliction. 43 U.S.C. § 1301(a).

For a detailed discussion of these navigability issues, see Kemp Wilson "Ownership of Mineral Interests Underlying Inland Bodies of Water and the Effects of Accretion and Erosion," 30 *Rocky Mt. Min. L. Inst.* 14-1 (1984).

The author is not aware of any published decision determining that any of the rivers within the state of Colorado are navigable. Based upon early opinions from the Colorado Attorney General, the State Land Board has not attempted to issue any leases covering oil and gas underlying the Colorado River. Due to the active oil and gas development in Garfield County, Colo., near the banks of the Colorado River, the Bureau of Land of Land Management has questioned whether the State of Colorado may assert ownership of the bed of the river based upon a navigability determination. A Memorandum dated May 17, 1988, from the Director of the Bureau of Land Management to the State Director in Colorado makes it clear that the final determination of navigability as to all sections of the Colorado River has not yet been determined.

The survey and patenting of lands by the United States of America along a meandering river like the Colorado River can raise a number of questions about appropriate ownership of "omitted lands" and islands within the river. In *Koch v. United States*, 847 F.3d 1015 (10th Cir. Colo. 1995), the 10th Circuit concluded that several islands within the Colorado River, which were unsurveyed at the time the patent issued, were owned by the successors to the original patentees. The 10th Circuit assumed that Colorado state law would follow the common law rule that all grants bounded upon a non-navigable river entitle the grantee to all islands lying between the main land and the center thread of the current. For a more detailed discussion of omitted lands issues, *see* George J. Morgenthaler, "Surveys of Riparian Real Property: Omitted Lands Make Rights Precarious," 30 *Rocky Mt. Min. L. Inst.* 19-1 (1984).

Non-navigable streams or rivers

A deed conveying land bordered by a non-navigable stream includes the bed to the center thread of the stream if the stream is described as a boundary or monument. *City of Denver v. Pearce,* 22 P. 774 (1889); *More v. Johnson*, 568 P.2d 437 (Colo. 1977). Where the words "along," "to" or "bounded by" a water course, or similar expressions are used to describe a grant, this rule is generally held to apply unless a contrary intention of the parties appears. *Smith v. Town of Fowler*, 333 P.2d 1034 (Colo. 1959). As a general rule, meander lines are not run as boundary lines of the lands surveyed. They are usually run to determine the outlines of the stream or other body of water and as a means of ascertaining the quantity of land embraced in the survey. This rule is subject, however, to many exceptions. In *Smith v. Town of Fowler*, the Colorado Supreme Court recognized two exceptions: first, where the parties to the instrument of conveyance intended to use the meander line and second, where public officers in making sales have actually or by necessary implication made the meander line the boundary line. *Smith v. Town of Fowler,* 333 P.2d at 1037.

The owner of lands bounded by a non-navigable stream is benefitted, or his holdings are impaired, by changes in the course of the stream occurring gradually over a period of time. *Smith v. Town of Fowler*, 333 P.2d at 1035. Where there is a sudden change in the course of the river or stream so as to constitute an avulsion, then there is no alteration in the boundary line, and it remains at the location of the river immediately prior to the change. *Thomson v. Clarks Incorporated*, 427 P.2d 314 (Colo. 1967); *Eaton v. Francis,* 484 P.2d 128 (Colo. App. 1971).

III. INTERPRETATION OF PROVISIONS OF THE OIL AND GAS LEASE

A. Habendum Clause – Generally

General nature of the oil and gas lease

There are no cases in Colorado determining whether the habendum clause of the modern lease creates a fee simple determinable or a fee simple subject to condition subsequent. In interpreting the meaning of "production" under the habendum clause, the Colorado Supreme Court has followed a more liberal interpretation. *Hoff v. Girdler Corp.*, 88 P.2d 100 (Colo. 1939). In the *Hoff* case the lessee established production of carbon dioxide in paying quantities, but the well was subsequently shut-in before the end of the primary term. The court's analysis focused on whether the lessees had intended to abandon the leasehold interest. Although it is an old decision, the court's rationale indicates a more lenient standard than those states following the Texas line of cases providing for automatic termination if there is not actual production in paying quantities at the end of the primary term.

Doctrine of indivisibility

The drilling of a producing well in a unit validates the outside acreage contained within the same lease. *Clovis v. Pacific Northwest Pipeline Corp.*, 345 P.2d 729 (Colo. 1959).

Requirement to file affidavit confirming production in paying quantities

To provide notice of the extension of the term of an oil and gas lease beyond the primary or definite term, a lessee must, prior to the expiration of six months after expiration of the primary or definite term of the lease, record in the county records where the lands covered by the lease are located an affidavit claiming an extension of the term of the lease beyond the primary term. There are no cases in Colorado addressing the effect of an affidavit recorded after the six month time frame. Colo. Rev. Stat. § 38-42-106 (2009).

Statutory requirement to release an oil and gas lease

Within 90 days after the date of forfeiture or expiration of an oil and gas lease, it is the duty of the lessee to execute a release of the oil and gas lease and file the same in the county records. Colo. Rev. Stat. § 38-42-104 (2009). If the owner of such lease neglects or refuses to execute a release then the owner of the leased premises may sue to obtain the release and may recover from the lessee $100 as damages and all costs together with reasonable attorneys' fees for preparing and prosecuting the suit, and the owner may recover any additional damages that evidence in the case warrants. Colo. Rev. Stat. § 38 42-105 (2009).

B. Production in "Paying Quantities"

General rule

As discussed in Section III.A. above, Colorado would follow a more lenient rule than Texas in determining whether a lease should be extended by virtue of production in paying quantities. *See Hoff v. Girdler*, 88 P.2d 100 (Colo. 1939). For a general discussion *see* Phillip D. Barber, "Oil and Gas Practice in Colorado" 1B *Colorado Methods of Practice* 12.3 (Cathy S. Krendl, ed. 2004).

Operating expenses

In determining the costs and expenses to be included in determining "production in paying quantities," Colorado has no published cases specifically discussing the habendum clause of an oil and gas lease. In the interpretation of a farmout agreement, however, the Colorado Supreme Court held that,

> [the] applicable standard for determining whether a well is commercial in circumstances like the present would appear to be whether it will return a profit over operating expenses and not whether it will return a profit after recovery of all drilling expenses. *Landauer v. Huey*, 352 P.2d 302 (Colo. 1960).

C. Shut-In Gas Clause

General rules

There are no cases in the state of Colorado determining whether the failure to pay shut-in royalties results in termination of the lease. Based upon Colorado's interpretation of the term "production," we assume that a determination of whether failure to pay shut-in royalties terminates the lease will be made based upon development of the leasehold and the terms of the shut-in gas royalty clause. There is no standard shut-in gas royalty clause in the oil and gas leases the author has encountered in the state of Colorado.

One should be aware that the Colorado Supreme Court has held that a duty to market gas arises during the primary term of the lease. *Davis v. Cramer*, 808 P.2d 358 (Colo. 1991). As a result, you should be certain to pay shut-in gas royalties during the primary term of the lease.

Amount of shut-in gas royalty

Like Texas, the amount of shut-in gas royalty has historically been $1 per net acre but that amount has been increasing. In addition, the author frequently encounters limitations on the length of time that a shut-in gas royalty clause can maintain the lease in effect.

D. Temporary Cessation of Production

General rule

Although there are no cases on point regarding the Temporary Cessation of Production, based on *Hoff v. Girdler*, 88 P.2d 100 (Colo. 1939), the author assumes the Colorado courts will follow the Texas and Oklahoma line of cases.

Lease provision

Most oil and gas lease forms contain various savings clauses including the cessation of production clause. Although these clauses provide certainty to the lessee, these clauses may also serve to limit the Temporary Cessation of Production which might otherwise be available to the lessee under the Supreme Court's decision in *Hoff v. Girdler*, 88 P.2d 100 (Colo. 1939).

E. Delay Rental Clause

General rule

Failure to pay delay rentals under the usual "unless" lease form, absent qualifying operations or production under other provisions of the lease, will result in lease termination. *O'Hara v. Coltrin*, 637 P.2d 398 (Colo. App. 1981).

Permitted excuses for faulty payment

Where delay rentals have been improperly paid, Colorado has prevented lease termination in certain circumstances such as acceptance of delay rental payments which result in an implied ratification of the lease and waiver of the forfeiture provision. *O'Hara v. Coltrin*, 637 P.2d 398 (Colo. App. 1981).

F. Definition of Operations

Obstruction doctrine or lockout rule

Although there are no cases in Colorado, we assume Colorado courts would follow the obstruction doctrine adopted in Texas. *See* Phillip D. Barber "Oil and Gas Practice in Colorado," 1B *Colorado Methods of Practice* 12.3 (Cathy S. Krendl, ed. 2004) (stating that, "If production is halted because of interference by the lessor with the lessee's operations, courts in equitable jurisdictions, such as Colorado, will not award lease termination,".).

G. Pooling

Reasons for pooling

Colo. Rev. Stat. § 34-60-116(6) (2009) addresses voluntary and involuntary pooling:

> When two or more separately owned tracts are embraced within a drilling unit, or when there are separately owned tracts in all or a part of the drilling unit, then persons owning such interests may pool their interests for the development and operation of the drilling unit. In the absence of voluntary pooling, the Commission, upon application of any interested person, may enter an order pooling all interests in the drilling unit for the development and operation thereof.

The term pooling is generally used to reflect the consolidation of two or more tracts within the same pool generally allowing the acreage to be included in an existing or assumed spacing unit for the objective formation. Where a portion of the oil and gas is owned by the United States of America, the term "communitization" is the functional equivalent of pooling, and the parties will be required to execute a communitization agreement in accordance with federal regulations.

Different types of units. A drill site unit or spacing unit generally follows the spacing pattern established by the Oil and Gas Conservation Commission.

Spacing refers to the establishment of parcels of land of approximately uniform size throughout a field, on each of which only a single well may be drilled, subject to an exception discussed below [in-fill drilling]. These parcels are called drilling units. In spacing a field, the Conservation Commission not only determines the size of the drilling unit but the location within the unit of the permitted well. For example, if a gas field is spaced on 640-acre units with a single well in each unit, the wells may be required to be in the approximate center of the northeast quarter of each section. Uniformity and the size of the drilling units within a spaced area and in the location of wells on these units is extremely important in preventing inequitable recovery of field reserves. Phillip D. Barber, "Oil and Gas Practice in Colorado," 1B *Colorado Methods of Practice* 14.6 (Cathy S. Krendl, ed. 2004).

There may be two areas that create some confusion. First, parties often refer to Colorado as having "40-acre statewide spacing." Colorado does not have any statewide spacing rules. Spacing orders apply to particular formations or fields in accordance with the Commission's order. This reference to statewide spacing is based upon the well location requirements of Rule 318 of the Rules of the Colorado Oil and Gas Conservation Commission. That rule provides that wells deeper than 2,500 feet shall be located not less than 600 feet from the lease line and shall be located not less than 1,200 feet from any other producible or drilling oil or gas well. This rule results in an approximate pattern of one well per 40 acres and, therefore, the general reference to 40-acre statewide spacing. However, the rule also provides that for wells drilled to less than 2,500 feet, the well should be located not less than 200 feet from any lease line.

A second area of confusion is distinguishing the concept of pooling versus unitization pursuant to a federal exploratory or secondary unit. The standard form pooling clause in an oil and gas lease frequently grants the lessor the authority to "pool or unitize" the lands covered by the lease with other leases and lands. Although there are no cases in Colorado, it is unlikely that the court would interpret this reference in the pooling clause to permit the lessee to include the lessor's interest in a federal exploratory unit which may cover thousands of acres. These large exploratory or secondary recovery units are intended to develop large areas overlying an entire pool or reservoir of oil and gas. The forming of the unit allows the entire pool or reservoir to be developed and produced in a manner which most efficiently utilizes the natural energy of the reservoir and allows maximum production to occur.

Voluntary, compulsory or both

Voluntary pooling. Voluntary pooling occurs by mutual agreement of the parties owning an interest in the oil and gas underlying the pooled lands. Most lease forms in the state of Colorado allow the lessee to pool the royalty interests of its lessor, but frequently the lessor will strike the pooling clause. There are no cases in Colorado determining whether the owner of an overriding royalty interest in an oil and gas lease which contains a pooling clause must execute the voluntary pooling agreement in order to have that interest bound by the terms of the agreement.

Compulsory units — Force pooling. Colo. Rev. Stat. § 34-60-116 (2009) provides for compulsory pooling. As a precondition to obtaining a force pooling order, the lands sought to be pooled must be spaced pursuant to an order of the Oil and Gas Conservation Commission establishing a drilling unit. This order is frequently referred to as a spacing order which specifies the number of acres to be included within each unit and the shape thereof from the common source of supply. In Colorado, it is not uncommon to obtain a force pooling order; however, due to the increased difficulty (time and expense) of obtaining spacing orders from the Commission, force pooling orders will not be as common on lands which are not already spaced.

In order to obtain a force pooling order, the party seeking the order must provide evidence that: (1) all unleased mineral owners have been tendered a reasonable offer to lease upon terms no less favorable than those currently prevailing in the area at the time of application: and (2) the unleased mineral owner has been furnished in writing that owner's share of the estimated drilling and completion costs of the well, the location and objective depth of the well and the estimated spud date for the well. After notice and hearing, the Commission may enter an order pooling all interests in the drilling unit for the development and operation thereof upon terms and conditions that are just and reasonable and afford the owner of each tract or interest in the drilling unit the opportunity to recover or receive without unnecessary expense his just and equitable share. The order shall provide for the reimbursement to the consenting owners who pay for the drilling and operation of the well of the non-consenting owner's share of the costs and risks of such drilling and operating out of the proceeds of production. The non-consenting owner's share of production is paid to the consenting owners until those owners recover 100 percent of the non-consenting owner's share of the cost of surface equipment beyond the wellhead connections plus 100 percent of the non-consenting owner's share of the cost of operation of the well commencing with first production and 200 percent of that portion of the costs and expense of staking, well site preparation, obtaining rights-of-way, rigging up, drilling, reworking, deepening or plugging back, testing and completing the well and that portion of the cost of equipment in the well including the wellhead connections. A non-consenting owner whose interest is not subject to a lease or other contract for development shall be deemed to have a landowner's proportionate royalty of 12.5 percent during the non-consent period. The operator is required to provide the non-consenting owner with a monthly statement of all costs incurred together with the quantity of oil and gas produced and the amount of proceeds realized from the sale of production during the preceding month.

Unleased mineral owner within the pooled unit

The unleased owner of an interest in the minerals underlying a drill site tract who has not been force pooled will probably be treated in the same manner as described under Texas law, but there are no cases in Colorado confirming this assumption. With respect to an unleased owner of a mineral interest in a non-drill site tract which is located within the spacing unit for the proposed well, that unleased mineral owner could bring an application for force pooling and "force pool his way into the well." It is also possible that the force pooling order would be effective from the date of first production, although there are no cases in Colorado determining this question.

Effect of pooling (or not pooling) non-participating royalty owner

Colorado does not have any cases determining whether a non-participating royalty owner must be joined in a voluntary pooling agreement in order to be bound by the terms of that agreement. Absent such a case, the better practice would be to include the non-participating royalty owner in any voluntary pooling agreement. With respect to a force pooling order, the rules of the Oil and Gas Conservation Commission require all owners of an interest in the minerals underlying the drill site unit to receive notice of the force pooling application except owners of overriding royalty interests. Oil and Gas Conservation Commission Rule 507(b)(2) (1998).

H. Calculation and Payment of Royalties

Meaning of a "market value" gas royalty clause

Colorado does not have a case on this point. For general discussion regarding oil and gas lease royalty clauses, *see* Phillip D. Barber, "Oil and Gas Practices in Colorado," 1B *Colorado Methods of Practice* 12.5 (Cathy S. Krendl, ed. 2004).

Items of expense deducted from royalty payment/post-production costs (PPCs)

Colorado follows the "first marketable product" approach illustrated by the cases below.

***Rogers v. Westerman Farm Co.*, 29 P.3d 887 (Colo. 2002).** In this case, the Colorado Supreme Court adopted the "first marketable product" rule for valuing production for royalty purposes, even where the lease provides for royalties to be paid "at the well" or "at the mouth of the well." The court concluded that the "at the well" language in the leases did not address the allocation of costs between the royalty owner and the lessee (although it did not explain what the purpose of that language is). Because the court interpreted the lease to be silent on the allocation of post-production costs (such as gathering, compression and dehydration), the court applied the implied covenant to market to reach the conclusion that it is the lessee's obligation to place gas in a marketable condition at no cost to the lessor. The court defined marketable condition in terms of both the physical condition of the gas and the location of the gas. According to the court, gas is marketable when it is both in a physical condition acceptable to the commercial market and in a location where the gas is saleable. The court noted that it may be that gas is in the first marketable condition when it is in a physical condition *and location* "to enter the pipeline," implying a *market* pipeline and not just a gathering line.

However, the court did not impose an obligation as a matter of law that the royalty be based on the value of the gas at the interstate pipeline connection without deduction to the lessor because it concluded that the question of whether gas is in a marketable condition is a factual question for the trial court. The decision certainly suggests, however, that gathering/transportation costs upstream of the market pipeline are not deductible. Lessees would be well advised to revise their oil and gas lease forms to specifically allow the deduction of costs incurred to condition gas or to move it from the wellhead. The decision also applies to overriding royalties, so any instruments creating overriding royalties must be similarly specific in order to allow the deduction of post-production costs.

***Garman v. Conoco*, 886 P.2d 652 (Colo. 1994).** This case arose on a certified question from the federal district court regarding the deductibility of post-production costs, such as processing, transportation and compression, when the assignment creating the overriding royalty is silent as to how post-production costs are to be borne. Therefore, the court did not review the language of any royalty clause. The court ruled that, because of the implied covenant to market in every oil and gas lease, any post-production costs incurred "to convert raw gas into a marketable product" are to be borne solely by the lessee. The court did not define what constitutes a marketable product, although it did cite dictionary definitions such as "sufficiently free from impurities that it will be taken by a purchaser." The court acknowledged that transportation of a marketable product is a deductible cost.

***Atlantic Richfield Co. v. Farm Credit Bank of Wichita*, 226 F.3d 1138 (10th Cir. 2000).** This case arose in the context of carbon dioxide production in Colorado; therefore, the federal court applied *Garman* and *Rogers* to reach its conclusions. The carbon dioxide was transported by the lessees from Colorado to West Texas for use in tertiary oil projects, so there was no arm's-length sale of the carbon dioxide. ARCO deducted its transportation costs including interest during construction ("IDC") and costs of capital ("COC"), and the royalty owners objected. The Court of Appeals held that the "at the mouth of the well" language in the leases "necessarily incorporates a transportation deduction, since the nearest market for CO_2 is 400 miles away in West Texas." The court further concluded that IDC and COC may be deducted where the lease is silent on the deductibility of transportation expenses:

> *Garman* and its progeny establish that lessees may deduct reasonable 'transportation costs,' absent a lease provision to the contrary. [Citation omitted.] Hence, under the *Garman-Rogers* rubric ARCO's IDC and COC are deductible if they: (1) qualify as transportation costs; and (2) are reasonable. The definition of 'transportation costs' is a question of law while the reasonableness of any given transportation expense is a question of fact. *Id.* at 1153.

The court concluded that IDC and COC do qualify as transportation costs.

Implied covenant to market

Implied covenants in oil and gas leases include the implied covenant to operate diligently and prudently. Embodied in the duty to operate diligently and prudently is the implied covenant to market which obliges the lessee to engage in marketing efforts which would be reasonably expected of all operators of ordinary prudence, having regard to interests of both lessor and lessee. *Garman v. Conoco, Inc.*, 886 P.2d 652 (Colo. 1994). In the context of post-production cost issues, *see* discussion above in the section regarding items of expense deducted from royalty payment.

The Colorado Supreme Court has held that a duty to market gas arises during the primary term of the lease. *Davis v. Cramer*, 808 P.2d 358 (Colo. 1991).

When royalties are due and penalties for late payment

By statute, payments of proceeds derived from the sale of oil, gas or associated products shall be paid by a payor to a payee commencing not later than six months after the end of the month in which production is first sold. Thereafter, such payments shall be made on a monthly basis not later than 60 days for oil and 90 days for gas and associated products following the end of the calendar month in which subsequent production is sold. Payments may be made annually if the aggregate sum due a payee for 12 consecutive months is $100 or less. Colo. Rev. Stat. § 34-60-118.5 (2009). "Payor" means the first purchaser of oil, gas or associated products from a well in Colorado unless the first purchaser has entered into an agreement under which the operator of a well has accepted responsibility for making payments to payees, in which case such operator shall be the payor. Colo. Rev. Stat. § 34-60-118.5 (2009).

"Payee" means any person or persons legally entitled to payment from proceeds derived from the sale of oil, gas or associated products from a well in Colorado but shall not include those interests owned by the state of Colorado. Colo. Rev. Stat. § 34-60-118.5 (2009). If the payor does not make payment within the time frames specified above and the delay in payment was not caused by any of the reasons specified in subsection (3), the payor shall pay such payee simple interest on the amount of the proceeds withheld, which interest shall be calculated from the date of each sale at a rate equal to two times the discount rate at the federal reserve bank of Kansas City as such rate existed on the first day of the calendar year or years in which proceeds were withheld. Colo. Rev. Stat. § 34-60-118.5 (2009). Reasons for delay specified in subsection (3) are: a failure or delay by the payee to confirm in writing the payee's fractional interest in the proceeds after a reasonable request in writing by the payor for such confirmation; a reasonable doubt by the payor as to the payee's identity, whereabouts or clear title to an interest in proceeds; or litigation that would affect the distribution of payments to a payee. As a prerequisite to seeking relief under this section for the failure of a payor to make timely payment, a payee shall give the payor written notice by certified mail of such failure, and the payor shall have 20 days after receipt of the required notice in which to pay the proceeds, plus any interest due thereon, or to respond in writing explaining the reason for nonpayment. Colo. Rev. Stat. § 34-60-118.5 (2009). In addition, payor's failure to provide payee with the information required by the statute will result in penalties as provided in Colo. Rev. Stat. § 34-60-121 (2009) (not more than $1,000 for each act of violation per day that such violation continues).

Are take-or-pay proceeds royalty bearing?

Royalty interests extend to any settlement or payment in which a producer receives consideration for compromising its pricing claim but only to the extent that the claim relates either to part or future production actually taken by the settling purchaser. *Westerman v. Rogers*, 1 P.3d 228 (Colo. App. 1999), *cert. denied* (adopting the Tenth Circuit Court of Appeals' analyses in *Harvey E. Yates Co. v. Powell*, 98 F.3d 1222 (10th Cir. 1996, applying New Mexico law); and *Watts v. Atlantic Richfield Co.*, 115 F.3d 785 (10th Cir. 1997, applying Oklahoma law)).

IV. OTHER TOPICS

A. Seismic Activity

Who has the right to conduct or authorize seismic tests?

Whoever has authority to execute a mineral lease on the land may grant a geophysical exploration permit; the mineral owner is the one who has the right to conduct geological and geophysical operations. *Grynberg v. Northglenn*, 739 P.2d 230 (Colo. 1987); *Mallon v. Bowen/Edwards Associates, Inc.*, 940 P.2d 1055 (Colo. App. 1996), *aff'd* 965 P.2d 105.

Does the lease grant the exclusive right to conduct seismic tests?

The rule in Colorado is likely to be that the lessee of an oil and gas lease has no implied exclusive right to conduct geophysical exploration. *See* Phillip D. Barber, "Oil and Gas Practice in Colorado," 1B *Colorado Methods of Practice* 13.4 (Cathy S. Krendl, ed. 2004) *citing Mustang Production Co. v. Texaco, Inc.*, 754 F.2d 892 (10th Cir. 1985); *Harrell v. F.H. Vahlsing, Inc.*, 248 S.W.2d 762 (Tex. Civ. App. 1952).

See also Mallon v. Bowen/Edwards Associates, Inc., 940 P.2d 1055 (Colo. App. 1996), *aff'd* 965 P.2d 105 (no geophysical trespass on lessee's right to explore for oil and gas where lessor incidentally acquired coalbed methane gas information by virtue of its retained right to explore for coal).

Liability for wrongfully condemning land

The landowner may recover the value of the loss of the speculative value of the lands directly explored. The landowner should have a right to recover compensation if leasing became impossible after the geophysical data was collected and if there was a *communication* of the information gathered by the person who conducted the operations in trespass. *See Grynberg v. Northglenn*, 739 P.2d 230 (Colo. 1987).

B. Surface Issues

General rule as to payment; Surface Damage Act

There is no common law or statutory duty in Colorado to pay damages to the surface owner related to drilling operations. Dominance of the mineral estate over the surface estate is recognized and the owner of the mineral estate may use so much of the surface as is reasonably necessary for its operations. *Notch Mountain Corp. v. Elliott*, 898 P.2d 550, 556 (Colo. 1995). Although there is no duty under the common law to pay surface damages, it is industry custom and standard in Colorado to pay the surface owner damages and enter into a surface damage agreement prior to entering the property for drilling operations. In addition, the Rules of the Colorado Oil and Gas Conservation Commission contain numerous requirements regarding surface access, reclamation and the notice required before commencing operations for the drilling of any well.

Lessee's right to use the surface, water, etc.

Colorado rules regarding a lessee's access to the surface under the terms of an oil and gas lease are similar to Texas. There are no Colorado cases specifically addressing the rights of an oil and gas lessee, but the severed mineral cases provide assurance that Colorado would follow the Texas rules. These rights are, of course, subject to the requirements of the Rules of the Colorado Oil and Gas Conservation Commission as discussed in Section IV.B.1. above.

Obstruction doctrine

Although the author is not aware of any published cases in Colorado, experience dictates that the courts will follow the Texas line of cases regarding the "Obstruction Doctrine."

Accommodation doctrine

The Colorado Supreme Court adopted the accommodation doctrine in *Gerrity Oil and Gas Corporation v. Magness*, 946 P.2d 913 (Colo. 1997), and that decision has now been codified under Colo. Rev. Stat. § 34-60-127 (2009).

C. Severance of Title from the State (Patents)

Prior to congressional ratification of the Constitution of the State of Colorado, Colorado's Enabling Act ("Act") was adopted. 18 Statutes at Large, Chap. 139, p. 474 (March 3, 1875). Pursuant to Section 7 of the Act, Colorado was granted Sections 16 and 36 in every township, or lands in lieu thereof where those sections were earlier disposed of, for the support of common schools. The State Board of Land Commissioners is charged with the administration of the approximately four million acres of state-owned land. Colo. Const. Art. IX, §§ 9 and 10.

In 1997, the Colorado Constitution was amended to allow the formation of a Stewardship Trust to be selected from the three million acres of surface lands held in trust by the Board of Land Commissioners. The Stewardship Trust will amount to 295,000-300,000 acres selected by a statewide nomination process valuable primarily to preserve long-term benefits and returns to the state and to be held and managed to maximize options for continued stewardship, public use or future disposition. In holding such lands in trust, the Board shall permit only those uses that will protect and enhance the beauty, natural values, open space and wildlife habitat of those lands except that any such restrictions on use need not necessarily preclude existing uses or management practices including but not limited to mineral resources, agricultural and grazing uses. *See* State Land Board Guidelines (August 17, 1999). Additional information can be found on the Board's Web site:

http://trustlands.state.co.us/. *See also* Section II.K. above pertaining to minerals owned by the state.

The Board of Land Commissioners may sell any state lands, as provided in Colo. Rev. Stat. § 36-1-124, in such parcels as they deem for the best interest of the state. However, it shall reserve to the state all rights to all minerals, ores and metals of any kind and character, and all coal, asphaltum oil, gas or other like substances in or under the land, and all geothermal resources and the right of ingress and egress. Colo. Rev. Stat. § 36 1 125 (2009). When the conditions of the sale as prescribed by statute have been complied with and the purchase money paid, the purchaser shall receive a patent for the land purchased. Colo. Rev. Stat. § 36-1-125 (2009).

The federal government owns substantial mineral interests in Colorado. In patents issued by the United States prior to 1909, the United States did not reserve minerals of any kind. In 1909, the United States was authorized by Congress to reserve coal, and effective July 17, 1914, the United States was authorized to reserve all oil, gas and other minerals. In many instances, the early county records reflect a patent from the United States which has been entered on a "recorder's form;" i.e., a boiler plate printed form on which the recorder enters the patentee's name and date of the patent. The reservation, if any, set forth in the recorder's form may not reflect the reservation which actually appears in the original patent. Therefore, we always recommend confirming any mineral reservations by examining a true copy of the patent maintained by the Bureau of Land Management. The Colorado State Office of the Bureau of Land Management, located at 2850 Youngfield St, Lakewood, CO 80215-7093, administers the federal lands located in Colorado.

D. Recording Acts

Nature of the oil and gas lease for recording purposes

The lessee's interest in an oil and gas lease is an interest in real estate. *Hagood v. Heckers*, 513 P.2d 208 (Colo. 1973).

Effect of not recording

An oil and gas lease, an assignment of a lease or any conveyance of a mineral interest that is not recorded in the county records where the minerals are located is not valid against:

a. any person with any kind of rights in or to such real property; and
b. who first records. Colo. Rev. Stat. § 38-35-109 (2009) ("Colorado Recording Act").

The Colorado Recording Act is a race-notice statute. Colo. Rev. Stat. § 38-35-109(1) (2009). An unrecorded instrument is valid against:

a. a party to the instrument; or
b. a party who has notice of the unrecorded conveyance prior to the acquisition of such rights. Colo. Rev. Stat. § 38-35-109 (2009).

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

Unrecorded agreements. Colorado also has a unique statutory provision related to recording which states that when an instrument in writing has been recorded and such instrument makes reference to some other instrument which is not recorded in the county records, such reference shall not be notice to any other person. Colo. Rev. Stat. § 38-35-108 (2009). No person other than the parties to the instrument shall be required to make inquiry or investigation concerning such recitation or reference. *Id.*

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

The statute also has its benefits. Frequently, during the course of negotiating title defects under a purchase and sale agreement, old agreements not of record become a sticking point in determining their effect on the marketability of title. The Colorado statute provides an effective argument that these unrecorded agreements do not affect the marketability of the title being conveyed.

Acknowledgment. An instrument of conveyance does not have to be properly acknowledged in order to be recorded in the county records. *See* Colo. Rev. Stat. § 38-35-106 (2009).

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

Doctrine of bona fide purchaser

Colorado cases describe a bona fide purchaser as one who takes property upon payment of value in good faith and lacking notice of any defect in the title. *Himes v. Schiro*, 711 P.2d 1281 (Colo. App. 1985). The reference to notice in the Colorado recording statute includes inquiry notice. *See Cottonwood Hill v. Ansay*, 782 P.2d 1207 (Colo. App. 1989).

Instruments that are void or voidable even if recorded

Colorado has little modern case law addressing these issues. We assume that a Colorado court, presented with the issues addressed under the discussions set forth for the state of Texas, would follow the rationale of the Texas decisions.

E. Important Conveyancing Rules

Duhig Rule (Overconveyance)

The Duhig Rule has been applied in the following cases: *Brown v. Kirk*, 257 P.2d 1045 (Colo. 1953); *Appling v. Federal Land Bank of*

Wichita, 816 P.2d 297 (Colo. App. 1991); *O'Brien v. Village Land Co.*, 794 P.2d 246 (Colo. 1990).

Reference to "interest conveyed" v. "land described"

While there are no cases addressing this particular issue in the state of Colorado, we assume that the courts will follow their standard rules of construction in interpreting the deed in giving effect to the intent of the parties as determined from the terms of the instrument.

Effect of a large non-participating royalty

This particular issue has given Colorado a great deal of difficulty. Two Colorado Supreme Court decisions in the 1950s seem to hold that, as a rule of property law and not as a rule of construction, a person who holds the right to the profits or a share of the profits that a mineral fee estate might yield, such person owns the mineral fee estate itself. *Simson v. Langholf*, 293 P.2d 302 (Colo. 1956); *Corlett v. Cox*, 373 P.2d 619 (Colo. 1958). For a general discussion, *see* Phillip D. Barber, "Oil and Gas Practice in Colorado," 1B *Colorado Methods of Practice* 10.2 (Cathy S. Krendl, ed. 2004). These cases have proven so troublesome that the mineral law section in Colorado lobbied for a legislative solution which altered the interpretation set forth in the case law. Effective July 1, 1991, Colo. Rev. Stat. § 38-30-107.5 provides as follows,

> Any conveyance, reservation or devise of royalty interest in minerals or geothermal resources, whether of a perpetual or limited duration, contained in any instrument executed on or after July 1, 1991, creates a real property interest which vests in the holder or holders of such interest the right to receive the designated royalty share of the specified minerals or geothermal resources or the proceeds therefrom in accordance with the terms of the instrument. Unless otherwise provided in the conveyance, reservation or devise, the holder of such interest shall not have the right to: (a) explore for or develop the minerals or geothermal resources; (b) grant a mineral development lease; or (c) receive any share of rentals, bonus payments, surface damage payments or similar sums that might be payable under the terms of any mineral development lease.

The Colorado Court of Appeals has undercut the harsh result in the *Simpson* and *Corlett* cases and holds that the reservation in that case created a non-participating royalty. *Keller Cattle Co. v. Allison*, 55 P.3d 257 (Colo. App. 2002). This case merely makes a passing reference to the prior Supreme Court decisions, but the result in the case indicates that the Court of Appeals does not recognize a rule of property law with respect to non-participating royalties.

Conveyance of mineral acres or royalty acres instead of an undivided interest

There are no cases in Colorado addressing a conflict between mineral acres conveyed versus the undivided interest stated in the instrument. It is not standard practice in Colorado to identify an interest by royalty or mineral acres.

Legal description

Sufficiency of description. If the description in the deed identifies or furnishes the means of identifying the property conveyed, then it is sufficient. *Harrison v. Evert*, 308 P.2d 216 (Colo. 1957).

Omnibus/Coverall/Global description. There is no case law in Colorado which specifically addresses the effectiveness of omnibus or coverall descriptions. A conveyance of all lands in the county may be sufficient to provide constructive notice because of Colorado's grantor/grantee system of recording; however, the author would not recommend that you rely on such a description.

F. Unique State Issues (Non-Conveyancing)

Statute allowing interest owners to perfect a security interest in proceeds from a well

Colorado does not have a statute similar to the Texas statute allowing interest owners to perfect a security interest in proceeds from a well. Colorado's oil and gas lien statute protects persons who perform labor upon or furnish machinery, material, fuel, explosives, power or supplies for sinking, repairing, altering or operating any gas well, oil well or other well or pipeline. Colo. Rev. Stat. §§ 38-24-101, *et seq.* (2009). However, proceeds of the sale of oil and gas are not "property" within the scope of the lien and, therefore, cannot be attached under a mechanic's lien on oil and gas wells. *Chambers v. Nation*, 497 P.2d 5 (Colo. 1972).

G. Burdens upon Title/Due Diligence

Mortgages/Deeds of trust

Mortgages and deeds of trust to private trustees may be used in Colorado but must be judicially foreclosed. Colorado also has a unique system of mortgage lien, whereby a deed of trust is granted to a "public trustee."

The overwhelming majority of Colorado real estate loans are secured by public trustee deeds of trust. Every Colorado county has a public trustee who is a county official. The public trustee is authorized to perform certain functions set by statute and only public trustees may exercise a power of sale in Colorado; but if desired, a public trustee deed of trust can be judicially foreclosed.

Public trustee deeds of trust have certain features favorable to lenders. Foreclosure through public trustee is usually more expeditious than judicial foreclosure as Colorado does not provide for an expedited procedure for judicial foreclosure of mortgages, which may be subject the lender to court docket delays. For the majority of loans, foreclosure through the public trustee is more economical than judicial foreclosure, as public trustee fees are set by statute. (The public trustee fee is $150; or if the indebtedness exceeds $400,000, the fee is equal to 1/32 of 1 percent of the original principal amount of the loan or the outstanding principal balance, whichever is less).

For some more complex transactions, mortgages and private trustee deeds of trust can be more desirable lien forms for a number of reasons. First, the public trustee's statutory powers deal with the foreclosure of real property only, and public trustees generally will not purport to sell personal property or to perform acts outside of their statutory authority so they do not take an active role in the administration of the deed of trust. Second, with certain limited exceptions, each County's public trustee is required to obtain and hold the "original evidence of debt" for foreclosure, and public trustee foreclosure is only available to the owner of an "evidence of debt." Difficulties can occur where properties in multiple counties secure a single note. Third, presentation of the original evidence of debt for release of deed of trust can also be an issue. Unless the lender fits within certain statutorily mandated categories, the original evidence of debt must be presented to obtain a release of the public trustee deed of trust or to foreclose the deed of trust. Many major entities currently making loans in Colorado, such as insurance companies, do not fit within the statutory categories of lenders permitted to proceed without providing the original evidence of debt. And if no "original evidence or debt" exists, judicial foreclosure of the public trustee deed of trust may be needed unless the lender is willing to provide the bond described below. If the lender does not fit within the statutory categories and does not have the original evidence of debt available for presentation to the public trustee in order to obtain a release of the deed of trust (which lender has a duty to obtain), it may be necessary to arrange for the pay-off of the loan through a cooperative title company in order to obtain title company indemnification of public trustee for the release, as a title company handling the loan pay off is an entity which can obtain a release without the original evidence of debt. Otherwise, a corporate surety bond equal to one-and-one-half times the face amount of the note may be required.

Judgment liens

A Transcript of the Judgment Record of a judgment obtained in any court of record in this state or any foreign judgment filed with the clerk of any court in this state may be certified by the clerk of such court and recorded in the county records. From the time of recording of such transcript of judgment, the judgment becomes a lien upon all of the real estate, not exempt from execution in the county where such transcript or judgment is recorded, owned by the judgment debtor or which such judgment debtor may afterwards acquire in such county until the lien expires. Colo. Rev. Stat. § 13-52-102(1) (2009). The judgment lien expires six years after entry of the judgment unless prior to the expiration of such six-year period the judgment is revived as provided by law, in which event the lien shall continue for six years from entry of the revived judgment. *Id.*

Duration of mortgage lien. Any lien upon property created by a mortgage or deed of trust shall cease to be a lien 15 years after the date on which final payment or performance of the obligations secured thereby is due as shown by such mortgage or deed of trust, recorded in the county records where the property is located. Colo. Rev. Stat. § 38-39-201 (2009). If the date upon which the final payment or performance is due cannot be determined from the information contained in the recorded mortgage or deed of trust, such date shall be considered the date of the recorded instrument or if the instrument is undated, then the date the instrument was first recorded. Colo. Rev. Stat. § 38-39-202(2) (2009). The lien of a recorded mortgage or deed of trust may be extended without the written agreement of the owner of the property encumbered by such lien by an instrument in writing, signed by the owner of the obligation secured by such lien. Such instrument shall describe the mortgage or deed of trust, state the date to which the lien has been extended and shall be recorded before the expiration of the 15-year period. The date to which the lien is extended by such instrument shall in no event be later than 15 years after the recording date of such instrument. Additional extensions may be recorded from time to time and shall not extend the lien of the original mortgage beyond a total of 30 years after the original maturity date of the mortgage or deed of trust without the written agreement of the owner of the property encumbered. Colo. Rev. Stat. § 38-39-202 (2009). No release or other instrument shall be necessary to discharge the lien of any recorded mortgage or deed of trust which has expired or ceased to be a lien as provided by Colo. Rev. Stat. §§ 38-39-201 and 38-39-202.

Involuntary mechanic's liens

Colorado has a specific statutory procedure for filing, securing and enforcing oil and gas liens. Colo. Rev. Stat. § 38-24-101 *et seq* (2009). There is an ongoing debate, not resolved by case law, about whether compliance with the oil and gas lien statute alone is sufficient or whether one must comply with a general mechanic's lien. A cautious approach may compel compliance of both the oil and gas lien statute and the general mechanic's lien statute.

The lien statement must be filed with the county clerk and recorder of the county in which the property is situated. Colo. Rev. Stat. § 38-24-101 (2009). The lien can be filed at any time after performance of the work or furnishing of materials and must be filed within six months of the final performance of the work or the last furnishing of materials. Colo. Rev. Stat. § 38-24-104 (2009). A suit to recover a lien filed pursuant to the oil and gas lien statute must be brought within six months after the date of filing the lien. Colo. Rev. Stat. § 38-24-105 (2009). The lien attaches upon the initial provision of services or furnishing of goods. Colo. Rev. Stat. § 38-24-103 (2009). The lien does not attach to the proceeds of oil and gas sales. *Chambers v. Nation*, 497 P.2d 5, 8 (Colo. 1972). For a general discussion, *see* Lynn P. Hendrix and Peter D. Robinson, "Mechanic's, Materialmen's, and Other Statutory Liens," *Special Institute on Dealing with Financial Distress in the Oil and Gas Industry*, (Rocky Mt. Min. L. Fdn. 2010).

Tax liens

The Colorado Constitution and Colorado Statutes subject all real and personal property not exempted by law to taxation. Colo. Const. Art. X, Sec. 3(1)(a). Colo. Rev. Stat. § 39-1-102(16) (2009). A lien for the general property taxes for the current year shall attach to all taxable property, real and personal, on the date of assessment. This lien shall have a priority over all other liens until such taxes, delinquent interest, advertising costs and fees shall have been paid in full. Colo. Rev. Stat. § 39-1-107 (2009).

Severed mineral interests are subject to separate assessment and taxation for Colorado property taxes. Colo. Rev. Stat. § 39-1-106 (2009). *Union Pacific R.R. Co. v. Hannah*, 214 P. 550 (1923); *Mitchell v. Espinosa*, 243 P.2d 412 (1952). Either the owner of the surface estate or mineral estate may file a schedule with the assessor listing the severed mineral interest. Colo. Rev. Stat. § 39-5-102(1) (2009). It is not unusual, however, for no schedule to be filed with respect to the severed mineral interest. A separate assessment of the mineral estate appears to be a condition to proper sale of the severed mineral estate for taxes. *See Mitchell v. Espinosa*.

Inheritance tax lien. The inheritance tax formally imposed by Colo. Rev. Stat. Title 39, Article 23, was a lien upon real property passed and transferred for a period of 15 years from the date of death. The inheritance tax was repealed for all decedents dying after December 31, 1979. As a result, all inheritance tax liens have now expired.

Lis pendens

After filing any pleading in an action in any court of record of this state or in any district court of the United States within this state wherein relief is claimed affecting the title to real property, any party to such action may record in the office of the county clerk and recorder in the county or counties in which the real property is situated a notice of lis pendens containing the name of the court where the action is pending, the names of the parties to such action at the time of such recording and a legal description of the real property. Colo. Rev. Stat. § 38-35-110 (2009). A notice of lis pendens that has not been extended expires and ceases to be notice to any person for any purpose six years after the date of its recording. Colo. Rev. Stat. § 38-35-110(4).

H. How to Use County Records

Records in the county

Out of the 63 Colorado counties, approximately 38 have oil and gas production. The elected county clerk is the ex-officio recorder of deeds and has custody and the obligation to preserve all documents received for recording or filing by the clerk and recorder. Colorado statutes obligate the clerk and recorder to maintain the following indices:

a. A grantor index and a grantee index of every document filed or recorded concerning or affecting real estate. Colo. Rev. Stat. § 30-10-408 (2009);
b. A reception book (or equivalent electronic or other process) listing chronologically each document accepted by the clerk and recorder for recording or filing. Colo. Rev. Stat. § 30-10-409 (2009);
c. A file of all subdivision plats presented for recording in accordance with law. The subdivision plats are indexed in the grantor index under the name of the person that signs and acknowledges the plat as owner and dedicator and in the grantee index under the name of the plat shown. In addition, the clerk and recorder must also keep an alphabetical index of such subdivision plats by the name of the plat. Colo. Rev. Stat. § 30-10-410 (2009) and
d. Index of trade name registration records provided by the Department of Revenue. Colo. Rev. Stat. § 30-10-420 (2009).

The clerk and recorders statewide charge $5 per page to record real property instruments and $10 for oversized plats. Colo. Rev. Stat. § 30-1-103 (2009). Documents containing multiple grants, notices, assignments or releases of leases, deeds of trust, mortgages or liens, or other instruments which require multiple entries in the grantor or grantee index shall incur an additional fee of $5 for each entry in excess of one per document. Pursuant to Colo. Rev. Stat. § 30-10-421 (2009), which is repealed effective July 1, 2005, the clerk is required to collect an additional surcharge of $1 for each document received for recording to defray the costs of providing electronic filing capabilities, if applicable, and to fund the electronic filing technology fund created pursuant to Colo. Rev. Stat. § 30-10-422.

All documents submitted for recording in the clerk and recorder's office shall contain a top margin of at least one inch and a left, right and bottom margin of at least one-half inch. Colo. Rev. Stat. § 30-10-406(3)(a) (2009). A new section added to the Colorado Statutes in 2002 provides that the county clerk and recorder may accept by electronic filing deeds and all other documents authorized by law to be recorded. Colo. Rev. Stat. § 30-10-405.5 (2009). However, no electronic filings shall be accepted by the clerk and recorder until he or she has established and made publically available the procedures for electronic filings. The clerk is not required to accept electronic filings. Colo. Rev. Stat. § 30-10-409 (2009).

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

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

Some Colorado counties also maintain a Torrens Title Registration System. We have rarely encountered situations where a title has been placed in the Torrens system. The system mainly occurs in eastern Colorado counties such as Kiowa, Morgan or Washington Counties.

Records outside the county

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

If you determine that the minerals underlying the lands under examination are owned by the United States of America, then it will be necessary to examine the records of the Colorado State Office, Bureau of Land Management, located at 2850 Youngfield St, Lakewood, CO 80215-7093; (303) 239-3600.

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

State title standards. The Title Standards Committee of the Colorado Bar Association's Real Estate Section annually reviews and revises as necessary the Colorado Real Estate Title Standards. The most current title standards were revised and effective January 1, 2003. The title standards are published by Attorneys' Title Guaranty Fund, Inc., 999 18th St, Ste 1101, Denver, CO 80202, (303) 292-3055 or (800) 525-6558; copies are available at a cost of $10 per copy.

Other records topics

For an excellent resource on Colorado Real Property Law (with significant attention given to oil and gas issues), see George E. Reeves, Colorado Property Law (2007).