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**TITLE CURATIVE FOR THE
FIELD LANDMAN**

*A Guide to Conducting Title Curative
- Primarily in the State of Texas*

Presented by

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BIOGRAPHICAL INFORMATION

Curt Horne began his career as an independent landman in Oklahoma in 1981, and has experience in Texas, Oklahoma, Arkansas and Montana. His firm, Curtis D. Horne & Associates, LLC, has offices in Houston and Fort Worth, providing clients throughout Texas with a full range of field land services. He is a member of the American Association of Professional Landmen, the Houston Association of Professional Landmen, the Ark-La-Tex Association of Professional Landmen and the Montana Association of Professional Landmen.

Mr. Horne is an instructor for the AAPL Certified Professional Landman Exam Review and the AAPL Basic Land Seminar, covering topics which include Real Property Law, Contract Law, The Oil & Gas Lease, Title Opinions and Curative, Conveyancing, Interest Calculations and Ethics. He currently serves as Chairman of the AAPL Field Landman Committee, as Assistant Chairman of the AAPL Certification Committee and as a member of the AAPL Legislative/Regulatory Committee. Curt was the recipient of the 2002 Field/Independent Landman Award from the AAPL.

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I. SCOPE OF ARTICLE

This paper deals with areas relatively common in the procurement of curative items requested in title opinions with respect to oil and gas leases covering onshore lands in the State of Texas. In the author's twenty-plus years of reading title opinions and conducting title curative, the same basic requirements are repeatedly made by examining attorneys. There are, of course, as many unique requirements as there are unique circumstances in chains of title. However, the field landman will be able to establish at least a starting place in fulfilling his title curative responsibilities by heeding the outline of this article. The reader is cautioned to use his own judgment and the advice of legal counsel in performing any title opinion curative and in drafting the necessary documents.

II. WHAT IS TITLE OPINION CURATIVE?

Title opinion curative is the body of measures requested by an examining attorney to remedy or "cure" defects in the record chain of title, to correct erroneous or ambiguous instruments, and to reconcile the record title with the actual occupancy and possession of the land in question. To err is human and those drafting conveyances which become a part of the public record are certainly human. Each of us has written something which we thought was clear when we penned it, only to find upon reading it later that even we are not certain what we intended. This is true of the drafters of deeds and the like and the parties to such deeds. Often, the original parties are long-since dead or departed so determining the intentions of the original parties is not strictly possible.

The descendants of individuals who die as residents of locales other than the county where a tract of land is located may be remiss about filing the wills or affidavits necessary to evidence their succession to the decedent's interest. If these unidentified successors convey the property, a gap in the chain of title results.

As in most jurisdictions, Texas recognizes that there is an imperfection in the record chain of title to most every privately owned parcel of land. Statutes have been enacted to enable the owners of a parcel to perfect their ownership through such measures as limitation title, adverse possession and the like. These same statutes provide a means for a party actually using or living on a piece of land to obtain ownership even though at odds with the record ownership. Liens and unpaid taxes, too, can create a problem for a successive owner (including an oil & gas lessee). All of these generally described shortcomings, as well as a myriad of others, give rise to title opinion curative.

It is important that the landman procuring title curative not create new title questions. For instance, in obtaining an affidavit of heirship, if one of the decedent's children has

died intestate, it will be necessary to explain the deceased child's heirship and marital history as well. Leaving a question such as this unexplored will no doubt give rise to an additional curative requirement.

III. THE TITLE OPINION

A formal report, rendered by an attorney following an examination of the chain of title, this document sets forth the attorney's opinion of the ownership of the tract of land in question subject to the satisfaction (or curing) of certain requirements. The original (or drilling) title opinion will generally analyze the affected leases and set forth the ownership of the minerals, surface, leasehold, royalties, and overriding royalties. The attorney may prepare the original title opinion after reviewing an abstract of title. Alternatively, he may generate a "stand up" title opinion by examining the instruments in the chain of title as indicated in a run sheet prepared by an abstractor or landman or may fully conduct his own title research by searching the indices of the public records and reviewing the pertinent instruments.

The supplemental title opinion will be rendered to change the ownership expressed in the original title opinion and/or respond to curative materials submitted to satisfy the requirements enumerated in the original title opinion. It is almost always written to account for changes occasioned by documents which the attorney did not examine in connection with the original title opinion. Often, the supplemental opinion will advise as to which of the original title curative requirements have been, in the attorney's view, satisfied.

The division order title opinion is rendered after it appears production will be established and usually expresses the division of royalties on a unit basis (if a pooled unit has been or will be established).

IV. LEASE AMENDMENTS

A. Designation or Change of Depository

Sometimes when an oil and gas lease is acquired, the depository bank for payment of delay rental and shut-in royalty is inadvertently omitted from the lease. To remedy this oversight, an amendment or designation of depository may be in order. Sometimes, too, the lessor's bank will change during the term of the lease. In this instance, having the lessor execute a recordable instrument designating the new depository is in order.

B. Amendment of Description

In the event that a lease contains an incorrect or incomplete legal description, the landman will obtain a recordable instrument containing the correct description, as prescribed by the examining attorney.

C. Extension of Primary Term

If the primary term of one or more leases will expire prior to the commencement of operations, it will be necessary to obtain a recordable instrument extending the primary term of said lease(s) and confirming the original lease.

D. Amendment of Lease

Often a lease will contain a drafting error, or may not contain proper provisions, such as a pooling clause, for the proposed operations. This necessitates that the Lessor execute a recordable instrument to either correct the error or to include the requisite language as prescribed by the examining attorney.

V. AFFIDAVITS

Affidavits are statements of facts known to the affiant about a particular subject. They are sworn and subscribed before a Notary Public who must affix a jurat, following the signature of the affiant. The usual jurat reads as follows:

SUBSCRIBED AND SWORN TO BEFORE ME, THIS _____ DAY OF
_____, 2006.

Notary Public in and for the State of Texas

Most affidavits also contain a notarial acknowledgment. An affidavit without the acknowledgement is probably sufficient and recordable but the absence of the jurat is fatal.

A. Affidavit of Identity

Often, a person's name appears several different ways in instruments in the chain of title. Women who receive property may marry or re-marry. The recipients of sex-change operations may elect to change their names to celebrate the conversion. The title examiner can generally find reasonably sufficient indications to allow him to assume that a person appearing with different names in the chain of title is one and the same but this assumption often needs to be

verified via an affidavit of identity obtained from an affiant familiar with the person.

B. Affidavit of Heirship and Marital History

It is common for the owner of an interest in real property to die without leaving a will. In such an instance, the laws of descent and distribution will dictate which heirs succeed to the interest of the intestate decedent. To help establish this information, the title examiner will often call for an affidavit of heirship and marital history.

In order to be effective, a Texas Affidavit of Heirship must contain the following:

1. Name of decedent, residence at time of death, and date and place of death.
2. Name, address and relationship of each of decedent's heirs.
3. Decedent's marital history, names and address of all spouses and children, and date of death and heirs of any predeceased spouse or child.
4. A statement as to whether the decedent died testate or intestate and, if testate, the disposition of decedent's will.
5. At least a general description of the real and personal property belonging to the estate of decedent.
6. An explanation for the omission of any of the above information.
7. A statement that all debts of the decedent are paid or the manner in which all debts will be paid.

C. Affidavit of Use and Possession

Sometimes the parties actually using and possessing a tract are not the same as the record owners according to the chain of title. Texas statutes allow an adverse claimant to become the owner of land provided he meets certain criteria. The longest period for perfecting title in this manner is 25 years. Thus the title examiner may call for one or more affidavits from disinterested persons familiar with the use and possession of a tract for at least the preceding 25 years (or for at least the 25 year period immediately preceding the severance of the minerals from the surface).

D. Affidavit of Non-Production

It will often be found that a tract of land has been subject to oil and gas leases and/or term royalty burdens which, although appearing to have expired, have not been released of record. The age of the burden, time constraints or other reasons may dictate that curative be performed to determine, as conclusively as possible, that the absence of production has allowed the term conveyances or leases to lapse. The results of this determination are often expressed by an affidavit obtained from a disinterested but knowledgeable party, and are often incorporated in the affidavit of use and possession. The landman performing the curative in this instance is cautioned to personally undertake a thorough examination of the drilling and production activity affecting the land under examination plus any lands with which the land under examination has ever been leased or pooled!

E. Affidavit of Production

Sometimes the lands under examination are subject to an existing oil and gas lease which is beyond its primary term or the lease may have been acquired from a term mineral owner. The title opinion may require that an investigation be performed to verify that production and/or operations have been continuous so as to have maintained the lease or perpetuated the term mineral interest.

F. Corroborating Affidavit

When obtaining affidavits, it is often suggested that more than one be obtained. Rather than generating completely separate affidavits on the same subject, it is sometimes helpful to simply have another knowledgeable individual execute a corroborating affidavit confirming and supporting the primary affidavit of use and possession.

VI. NONPARTICIPATING ROYALTY INTERESTS

A. Nature of Interest

The nonparticipating royalty interest is generally one which neither requires the owner to join in the execution of an oil and gas lease nor allows the owner to receive any portion of the bonus or delay rentals. In other words, the power to execute leases is owned by the executive mineral owner. However, the right to grant an oil and gas lease which binds the nonparticipating royalty interest does not automatically include the right to grant pooling on behalf of the nonparticipating royalty interest (absent some express language granting the power to pool in the instrument creating the nonparticipating royalty interest). So, in order to be able to pool the nonparticipating royalty interest with interests in other lands, the owner of the nonparticipating royalty interest must expressly grant pooling consent. If the owner of a nonparticipating royalty interest under the drillsite tract in a pooled unit fails to consent to pooling, the nonparticipating royalty interest owner will be paid his royalty share on a lease basis - undiluted to

the pooled unit.

This may not be a significant problem to the lessee if the royalty reserved to the lessor in the affected lease is sufficient (after being diluted to the pooled unit) to cover all of the nonparticipating royalty interest. Where the nonparticipating royalty interest exceeds the lessor's royalty, it is commonly thought that the lessee must bear the excess out of its net revenue interest. ?

The modern lease forms of a few knowledgeable landowners obligate the lessee to obtain pooling consent from the nonparticipating royalty interest owners. Otherwise, such leases require the lessee to bear all of the nonparticipating royalty interest even though, absent such a provision, the lessor's royalty would bear the nonparticipating royalty interest.

B. Ratification and/or Consent to Pool

The ratification is the most common approach to curing the pooling dilemma created by the nonparticipating royalty interest. The nonparticipating royalty interest owner ratifying the lease is, in effect, simply adopting the pooling provision contained in the lease. Too, if there is any question whatsoever that the owner's interest might be an executory (rather than a non-executory) interest, a ratification containing words of grant will help ensure that the interest is leased and will clarify that no delay rentals are owed the party executing the ratification.

Often, the lease covers separate tracts but less than all of the separate tracts are burdened by the nonparticipating royalty interest. The landman obtaining ratifications will want to consult closely with the examining attorney about limiting the ratification to cover only the tract or tracts burdened by the nonparticipating royalty interest so as not to unreasonably affect the lessor's royalty share of production from the unburdened tracts.

Some owners are reluctant to ratify a lease. Instead, such owners may prefer to execute an instrument granting the owner of the lease the right to pool the nonparticipating royalty interest. In such an instance, the pooling allowed by the nonparticipating royalty owner may not coincide with the pooling provided in the lease (*i.e.*, gas unit sizes permitted in the consent to pool may be smaller than those permitted by the lease).

VII. UNRELEASED LEASES

A. Release of Oil and Gas Lease

The title examiner will often discover leases in the chain of title that, although past their primary terms, have not been released of record. The surest way to confirm that such a lease has lapsed is to obtain a release from the last record owner(s) of the lease.

B. Affidavit of Non-Production

Sometimes the number of unreleased leases, the quantum of working interest owners involved or the age of the unreleased lease makes it prohibitive to obtain releases. In some such instances, affidavits may be obtained to help confirm that the prior leases expired. This information is often incorporated in the affidavit of use and possession but the practitioner is cautioned that the affiant likely will be limited in his knowledge of (a) what lands were covered by a prior lease, (b) whether any of the lands covered by the prior lease were pooled with other lands, (c) what wells may have been drilled on the other leased lands or lands pooled therewith, and (d) the status of any such wells.

The landman must identify all lands covered by the unreleased leases and ascertain conclusively that there are no producing, shut-in, workover or recently drilled wells situated on any of the lands covered by the prior leases and/or lands pooled with any of the lands covered by the prior leases. Remember, few older leases contain Pugh clauses or developed acreage-type provisions.

VIII. UNRELEASED LIENS

A. Release

A deed of trust, tax lien or mechanics/materialmans lien which predates the oil and gas lease is superior to the oil and gas lease. Thus, foreclosure by the lien holder could extinguish the oil and gas lease. It is not uncommon to find that the debt has been satisfied but that no release has been filed of record. The examining attorney, in these cases, will usually call for a release of the lien to be obtained and filed of record.

B. Subordination

If a lien has not been released because the debt has not been satisfied (and the statutory period for the lien holder to enforce same has not tolled), the examining attorney will generally request that a subordination be obtained from the lien holder. In essence, the subordination allows the parties to treat the oil and gas lease as if it existed prior to the lien. The establishment of production by drilling will enhance the value of the lien holder's collateral so the lien holder should be willing to execute the subordination.

IX. AD VALOREM TAXES

All counties and independent school district assess property taxes. In some localities, there are also other taxing authorities such as water districts, hospital districts, road improvement districts and the like. Failure to pay ad valorem taxes subjects the property to a lien and, perhaps, foreclosure just as with liens discussed above. To ensure that taxes are paid, the title attorney may call for the procurement of tax certificates from all taxing authorities.

X. OTHER CURATIVE

A. Tenants

Tenants create problems for the title examiner and, more than occasionally, the operator. Often the surface or agricultural lease is not recorded and the practitioner should be careful to investigate any party actually using or in possession of the land to be sure that such party's use or possession is not adverse to the record owner.

B. Quitclaim Deeds

An individual may own an interest in real property of which he or she may not even be aware. To be certain that this individual is fully divested of all interest, and does not later assert a claim to the land, a quitclaim deed may be secured from the individual in favor of the appropriate owner.

C. Stipulations of Interest

The owners of interests in land may all be known but may have so confused the record ownership of their respective interests as to render the ownership undeterminable by the title examiner. In these cases, it is sometimes appropriate to cure the defective conveyances/reservations by obtaining a stipulation of interest and cross-conveyance by and between the affected parties.

D. Certified or Exemplified Copies

Instruments which will resolve defects or gaps in the chain of title being examined sometimes appear of record only in another county. Wills, for instance, are generally probated in the county in which the decedent resided. As such, no record of the proceedings may appear in the county where the property is located. The practitioner may be asked to locate these foreign proceedings and to obtain copies which have been certified (or exemplified) by the clerk where filed. Such copies, so certified or exemplified, will be recordable in the county where the property is located - thus curing the defect or bridging the gap.

