

Oil & Gas Title Opinions: A Brief Synopsis

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There are five commonly encountered Oil and Gas Title Opinions with varying scope and purpose; specifically, Original Title Opinions, Division Order Title Opinions, Supplemental Title Opinions, Lending Title Opinions, and finally Acquisition Title Opinions. This article will provide brief definitions for each of the five types of Opinions, discuss content and format, and lastly, discuss common title issues and commonly employed Requirements set forth by Oil and Gas Title Attorneys and practitioners.

Common Types of Title Opinions

The Original Title Opinion (“OTO”) is the most common type of Title Opinion encountered Oil and Gas Title Attorneys and Landmen. The OTO provides a client with an attorney’s professional opinion regarding the advisability of commencing drilling operations on a particular tract of land. Based on title research, usually conducted in a Courthouse, covering a particular piece of property, an attorney will spot potential issues and will draft recommendations to the client regarding legal implications arising, or that may arise, from entering and drilling on that particular tract of land. This is based on various title standards, case law, relevant statutes, and of course, the experience of the Title Attorney. The Title Attorney formulates an opinion as to whether or not a particular defect results in a serious impediment to the transaction at issue, and if it will require correction. There are title standards that help guide practitioners on common issues that arise, which represent the “collective judgment” of title examination professionals and are used to direct a practitioner’s examination. This is not to be confused with title standards to be applied to examinations conducted for title insurance.

Another type of title opinion is the Division Order Title Opinion (“DOTO”). A DOTO sets forth the ownership of production from an existing well, and serves as the basis for preparing division orders. A DOTO must tabulate and identify the ownership of royalties as well as defects to title that have not been resolved by previously published Title Opinions. It is not limited to just the Lessors’ royalty, but also includes nonparticipating royalty owners, overriding royalty owners, working interest owners, and net profit interest owners. Because many DOTO’s rely on previously published Opinions, the examining attorney should closely consider whether or not the issues spotted in previously rendered Title Opinions have been cured or have subsequently become immaterial. Common issues typically encountered while drafting a DOTO include, but are definitely not limited to, ambiguous royalty language, existing unsubordinated liens burdening the leasehold estate and the ramifications of unrecorded farm-out agreements.

A third type of Title Opinion is the Supplemental Title Opinion (“STO”). Typically, a STO discusses the status of Requirements published in previous Title Opinions covering the same tract of land. It is similar to the Original Title Opinion, yet only covers the time period from the previously published Opinion to the present state of the property in question. Supplemental Title Opinions are a response to curative that has been performed and curative that still needs to be performed.

A fourth type of Opinion is the Lending Title Opinion. A LTO is drafted on behalf of a lending institution concerning a piece of property for which the institution will provide a loan. The LTO is intended to appraise a lending institution of its position as a secured creditor over a particular tract of land. Because a LTO does not typically concern other interest holders and is limited to a lien priority discussion, the examining attorney will usually opine whether or not the security instrument is a first or prior lien. When drafting a Lending Title Opinion, the examining attorney should be mindful of ethical considerations. The LTO is usually designed for a limited purpose and normally is not provided to the borrower. Therefore, if the LTO is provided to a borrower, its purpose and scope should be thoroughly laid out and adequately limited.

The fifth, and last, type of Title Opinion discussed is known as the Acquisition Title Opinion. An acquisition title opinion has a limited and specific purpose. Typically, an Acquisition Title Opinion is prepared in order to confirm what the buyer is purchasing and that the seller's title has transferred. It is normally prepared in connection with the client's due diligence program. The examining attorney should alert the client to any encumbrances that would affect the acquisition of the working interest in the tract. However, because of their limited use, acquisition title opinions should be used with caution and as a supplement to original title opinions, which is preferred.

Contents of Title Opinions

A Title Opinion should always contain the essential information necessary to advise the client on the current status of title and the steps that need to be taken to make title to the land marketable. Generally, a Title Opinion contains the following content: a description of the land, the materials examined, a division of interest, a discussion of the subject lease(s), a discussion of the Assignments, and Comments and Requirements.

Description — A title opinion should contain a description of the land under examination, including a reference to the underlying Subject Lease or Leases. The description should identify the property with a metes and bounds description, if such is available, along with a plat. This description will usually appear in the caption or first paragraph of the opinion.

Materials Examined — The materials examined section includes a list of all title evidence used to prepare the opinion. This includes documents such as abstracts, affidavits, transcripts, leases, assignments, and more. The materials examined should set forth the time period that is being covered by the opinion.

Division of Interest — This part of the opinion sets forth, in decimal format, each individual ownership interest. It is divided into surface, mineral, royalty, and leasehold interests. The sum of all these interests must always equal 1.00000000 (to the eighth decimal place).

Discussion of the Subject Lease(s) — The examining attorney should include a discussion of the pertinent provisions of the Subject Lease(s) and any amendments or ratifications made to the Subject Lease(s) in an exhibit attached at the end of the opinion. The pertinent provisions include, but are not limited to, the names of the Lessor(s) and Lessee(s), the date the lease was executed, recording information, acreage covered, primary term, existence of delay rentals and payment instructions, royalties and shut-in royalties, pooling language, governmental authority, and any special provisions in need of review that the leases may contain.

Discussion of the Assignments — The examining attorney should include a discussion of the relevant assignment information including the Assignor(s) and Assignee(s), date of execution and any recording information, the interest being assigned, and any interest being reserved and retained by the Assignor in executing this Assignment.

Comments and Requirements — The comments and requirements section is a detailed legal analysis that sets forth requirements necessary to make the title marketable. There are different kinds of comments that will be listed in the title opinion. Advisory comments concern matters that do not directly affect the marketability of title, but may, or in the future, limit the free use and enjoyment of the property. Even though no curative action may be required, the examining attorney should still point out recorded easements, restrictions, covenants, mineral conveyances, and leases. The Opinion will also contain exceptions that are matters specifically excluded from the opinion. It is the responsibility of the attorney to look over each document and point out which matters are made without any warranty. Typically, a comment and requirement section will include unreleased oil and gas leases, liens, rights-of-way, and taxes:

Unreleased oil, gas, and mineral leases — There may be unreleased oil and gas leases which constitute a cloud on the title, or require additional research as to perpetuation.

Liens and Rights-of-Way — The examining attorney should note the existence of any easements or rights-of-way that could affect operations on the property.

Taxes — Unpaid taxes constitute an encumbrance on the property, and the examining attorney should indicate the status of the payment of ad valorem taxes.

Treatment of Title Issues

There are a variety of tools that can be used to cure defects in title. Prominent tools that attorneys rely on include corrective acknowledgments, corrective deeds, ratifications, stipulations of interests, affidavits, and releases. Corrective acknowledgments are used for faulty acknowledgments. It is an additional instrument that should be prepared as a duplicate of the original and executed and acknowledged in accordance with the correct procedures. For older faulty acknowledgments, the party may file suit in the district court seeking a judgment that proves the validity of the instruments or corrects the certificate as long as the instrument was signed and proved or acknowledged as required by law.

A corrective deed may be utilized when there is some patent imperfection in a deed, such as errors occurring in the property description, mistaken recordation references, misnomers of a party, and more. Correction deeds may also be used to explain the grantor's right or authority to convey. Correction deeds are also used to convert equitable title to legal title. It may also only correct mutual errors, like spelling errors or total acreage covered. They may not make a material change in the scope or substance of the original transaction. A correction deed must comply with all the requirements of a valid deed.

A Ratification is the process of recognizing the application or validity of a defective instrument that is otherwise valid to revive or conform the transaction, and applies the validity of the document to the present situation. Ratifications may be used when a document appears invalid or has questionable status (such as a remainderman ratifying the lease of the life tenant). It may also be used to revive a lapsed mineral lease, so long as it contains appropriate language. A ratification may occur by conduct or by the execution of a instrument. It may be accomplished indirectly by a party signing a document for a particular purpose other than ratification, which recognizes the validity of the transaction in question. Ratification may also occur when a party accepts some benefit, such as royalty, from the transaction. Otherwise, an express and written ratification can be executed. The written statement that ratifies a prior instrument should be supported by consideration in order to evidence a contract between the parties. This written statement must be explicit. When the statement is by a non-participating royalty interest owner and is intended to ratify a mineral lease, the particular provision of the lease being ratified should be specified.

A stipulation of interest is a contract that consists of mutual conveyances, and therefore, it must conform to the requirements of both a contract and conveyance. Consequently, title to the property interest will be owned as set out in the stipulation, that is if it contains adequate granting language. A stipulation of interest is used when conflicts and confusion result from poorly worded descriptions of the fractional interests conveyed or retained in a mineral estate. It is appropriate to use a stipulation of interest when there are multiple claimants to various interests in a piece of property, or may be used for counterpart execution and provide that the stipulation is only binding on those who sign it.

Affidavits contain averments or testimony of the affiant covering issues associated with a particular parcel of land. The affiant must administer an oath to tell the truth in front of an authorized officer, who must also sign a jurat certifying that the averment was made by the affiant under oath. Affidavits should be transmitted to the county clerk where the subject property is located for recording. Another common type of affidavit is an affidavit of heirship. This requires the affiant to state all facts necessary to establish inheritance of a decedent's real estate as well as proportional interest. Also, there are affidavits of invalidity of oil and gas lease that require the affiant to state facts pertaining to production, or lack thereof.

Releases, while not requiring any prescribed form, must be supported by consideration and signed by all parties holding or claiming to hold the right being released.

While there are varying types of Title Opinions, along with the contents contained therein, many of the basics may be tailored to meet the needs of the client. Communication between the party requesting the Title Opinion and the Title Attorney drafting said Opinion is a necessity. Such communication will allow the Title Attorney to prepare the most valuable workproduct and alleviate unnecessary content, all the while reducing the overall cost.

ABOUT THE AUTHORS —■■■

M. Ryan Kirby and Gerald Walrath are founding partners of Kirby, Mathews & Walrath; a firm that was founded on the idea that oil and gas operators are best served by individuals that understand the needs of the industry, as well as fulfilling those needs in an efficient, cost-effective and timely manner, all the while establishing a relationship and a dialogue with the client. Prior to the formation of the firm, both worked closely together as attorneys, Section Managers and Partners for a large Houston-based oil and gas firm. In addition to his legal practice, M. Ryan Kirby is also a frequent speaker at seminars for various Landmen's organizations; he also serves as an Adjunct Professor at South Texas College of Law, where he teaches the Texas Oil, Gas and Land Titles course.