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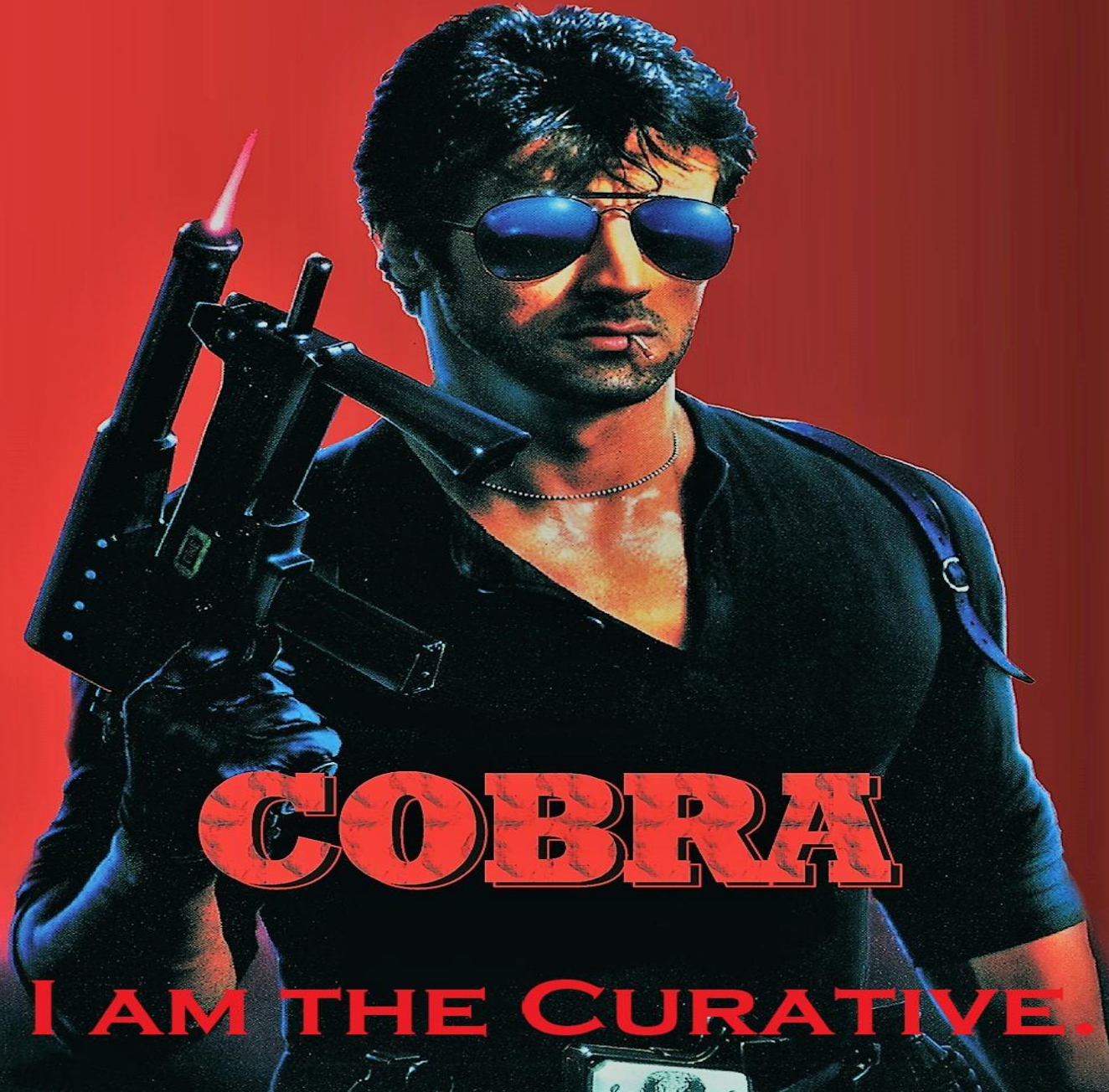
KEEP
CALM
&
CURE
ON

Overview

Drafting curative is a mainstay of being a landman.

This presentation will focus on practical guidance to ensure that the curative you draft accomplishes your goals.

Defects are the Disease.



COBRA

I AM THE CURATIVE.

Overview: Topics of Discussion

- Affidavits – In General
- Affidavits of Heirship
- Affidavits of Non-Production
- Affidavits of Use & Possession
- Probate
- Ratifications
- Stipulations
- Certifications of Trust
- Correction Deeds
- Recording & Notice

Affidavits – In General

What is an Affidavit?

A statement *in writing* of a *fact* or facts *signed* by the party making it, *sworn* to before an officer authorized to administer oaths, and officially certified to by the officer under his seal of office.

Tex. Gov't Code § 312.011(1)

Affidavits – In General

Fact or Facts

The Affiant (party executing the affidavit) should have *personal* knowledge of all *facts* recited in the Affidavit.

- Avoid phrases such as “to the best of my belief.”
- Avoid statements of law such as “only heirs.”

Affidavits – In General

Affiant

The Affiant is *not* required to be a disinterested party.

- Best practice to obtain affidavit from at least two disinterested parties, including corroborating affidavits from heirs.
 - Not always possible – business risk.
 - “*I forgot about my seven siblings.*”

Affidavits – In General

Signed

The Affidavit should include the Affiant's *signature* and a corresponding certificate of *acknowledgement*.

Acknowledgment Requirements:

- Identity of Affiant (including capacity)
 - Date & Location Acknowledged
 - Identity (and seal) of Officer

Tex. Civ. Prac. & Rem. Code §121.001-8

Affidavits – In General

Sworn

The Affidavit should include a *Jurat* executed by the Affiant.

- A jurat is a certificate by a competent officer (notary public) that the writing was *sworn* to by the person who signed it.

Drafting Tip

- Best practice to include both a certificate of acknowledgment and a jurat.

Affidavits – In General

Jurat Exception

Mansions v. Montgomery County 365 S.W.3d 314 (Tex. 2012)

- Issue: Whether an instrument purporting to be an Affidavit, which included a certificate of acknowledgment, but which did not include an executed jurat, was in fact an Affidavit.
- Holding: The laws of Texas require that an affidavit be sworn to, [but] it does *not* require a jurat or clause stating that the writing was sworn to before the officer. However, if an affidavit lacks a jurat, *other evidence* must show that it was sworn to before an authorized officer.

See also Asset Liq. Grp. v. Wadsworth, 2016 Tex. App. LEXIS 8878 (Tex. App. – Houston 2016).

Affidavit of Heirship

What is it? What is required?

An affidavit “or other instrument legally executed and acknowledged or sworn” that contains a statement of facts concerning *the family history, genealogy, marital status, or the identity of the heirs* of a decedent.

Requirements:

- Qualifies as an Affidavit (*see* previous slides).
- Filed for 5 years in the county where the land is located or deceased was domiciled.

Affidavit of Heirship

What does it accomplish?

- The statements contained in the affidavit are *prima facie* evidence of the identity of the deceased's heirs and will be admitted as evidence in a judicial determination of heirship.

Limitations:

- Statements in affidavit may still be rebutted by “anyone interested in a proceeding in which the affidavit or instrument is offered in evidence.”
 - Does not affect the rights of an omitted heir or creditor.

Tex. Estates Code § 203.001

Affidavit of Heirship

Proceeding to Declare Heirship

A Judicial Determination of Heirship includes a final judgment.

- Determines the identity and respective shares of a decedent's heirs.
- Useful if identity of heirs is questionable and additional certainty is required.
- Affidavits recorded for five or more years admissible as *prima facie* evidence.

Tex. Estates Code § 202.001 *et seq.*

Affidavit of Heirship

Texas' Law Controls

In a proceeding to declare heirship, the laws of *Texas* regarding intestate succession control, regardless of the decedent's state of residence at the time of death.

Singleton v. St. Louis Union Trust Co., 191 S.W.2d 143 (Tex. App.—Waco 1945, writ ref'd n.r.e.)

- “a court may determine through a proceeding to declare heirship: 1) the persons who are a decedent's heirs and only heirs; and 2) the heirs' respective shares and interests under the laws of this state in the decedent's estate.”

Tex. Estates Code § 202.001

Affidavit of Non-Production

What is it? What is required?

An affidavit that contains a statement of facts concerning the development and production history of a described tract of land for a specified period.

Requirements:

- Qualifies as an Affidavit (*see* previous slides).
- Facts sufficient to show that an interest that depends upon production (i.e., an oil and gas lease) has expired by its own terms.

Affidavit of Non-Production

What facts?

- Legally sufficient property description
- Whether lands ever pooled with other lands
- Whether any leases within primary term
- Quantity and location of wells drilled
 - Whether any wells still producing
 - Date of last production

Affidavit of Non-Production

What does it accomplish?

Serves as a “curative device of necessity” when an actual release of the lease is not feasible.

Caution:

- No Texas statute authorizing use of affidavits of non-production.
 - The affidavit itself does *not* terminate the lease.
 - See Texas Title Standard 13.30.

Recommendations:

- Always obtain a release when possible.
- Confirm statements in affidavit with the records of the Texas Railroad Commission.

Affidavit of Use & Possession

What is it? What is required?

An affidavit that contains a statement of facts concerning the specific types of use and the person(s) in possession of a described tract of land for a specified period.

Requirements:

- Qualifies as an Affidavit (*see* previous slides).
- Facts sufficient to show the use and possession of the property.

Affidavit of Use & Possession

What facts?

- *Source* and *duration* of affiant's knowledge
- *Specific* facts regarding the property, such as:
 - Location of improvements and fences (when built and present state)
 - Uses of the land (cultivation, grazing, etc.)
 - Identity of person(s) owning or *claiming* ownership
 - Land plat illustrating such information

Affidavit of Use & Possession

How many years back? Why?

No Mineral Severances

- At least 25 years preceding the present date.
- The longest required period of adverse possession in Texas is 25 years.

Mineral Severances

- If possible, at least one (1) day prior to the first mineral severance.
- Following a *complete* mineral severance, adverse possession of the surface does not count as adverse possession of the minerals.

Affidavit of Use & Possession

What does it accomplish?

Provides historical evidence of the property in question that would be admissible as evidence in a Trespass to Try Title lawsuit.

Caution:

- No Texas statute authorizing use of affidavits of use and possession.
 - The affidavit itself does *not* establish title to the property.
 - See Texas Title Standard 13.20.

Recommendations:

- Always obtain an Affidavit of Use & Possession when possible.
- Include as many specific details regarding the land as possible.

Affidavit of Use & Possession

Patents Dated After 1895

Lands patented by the State of Texas *after* September 1, 1895, may not include all interest in the mineral estate.

Recommendation:

- Obtain a mineral classification letter from the Texas General Land Office that contains a statement indicating whether any mineral interest was reserved to the State of Texas in the patent of the land.
 - Can be obtained by emailing the GLO's legal department.

Probate

What is “certified” probate?

In order to be *certified*, the Will and Order must:

- be attested by and include the signature of the court clerk or other official who has custody of the will or who oversees probate records.

Tex. Local Gov’t Code § 191.001 *et seq.*

- A certified copy of probate, which was originally probated in the State of Texas, may be filed of record in any County in the State of Texas.

Probate

What is “exemplified” probate?

In order to be *exemplified*, the Will and Order must:

- be certified by the court clerk or official (“certified”)
- include a certificate with the signature of the judge or presiding magistrate of the court stating that the attestation is in proper form; and
- have the court seal affixed, if a court seal exists.

Tex. Estates Code § 501.002(c) and 503.001

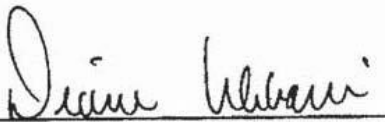
- An exemplified copy of probate may be filed of record in any County in the State of Texas, whether originally probated in Texas or another State.

Probate

Example of Exemplification

I further certify that the Cause Number is PB-02-00017 on the docket of said County.

IN WITNESS WHEREOF, I have hereunto set my hand and Seal of said Court this
30th day of May, 2006


CLERK OF THE DISTRICT COURT

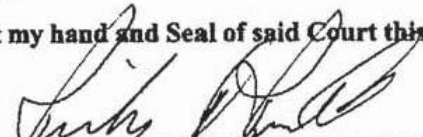


United States of America
State of New Mexico
County of Quay

)
)ss.
)

I, Ricky D. Purcell, Judge of the Tenth Judicial District, Division I, State of New Mexico, do hereby certify that Diane Ulibarri by whom the foregoing Certificate was made, was at the date thereof, Clerk of said Court, duly qualified and that the said Certificate is in due form of law and made by the proper officer.

IN WITNESS WHEREOF, I have unto set my hand and Seal of said Court this
30th day of May, 2006.


DISTRICT JUDGE



Probate

Out-of-State Probate Orders

Foreign Courts have no authority to dispose of Texas property.

A foreign court “lacks jurisdiction to issue rulings affecting...real property in Texas” and has “no jurisdiction to...construe [a] will as it [relates] to...real property located in Texas. Only [a] Texas probate court - the ancillary court - can do that.”

Haga v. Thomas, 409 S.W.3d 731, 737 (Tex. App. 2013, pet denied)

- Dispute over Texas property devised by Will decided by a Texas Court.

Tex. Estates Code § 503.003 and 504.002

- Ok to rely on exemplified foreign probate filed in County; *not* ok to rely on a foreign order purporting to interpret a Will's provisions regarding ownership of property located in Texas.

Probate

Family Settlement Agreements

Elements of a Family Settlement Agreement:

- Executed by the devisees/beneficiaries of a Last Will and Testament
 - Contains an express agreement not to probate the Will
 - Contains an express division of the property between the parties
 - Includes an attached copy of the Last Will and Testament
- Family Settlement Agreements are valid and binding upon the parties thereto.

Tex. Estates Code § 122.201

In re Estate of Halbert, 172 S.W.3d 194 (Tex. App. – 2005, pet. denied)

Executor's Deed

Why is it needed?

Probate of an estate filed in Texas remains open until closed.

Tex. Estates Code § 405.004 – 405.0015

Hypothetical Example:

- Abe's Will devises his mineral interests to Bill and Betty, and appoints Carl as Independent Executor, including the express power of sale over real property.
- 40 years following the probate of Abe's Will, David is appointed as Successor Independent Executor, and executes an Executor's Deed to Emily, conveying Abe's mineral interest.
- Although Bill and Betty were credited with Abe's mineral interest for 40 years, the execution of the Executor's Deed has divested them of their interest.

Executor's Deed

No Express Power of Sale in Will

Indep. Executor may still convey estate property *without* an express power of sale if necessary or advisable to satisfy expenses and claims against the estate.

Tex. Estates Code § 356.251

- Purchaser protected against claims of devisees if statutory affidavit obtained from Indep. Executor and filed of record in County Records.

Tex. Estates Code § 402.053

Lease Ratification

What is it?

An agreement ratifying and confirming a lease executed by a concurrent owner other than the original lessor or conduct by such person which by implication ratifies and confirms the lease.

Williams & Meyers, Oil and Gas Law § 505.2

- Applicable to documents other than oil and gas leases
- Limitation: Revivor (include present lease language and reference terms of revived lease)
- Limitation: Void Leases (ratification of a void instrument does not validate void instrument)

Lease Ratification

Why is it needed?

Pooling = Cross-Conveyance

- In Texas, pooling is considered a cross-conveyance of the mineral interests of each party within the pooled lands.
- If the executive right owner was given the power to pool a non-executive's interest without the non-executive's consent, the executive right owner would be conveying the non-executive's interest without their consent.
 - *Brown v. Smith*, 174 S.W.2d 43 (Tex. 1943).

Lease Ratification

What is the problem?

Lease ratification by a non-executive owner entitles the non-executive to a proportionate share of royalty on *all* the lands covered by the lease, even if the oil and gas is produced from a well on another tract other than on the specific tract in which they own a nonparticipating royalty interest.

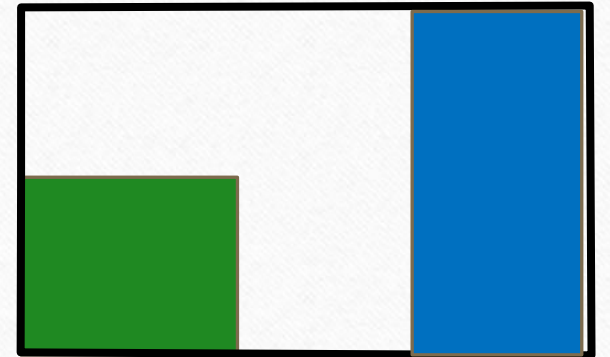
Checklist for possible lease communitization:

- The lease covers separate tracts
- The lease includes a pooling provision
- At least one tract includes a non-executive owner

Lease Ratification

Hypothetical Example

- Abe: owns 100% MI in WA (300 acres) and GA (100 acres).
- Betty: owns 1/8th floating NPRI in GA (100 acres).
- Carlos: owns 100% MI in BA (200 acres).
- Abe and Carlos each execute a lease with Supreme Oil Company covering their respective acreage, being a cumulative 600 acres (GA + WA + BA).
 - Each lease includes a 25% lease royalty and a pooling clause.
- Betty (GA) ratifies Abe's lease (GA & WA).



Lease Ratification

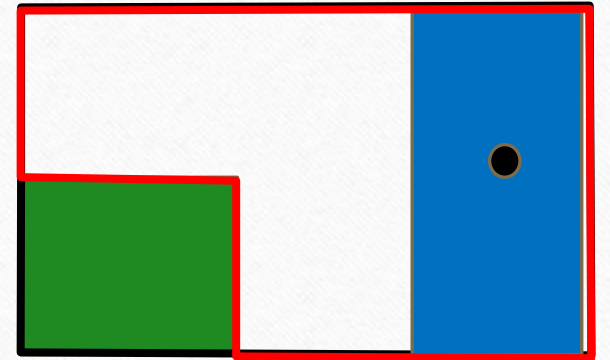
Hypothetical Example

- Supreme Oil forms Unit consisting of WA and BA.
- A vertical well is drilled on BA.
- Betty's entitlement to production the well:

1/8 of 100/400 of 300/500 of 25%

[NPRI] [Lease Tract Reduction] [Unit Tract Reduction] [Lease Royalty]

- Ratification of Abe's lease communitized Betty's NPRI throughout GA and WA.
- Because WA is pooled with BA, Betty is entitled to production from BA.



Lease Ratification

What is the alternative?

Consent to Pooling Agreement

- Eliminates Communitization issue.
- Should include Non-Appportionment Clause.
 - Royalties paid only to owner of producing tract; neighbors get nothing.
- Can be customized to limit scope:
 - Pooling can be limited to acreage within pooled unit, acreage assigned to well, etc.
 - Not required to consent to all acreage covered by executive owner's lease.

Lease Ratification

Ratification vs. Consent to Pool

Ratifications

- Only allows the non-executive to adopt terms already negotiated.
- Non-executive not included in the negotiation – unilateral effort by Lessor.

Consent to Pool Agreements

- Agreement directly negotiated by non-executive interest owner.
- Texas Courts more likely to uphold the agreement since the non-executive is an original party to the agreement.

Stipulation of Interest

“Stipulate” vs. “Grant”

Stipulation Language

NOW THEREFORE, for and in consideration of the premises, and other valuable considerations, the receipt and sufficiency of which are hereby acknowledged, each of the undersigned does hereby acknowledge, stipulate, and agree that the surface interest and the mineral interest, hereinafter referred to as "Subject Interest," owned by each in, under, and to the Subject Lands is as follows...

Stipulation of Interest

“Stipulate” vs. “Grant”

Granting Language

To effectuate the purposes of this Stipulation of Interest, each of the parties hereto does hereby grant, bargain, sell, convey, quitclaim and deliver unto each of the other respective parties any interest in the Subject Interest (as herein stipulated) necessary to vest in each of said respective parties the interest set opposite their name above, together with all rights incident thereto, to have and to hold the same to each of said parties and their respective successors, heirs and assigns forever.

Stipulation of Interest

“Stipulate” vs. “Grant”

A stipulation that does *not* include present words of grant and cross-conveyance is probably *not* a conveyance.

- The Texas Supreme Court recently reviewed a “Boundary Stipulation” executed by adjacent landowners, which stated that the parties desired to “declare, stipulate, acknowledge, and establish of record” the boundary of their respective tracts.
- Although the Court held that the boundary stipulation was a valid agreement between the landowners, it quietly stated in a footnote that it was not determining whether “the boundary stipulation was effective as a conveyance.”
- *Concho Res. Inc. v. Ellison*, 2021 Tex. Lexis 301 (Tex. 2021).

Stipulation of Interest

“Stipulate” vs. “Grant”

Stipulation Language

- Essentially a contractual agreement between the parties executing the document.
 - May or may not bind successors-in-interest; invites legal challenges.
 - *See, e.g.,* Tex. Property Code § 5.002

Granting Language

- Actually conveys (or cross-conveys) the interests being stipulated to in the document.
 - A conveyance binds successors-in-interest.

Trust Agreements & Trustees

Trustee Authority

Texas Property Code provides Trustees with broad authority; however, the terms of the Trust Agreement control and may limit statutory authority.

- Tex. Property Code § 111.0035(b).
- Exception: Trustee of “Blind” Trust (Tex. Prop. Code § 101.001)
 - Trustee of “Blind” Trust may convey as though they owned property individually.
- Limitation: Prior to June 1, 2017, no delegation of Trustee’s authority.
 - However, Trustee could delegate authority if Trust Agreement expressly authorizes.
 - Tex. Property Code § 113.018.

Trust Agreements & Trustees

Certification of Trust

A statutory Certification of Trust alleviates the need to carefully investigate the authority of the Trustee executing a conveyance or lease.

- A person or entity who acts in reliance on a Certification of Trust without knowledge that the representations contained therein are incorrect is not liable to any person for the action and may assume, without inquiry, the existence of the facts contained in the Certification.
 - Tex. Property Code § 114.086

Trust Agreements & Trustees

Certification of Trust

The Certification of Trust must contain the following information:

- A statement that the trust exists (including date executed) and has not been revoked, modified or amended in any manner that would cause the representations contained in the certification to be incorrect;
 - Identity and mailing address of the settlor and acting trustee(s), and the manner in which title to trust property should be taken;
 - Power(s) of trustee(s) or statement that powers include all statutory powers, and whether all or some subset of trustees are required to exercise powers; and
 - Whether revocable and the identity of person with revocation power.

Correction Deeds

Generally

Deeds containing an ambiguity or error may be corrected.

Tex. Property Code § 5.027

- A correction instrument that complies with Section 5.028 or 5.029 may correct an ambiguity or error in a recorded original instrument of conveyance to transfer real property or an interest in real property, including an ambiguity or error that relates to the description of or extent of the interest conveyed.
- Correction deeds are subject to rights of a BFP and creditors.
 - Tex. Property Code § 5.027(c) and § 13.001

Correction Deeds

What is “Non-Material”?

Non-Material corrections include:

- Inaccurate/incorrect element in a legal description (descriptive calls, lot/section/block, etc.)
 - The name of a party (first/middle/last name; an “aka” designation; LLC/Inc./Ltd.)
 - The marital status of a party
 - Execution date of the conveyance
 - Recording data for an instrument referenced in the correction instrument
 - A fact relating to the acknowledgment or authentication

Tex. Property Code § 5.028

Correction Deeds

What is “Material”?

Material corrections include:

- Adding a buyer’s disclaimer of an interest in the real property that is the subject of the original instrument of conveyance
 - Adding a mortgagee’s consent or subordination to a recorded document
 - Adding or removing land to a conveyance that correctly conveys other land
- Amending a lot or unit number or letter of property owned by the grantor that was inaccurately identified as another lot or unit number or letter of property owned by the grantor in the recorded original instrument of conveyance

Tex. Property Code § 5.029

Correction Deeds

“Material” vs. “Non-Material”

Who can execute correction deeds?

Non-Material:

- “A person who has personal knowledge of facts relevant to the correction.”
- Mail copy of corrected deed to each non-executing original party to the deed.

Material:

- “Parties to the original transaction or the parties’ heirs, successors, or assigns, as applicable.”
 - **Caution!** Original parties can execute correction even after their interest is sold.
 - *Broadway Nat’l Bank v. Yates Energy Corp.*, 2021 Tex. Lexis 396 (Tex. 2021).

Recording & Notice

Federal Leasehold

Federal leasehold instruments are required to be filed with BLM.

- Filing with the BLM does not provide constructive notice.
- Filing instruments in County records establishes constructive notice.

Curative Tip:

To establish unquestionable constructive notice, some Operators prefer to file a counterpart to the Federal document in the County records, utilizing a non-Federal form containing present grant/assignment language.

Recording & Notice

State Leasehold

Leases covering Relinquishment Act lands
must be filed with State.

- Filing lease in County records establishes constructive notice, but the lease does not become effective until filed with and approved by GLO.
- “No mineral lease executed by the owner of the land or minerals under this subchapter is effective until a certified copy of the lease is filed in the land office.”

Tex. Nat. Res. Code § 52.183

Disclaimer

Information included herein is subject to change without notice.

The information included in this presentation does not constitute legal advice and should not substitute as a replacement for obtaining a title opinion or other legal advice from an attorney licensed in the state of Texas.

Seriously, this presentation hasn't made anyone an expert.

Biography

Mr. Potts is a graduate of Texas A&M University and St. Mary's University School of Law. While in law school, he served as a staff writer for the St. Mary's Law Journal and clerked at The Supreme Court of Texas for Justice Scott Brister.

Mr. Potts is a Partner with Kirby, Mathews & Walrath. He is licensed to practice law in Texas and New Mexico, and is certified by the Texas Board of Legal Specialization in Oil, Gas and Mineral Law.

Since becoming a licensed attorney, Mr. Potts has devoted his practice exclusively to energy law, conducting title examination in various plays throughout Texas and in the Permian region of New Mexico.

Questions or Comments?

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