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# THE ABCs OF THE MINERAL TITLE OPINIONS

Michael Daily

# The ABCs Of Mineral Title Opinions

C. Michael Daily<sup>1</sup>

## I. The Purpose of the Title Opinion

A title opinion is a legal document and an important written communication between an attorney and his client. One of the foremost reasons for rendering a title opinion is to provide the client with a report of the present state of title in a given area. The information presented in a title opinion will initially aid the client in determining whether to pursue a certain drilling prospect. A thorough examination will reveal whether an owner has marketable title and will suggest curative measures to owners with title defects. Additionally, the title opinion will expose litigation risk to the client.

Although the information contained in a title opinion is highly technical, it must be stressed that the opinion will serve as a communication device between the attorney and several members of the client's organization. For example, the client's brokers will use the information in the title opinion to identify any unleased parties and to create a list of interested parties for an integration application. After integration, the company land manager may use the opinion to calculate the quantum of interest under lease to the client, its competitors, as well as calculating which interests remain unleased. Upon the completion of a successful well, the client's division order department will use the opinion to prepare pay decks. The legal department may review the opinion to weigh the potential business risk associated with waiving a certain title requirement. In addition to the client, all partners under the unit Joint Operating Agreement are entitled to review the title opinion.

## II. Characteristics of a Title Examiner

A title examiner must be well versed in various areas of the law. Title examination not only requires knowledge of specialized oil and gas legal concepts, but also requires an examiner to have an understanding of how other subjects, such as wills, trusts, intestacy and estates, family law, domestic relations, and contract law, can affect the marketability of title. Furthermore, it helps to have knowledge of the oil and gas industry and understand your client's drilling schedule.

The attitude of the title examiner has been defined as follows:

The purpose of title examination, objections and requirements is to secure the examiner's client a title which is marketable as shown by the record, subject to no encumbrances other than those

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expressly provided for by the client's contract with the examiner. Objections and requirements should be made only when irregularities or defects in title can be reasonably expected to expose the purchaser or lender to the hazard of adverse claims or litigation.<sup>2</sup>

In essence, the examiner should be objective and should counsel and advise the client about any marketability issues that could expose the client to an adverse claim or a lawsuit. It is fair to err on the side of caution, in this regard. It is ultimately the client's decision to take a suggested action or waive a title requirement.

### **III. Types of Mineral Title Opinions**

There are several different types of title opinions that an attorney could render, such as the drilling title opinion, drill site tract title opinion, supplemental title opinion, acquisition title opinion and division order title opinion. The particular form of opinion that is rendered will ultimately depend on the specific needs of the client.

#### **A. Preliminary Title Opinions and Drilling Title Opinion**

Preliminary title opinions are rendered prior to a client taking leases from owners. The objective is to determine the leased and unleased interests in a given prospect. In general, a preliminary opinion may be prepared before the client has determined whether they will drill in the unit.

A drilling title opinion is more comprehensive, and is prepared before integration proceedings and before the well is drilled. This opinion will set forth the surface, mineral and leasehold ownership for the owners of the individual tracts within the drilling unit, list encumbrances, discuss marketability problems and suggest curative. At this point, the client has determined that it will take sufficient steps to attempt to secure leases from unleased parties, and integrate the non-consenting parties in a proceeding before the Arkansas Oil and Gas Commission.

#### **B. Drill Site Tract Title Opinion**

Occasionally, a client will request that a drill site tract title opinion be rendered. Drill site tract title opinions, as the title suggests, are limited to the drill site tract and these opinions set forth the surface, mineral and leasehold ownership, list encumbrances, discuss marketability problems and suggest curative only for the particular drill site.

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<sup>2</sup> See Standard 1.2 of the Standards for Examination of Real Estate Titles in Arkansas, Published by the Arkansas Bar Association (2010); citing Lewis M. Simes & Clarence B. Taylor, Model Title Standards Report (University of Michigan Law School) (1960).

C. Supplemental Title Opinion

A supplemental title opinion is rendered by an examiner who will update a prior preliminary or drilling title opinion with the use of a supplemental abstract (or other supplemental materials provided by the client). Often, the examiner will not have the original abstract or title documents that were used for rendering the original opinion. Therefore, to ensure a comprehensive examination, the supplemental abstract should include all materials recorded from the date of the last instrument examined in the prior opinion.

D. Acquisition Title Opinion

A client who is acquiring oil and gas interests from a third party may request an acquisition title opinion. Acquisition title opinions are limited to a particular entity's fee or leasehold interests in one section or may cover multiple sections. In many cases, acquisition title opinions are similar to supplemental title opinions in that the examiner is updating a prior title opinion with the use of subsequently recorded instruments.

E. Division Order Title Opinion

The division order title opinion is similar to the drilling title opinion, but will contain a full recapitulation of the ownership interest on an attached spreadsheet. This opinion is prepared once a well has been drilled and is producing in paying quantities. An attorney is usually working from a prior opinion, a supplemental abstract, as well as additional unrecorded curative that has been obtained by a company's landman. Among other things, the client will use the information in the division order title opinion to prepare a pay deck.

**IV. Presentation of the Title Opinion**

Most title opinions include (A) a caption, description of the property that is covered and a description of the materials examined; (B) an individual tract ownership summary; (C) schedules of leases, mortgages and other encumbrances; and (D) a section on comments, exceptions and curative requirements. Each section is briefly discussed in turn below.

A. Caption, Lands Covered and Materials Examined

Title opinions are presented in the form of a letter, on the law firm's letterhead, and addressed to the client's land manager, or the company representative who ordered the title opinion. The land area that is covered by a title opinion is ultimately determined by the client, but will typically cover the proposed drilling unit, which is often a 640 acre governmental section.

The title opinion will contain a description of the materials that were reviewed. The title opinion is only as good as the materials that were reviewed by the examiner. The more comprehensive and accurate the materials are, the better the final product will be. In Arkansas, where courthouse records are kept, not on a tract index, but in grantor/grantee books, the use of certified abstracts, prepared by a disinterested third party, while more expensive, is the most reliable option.

#### B. Individual Tract Ownership Summary

Each individual tract within the unit is presented separately in the title opinion. Often, an examiner is presented with a field landman's or lease broker's ownership report which has previously broken the section into numerous tracts. The title examiner should attempt to remain consistent with the client or its broker and follow the same tract numbers if at all possible. If there is no mineral ownership report or prior opinion to work from, the examiner should create as many separate tracts as there are combinations of surface, mineral and leasehold ownership.

Unless there are reasons to omit it, surface ownership is included in the individual tract ownership summary, followed by the mineral ownership and leasehold ownership. Surface ownership can be omitted in a leasehold acquisition title opinion. Surface ownership can also be omitted for some tracts in a preliminary or a drilling title opinion if the client consents. Such a situation could occur if the unit includes an area with several developed surface tracts, but severed mineral ownership. In this case, the client should be certain that it has no desire to conduct any surface operations on the omitted lands.

Mineral ownership is separately listed, and the ownership interest is broken down into fractional or decimal shares. In the event the mineral estate has been further subdivided, i.e., separate parties own executive rights and non-participating royalty interests, then the examiner should initially list the owner of the executive right with a corresponding footnote that lists the non-participating royalty interests.

Finally, each tract ownership summary includes the leasehold ownership information. This section shows which parties have been leased, and to whom. For each lease, the appropriate net revenue interest and working interest ownership is shown. Unleased parties and strangers to title who have executed leases are also indicated. If a lease has been burdened by one or more overriding royalty interests, these leases contain a footnote that corresponds to the burdening interest.

#### C. Schedules of Leases, Mortgages and Other Encumbrances

A more comprehensive examination of each lease is contained in a separate lease analysis that follows the tract ownership summary. A typical lease analysis includes the recording information for each lease, the parties to the lease, the royalty, the fractional interest and the tracts leased, whether there is a delay rental or shut-in royalty provision, whether the lease

contains a pooling clause, and the lessor's depository bank information. The lease analysis is also the place to note any unusual lease provisions. An unusual provision could include an automatic renewal provision, an assignment of royalty to a third-party, or a separate surface restoration agreement. If a current lease presents a marketability problem, the examiner can direct the client to review a comment and requirement. The schedule should include all assignments of the original lease, assignments of overriding royalty interests, ratifications, and lease extensions.

The opinion should contain a separate schedule of leases that are shown to be past the primary term. The schedule should set forth the name of the lessor, the lessee, the relevant recording information and include a list of any lands outside of the examined area that are covered by the lease. The examiner should direct the client to determine whether any of the leases that have expired by their primary term have been extended by production or agreement.

A separate schedule for mortgages should be prepared which displays the recorded mortgages and deeds of trust that have not been released. The examiner should include a description of the tract that is affected by the mortgage and which leases, if any are superior or inferior to the lease. For inferior leases, a requirement should be made that suggests that the client obtain a written subordination agreement from the holder of the mortgage.

The examiner should make a separate schedule for rights of ways and easements, which will include the parties to the agreement, the recording information, and the tract affected. The examiner will make a general requirement that asks that the client satisfy himself that the easement or right of way will not affect his interest.

The examiner could make a separate schedule for unsatisfied judgments and tax delinquencies, or could draft individual requirements for each encumbered tract. In either case, the examiner should always include unsatisfied judgments and tax delinquencies in the tract analysis and require that each encumbrance be satisfied prior to paying royalties to the property owner.

#### D. Comments, Exceptions and Requirements

Finally, a title opinion will contain a thorough discussion section that contains general comments, examination exceptions, as well as requirements that will include suggestions for dealing with serious title defects. In this portion of the opinion, the examiner will define the scope of the examination and will attempt to clearly and concisely explain marketability of title issues. The requirement will include the relevant facts related to the title issue, inform the client of the risks associated with the problem, explain the applicable law, and provide the client with curative options.

## **V. Conclusion**

Appendix “A” and “B” to this paper are examples of two different title opinions—a drilling title opinion and an acquisition title opinion, respectively. Remember that when drafting any title opinion, the scope of examination will ultimately be dictated by the client. In any case, the attorney should always take into account the specific purpose of the examination, and consider the various company personnel that will benefit from the title opinion. The examining attorney should work from an objective viewpoint and prepare a document that clearly communicates the present state of title.

**Appendix "A" Drilling Title Opinion Form**

February 24, 2012

Gas, Oil and Mineral Producer, LLC.  
Attention: Mr. Mineral Producer  
1809 Fictional Way  
Fort Smith, AR 72903

Re: Section 1, Township 1 North, Range 1 West,  
Lost County, Arkansas (640 acres)

**DRILLING TITLE OPINION  
CMD1-1-1-1**

**INSTRUMENTS EXAMINED:**

1. Abstract of Title No. AR-19,101 in one volume, prepared by Reliable Abstract Company, last certified to on December 29, 2011 at 5:00 p.m.
2. Abstract of Title No. AR-19,102 in one volume, prepared by Reliable Abstract Company, last certified to on December 29, 2011 at 5:00 p.m.

**INDIVIDUAL TRACT OWNERSHIP:**

**TRACT 1**

[tract legal description], Section 1, Township 1 North, Range  
1 West, Lost County, Arkansas. (34 acres)

Surface: Waylon Jennings

Minerals: Waylon Jennings, 1/2  
John Denver, 1/2

Working Interest:

Interest of Waylon Jennings:

BSH, Inc., 7/8 net revenue interest (100% working interest)

Interest of John Denver:

TSC, LLC, 60% of 7/8 net revenue interest (60% working interest)

GHI, Inc, 40% of 7/8 net revenue interest (40% working interest)<sup>1</sup>

Interest, if any, of Carl Lewis:

QRS, LLC, 7/8 net revenue interest (100% working interest) (See Requirement 14)

<sup>1</sup> Subject to a proportionately reduced overriding royalty interest vested in YEP Royalty Company, that is equal to the positive difference between the aggregate of all existing lease burdens and fifteen percent (15%).

#### LEASE ANALYSIS:

##### LEASE A:

Dated:	November 17, 2003
Recorded:	Book 82, Page 263
Lessor:	Sally Jesse Rafael
Lessee:	Tri-More Oil and Gas, LLC.
Lands Covered:	Tracts 2, 3 and other lands
Interest Covered:	1/3
Term:	Five years
Royalty:	1/8
Delay Rental:	None, paid up lease
Depository Bank:	Pay directly to lessor
Pooling Clause:	Yes
Unusual Provisions:	Several portions of the Lease were stricken or modified by the parties. Please review the Lease in its entirety.

AND

“15. Lessee is hereby given the exclusive option and right to extend the primary term of this lease as to all of the above described lands for an additional five (5) years, commencing with the expiration of the original primary term described in paragraph 2 above. This option may be exercised by lessee at any time during the original primary term by paying to lessor the sum of \$135.00 per net mineral acre for each net mineral acre hereunder that is being extended by lessee and is not otherwise being maintained by other provisions hereof. Payment may be made by check or draft mailed, tendered or delivered to lessor at any time during the primary term hereof. If, at the time this payment is made, multiple parties are entitled to specific amounts according to lessee’s records, such payment may be divided between said parties and paid in the same proportions.”

ASSIGNMENT OF LEASE A:

Dated:	January 16, 2005
Recorded:	Book 78, Page 371
Assignor:	Try Hard Oil and Gas, LLC
Assignee:	Drilling Gas, Inc.
Interest Assigned:	All of Assignor’s right, title and interest

EXTENSION OF LEASE A:

Dated:	October 21, 2008
Recorded:	Book 373, Page 30
Notes:	Extends the lease an additional five (5) years.

REQUIREMENTS:

1. The instruments we have examined reflect numerous irregularities in the early title chains to the various tracts covered by this opinion. These irregularities include, without limitation, missing instruments, instruments executed by persons purporting to be the heirs or surviving spouses of record owners, and instruments with obvious errors in their legal descriptions.

REQUIREMENT: You should obtain affidavits executed by knowledgeable individuals establishing that the owners of the surface of the various tracts covered by this opinion and their immediate predecessors in title have been in actual adverse possession of the various tracts for at least twenty-five years.

- We have examined documents purporting to be executed on behalf of various trusts and corporate entities. We have not been furnished documents creating those trusts or corporate entities or showing who is authorized to execute documents on behalf of those trusts or corporate entities.

REQUIREMENT: In each case, you should satisfy yourself of the valid existence of such trust or corporate entity and that the person(s) executing the instrument on behalf of the trust or corporate entity was authorized to do so.

- We have been furnished with copies of various unreleased oil and gas leases which are beyond their primary term. Immediately below, we have tabulated relevant data of these oil and gas leases including the Sections, Townships, and Ranges of any lands covered that are outside the lands under examination.

ABSTRACT BOOK	PG. NO.	GRANTOR	GRANTEE	BOOK/PAGE	DATE	TRACT NUMBERS	LANDS OUTSIDE SEC. 1-1-1
AR-19,101	130	Ivan B. Lessor	Who Be Lessee, LLC	I-216	5/15/1989	,9,10,	Sections 8-8-2, 9-8-2
AR-19,102	34	J. Farmer	Fat Producer, Inc.	D-305	4/1/1989	,14,	Section 2-1-1

REQUIREMENT: You should satisfy yourself that the oil and gas leases tabulated above, with exception of the current leases tabulated above the requirement section, have expired in accordance with their terms and have not been extended by production.

- We have been furnished with copies of various unreleased mortgages or deeds of trust covering lands under examination. Immediately below, we have tabulated those unreleased mortgages or deeds of trust which were recorded after 1979.

ABSTRACT BOOK	PG. NO.	GRANTOR	GRANTEE	KIND INST.	BOOK/PAGE	DATE	TRACT NUMBERS	INFERIOR/SUPERIOR TO CURRENT LEASE
AR-19,272	<a href="#">367</a>	Sonny Williams	Large Corporate Bank	MTG	251-387	7/20/1998	,1,4,	Superior to Lease C
AR-19,272	<a href="#">489</a>	Sally J. Rafael	Bank of Universe	MTG	422-311	10/13/2006	,1,4,	Inferior to Lease B

REQUIREMENT: You should obtain subordination agreements subordinating those mortgages tabulated above which are shown to be superior to the current leases or to any lease which you may obtain covering the mortgaged interests. For any mortgage which is inferior to the current lease, you should obtain the mortgagee's consent allowing you to make royalty payments to the mortgagors as long as they are not in default.

5. We have been furnished with copies of tax delinquencies for several interests covered by this opinion. Immediately below, we have tabulated the notices for those delinquent taxes.

TRACT NO.	TAX YEAR	OWNER
2, 3, 3A	2003-2007	Razorback Minerals, LLC.
1	2009	John D. Smithenhauser

REQUIREMENT: You should cause those delinquencies to be paid prior to paying royalty on the above interests.

6. The abstract sets out the following easements and/or rights of way across portions of the lands under examination:

ABSTRACT BOOK	PG. NO.	GRANTOR	GRANTEE	KIND INST.	BOOK/PAGE	TRACT NUMBERS
AR-19,101	283	Lee Smith	Pipeline Company, LLC	R/W	113-361	,1,
AR-19,101	198	Chet Lemon	Pipeline Company, LLC	R/W	112-154	,3,4,

REQUIREMENT: You should satisfy yourself that none of the above easements and/or rights of way will adversely affect your interest.

Very truly yours,

C. Michael Daily

**Appendix "B" Acquisition Title Opinion Form**

February 23, 2012

ACQUISITION TITLE OPINION CMD-1-1-1\_\_\_\_\_

Gas, Oil and Mineral Producer, LLC  
Attention: Mr. Mineral Producer  
1809 Fictional Way  
Fort Smith, AR 72903

Re: Acquisition of the following interests:  
BSH 1-1 #1-1 Well; the BSH 1-1 #2-1 Well; and the BSH 1-1 #3-1 Well  
all located within Section 1, Township 1, Range 1, Lost County, Arkansas

Gentlemen:

This Acquisition Title Opinion is limited to the interest of \_\_\_\_\_ and affiliated entities, in and to the wellbore only of the above-described wells. Based upon the examination of the materials described in Exhibit "B" attached hereto, subject to the requirements set forth herein, we find \_\_\_\_\_ and affiliated entities to be vested with the interest shown below in and to the wellbore of the referenced oil and gas well(s) and producing unit as of \_\_\_\_\_, presumably at 5:00 p.m. the date of the last document provided to us for examination.

**OIL AND GAS LEASEHOLD ESTATE:**

**A. UNIT WORKING INTEREST:**

\_\_\_\_\_ Well

Recorded Interest: \_\_\_\_\_

Record Interest: \_\_\_\_\_

Difference: \_\_\_\_\_

\_\_\_\_\_ Well

Recorded Interest: \_\_\_\_\_

Record Interest: \_\_\_\_\_

Difference: \_\_\_\_\_

\_\_\_\_\_ Well

Recorded Interest: \_\_\_\_\_

Record Interest: \_\_\_\_\_

Difference: \_\_\_\_\_

**B. UNIT NET REVENUE INTEREST:**

\_\_\_\_\_ Well

\_\_\_\_\_ Well

Represented Interest: \_\_\_\_\_

Record Interest: \_\_\_\_\_

Difference: \_\_\_\_\_

\_\_\_\_\_ Well

\_\_\_\_\_ Well

Represented Interest: \_\_\_\_\_

Record Interest: \_\_\_\_\_

Difference: \_\_\_\_\_

\_\_\_\_\_ Well

\_\_\_\_\_ Well

Represented Interest: \_\_\_\_\_

Record Interest: \_\_\_\_\_

Difference: \_\_\_\_\_

**C. BASIS LEASES AND ASSIGNMENTS:**

See the prior title opinions attached hereto as Exhibit "A-1." Leases and/or Assignments filed of record subsequent to the closing date of said prior title opinion, if any, are set forth on Exhibit "A-2" attached hereto.

**D. ENCUMBRANCES:**

**1. UNRELEASED MORTGAGES:**

\_\_\_\_\_

**2. PENDING SUITS, JUDGMENTS OR LIENS:**

\_\_\_\_\_

**E. COMMENTS:**

1. Pursuant to your request, we have based this Opinion upon previous title opinions furnished to us by you and upon copies of the public records of Van Buren County, Arkansas, selected and indexed for our examination by your landman. In some Sections, title opinions have been based on documents collected by persons other than licensed abstracters providing certified abstracts of title. We assume that you are aware of, and are willing to incur, the risks which are inherent in relying upon title as reflected by such opinions, instruments and tract indices, as opposed to the customary examination of abstracts of title. Also, you should note that we are unable to certify as to the absence of any pending suits, judgments, or liens, other than those properly indexed against the captioned property in said tract indices.

REQUIREMENT: Advisory.

2. This Acquisition Title Opinion is subject to the General Comments, Objections and Requirements contained in our letter addressed to you, dated \_\_\_\_\_. The

General Comments, Objections and Requirements contained in such letter have universal application to all properties involved in the \_\_\_\_\_ Acquisition and as such have not been repeated herein.

REQUIREMENT: Advisory.

3. In addition to \_\_\_\_\_ of the original title opinion, dated \_\_\_\_\_ (Exhibit "A-1"), we set forth herein mortgage agreements executed by mineral interest owners which we have been provided in documents post-dating any mortgage agreements reviewed by the title examiner rendering the original title opinion.

You should review all existing mortgage agreements set forth in the original title opinion, referenced above, as well as all subsequent mortgage agreements set forth in this supplemental mortgage agreement requirement.

**[INSERT MORTGAGE TABLE]**

REQUIREMENT: You should determine, on a case-by-case basis, whether you will attempt to obtain subordination agreements subordinating those mortgages or deeds of trust to any leases taken on the lands under examination.

4. We call your attention to each requirement set forth in the previous title opinion, dated \_\_\_\_\_, attached hereto as Exhibit "A-1." [With the exception of \_\_\_\_\_, w]We are unable to confirm that the requirements set forth in the original title opinion have been satisfied.

REQUIREMENT: You should thoroughly review each requirement set forth in the original title opinion and determine the status of those requirements. You should further determine whether any unsatisfied requirement is sufficient to reflect a title defect in any applicable tract within this Section.

5. We have calculated \_\_\_\_\_'s interest based on the title opinion provided for review and supplemental documents provided by your broker as set forth in Exhibits "A-1" and "B," attached to this acquisition opinion. Our review is specifically limited to the contents of these sets of documents.

REQUIREMENT: Advisory.

6. Our calculations reflect a discrepancy in the gross working interest and in the net revenue interest for each of the eleven wells in this Section. In every discrepancy, the record interest which we calculate appears to be slightly [more/less] than that

represented by \_\_\_\_\_.

**REQUIREMENT:** You should review the percentages we have arrived at in rendering this acquisition title opinion and the percentages reflected in the Section-by-Section run sheet you have provided for our review. You should reconcile any discrepancy, making us aware of any interest change from that provided to us in the Section-by-Section run sheet.

Very truly yours,

C. Michael Daily