Chapter 1

MINERAL TITLE EXAMINATIONS: THE WHOS, WHATS, WHENS, WHERES, AND WHYs OF MINERAL TITLE ASSURANCE

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§ 1.01 Introduction.

Title examinations and opinions are all about title assurance. Secure titles let project managers sleep at night. Exploration departments must convince management that projects are geologically sound and economically feasible. They must also convince them that they are legally supportable. Legally supportable projects center on marketable titles. Upfront capital and human-resource investments are so huge, particularly with mining projects, that title miscues are inexcusable. Tragedies abound when adequate project title assurance is underutilized or fails outright. The more notorious are chronicled in the decisional law and authorities and provide grist for the Socratic sparing mill in the nation's law schools.

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§ 1.02 History of Title Assurance.

“Title” has many meanings. It denotes the type and nature of one's ownership and rights in relation to land. Title can be possessory (as with a lease) or non-possessory (as with a future interest such as a remainder following a life estate, a reversion, or right-of-reentry). It can take the form of fee estate; an estate for years; a leasehold estate; a future interest; or simply a right to use or cross-over land, as with an easement, right-of-way, license, profit à prendre, or other [in]corporeal hereditament. The title is said to be “marketable,” “good,” “valid,” “sufficient,” “clouded,” and even “perfect.” Also, title is sometimes defined by its source, such as titles by purchase, descent, devise, adverse possession, prescription, or decree. Finally, titles may be legal or equitable, and vested or inchoate.

Over time several methods of title assurance developed in respect of real property. In American jurisprudence, vendors or owners of land are not required to prove title—vendees, buyers, lenders, or users are. The exception appears when the vendor/owner contracts to do so. This practice stems from the courts' extension of the caveat emptor doctrine for chattels to real property. Purchasers needed a system from which they could obtain some assurance that the title they wished to purchase was reasonably clear of defects such that a reasonably prudent person would purchase it or act upon it in the course of commerce.
Evidence or the assurance of title, and reporting the title's nature, character, quality, and validity is the focus of this Special Institute. Initially, possession was the evidence of title. Transfer of title, ownership, or right of possession was represented symbolically by the passing of a clod of dirt or a twig from the owner seller (grantor) to a non-owner buyer (grantee). In English common law, this ceremonial act of transfer of title was called livery of seisen or feoffment. At some point, written instruments replaced the clod and twig. Evidence or proof of the transfer tenuously remained in the memories of attending witnesses to the ceremony. In time, the English Statute of Frauds and Perjuries of 1677 required all transfers or encumbrances of land to be in writing.

As titles proliferated and societies became more complex, the need for government-monitored registration of land titles developed. American jurisdictions utilize two, public records-based systems of title assurance: title registration and title recording. Both systems have as their objective the security of titles.

One, the least well-known, is the Torrens system. Titles are registered with the state in the same manner as automobile and pleasure boat titles. The seller endorses his certificate of title over to the purchaser (or other more common instrument of transfer), who presents it to the registrar for "registration," and the purchaser then receives a new certificate of title in return as the purchaser's evidence of title. The Torrens system is used in several former British Commonwealth jurisdictions and found some favor in the United States in the early Twentieth Century and was adopted in one form or the other by twenty states. The Torrens system has fallen out of favor in most American jurisdictions and is authorized by statute in only ten states, and of those only four actually use the system.

From their inception recording systems have been creatures of statute. The American system stems from the English Statute of Enrollments of 1535. History teaches that recording became necessary when parties resorted to paper transfers in order to document exceptions, reservations, conditions, and limitations, to facilitate lenders perfecting their encumbrances, and to prevent secret transfers.

This system came to America with the colonial migration and transplant of English culture, including its body of laws to the New World. Spanish, Dutch, and French systems ultimately gave way to the English recording model. The objective of recording statutes has three components: (1) the original one of establishing a priority of right between competing claimants by incentivizing prompt recording of conveyances and encumbrances; (2) an equitable one of protecting subsequent purchasers against unknown conveyances and encumbrances; and (3) a constructive one of preserving all links in the chain of title (the history) so that a determination might be made as to the current owner and the nature of encumbrances, limitations, and conditions on the title.

Recording is not so much the registration of land titles--the Torrens System; as it is the cataloguing of the evidence of title. "Recording" denotes the delivery of the instrument of title or encumbrance to a registrar of deeds, who logs the instrument into the reception book, replicates the instrument by copying it verbatim onto an official record for permanent retention, and returning the instrument to the grantee. It establishes a system priority based upon the date of presentation of the instrument for recording. Initially, recorders
copied the instruments by hand (long-hand) into books, *ad seriatum*, again in the order of presentment.\(^{15}\) As title instruments proliferated, recorders not only logged them into reception books, but also indexed them by grantor, grantee, document type, and land description, as well as copying them into the official record.\(^{16}\) Ultimately, as technology developed, photostatic copying, micro-fiche/readers, and now computers, have modernized the indexing and retrieval systems.

Consequently, one relies on the recording system to provide evidence of the chain of title, but not a declaration of the title itself. To ensure (or assure) oneself that title is marketable, one must examine the title evidence in the recorder’s office, deed by deed (or link by link), instrument by instrument--each link in the chain of title--until the current date to determine the status, nature, character, and type of title.

§ 1.03. Proof of Title.

Again, the focus is title assurance or proof of title. Title examiners are called upon to provide a declaration of title validity. Since title validity is based upon the application of the law of deeds and conveyances, coupled with the law of deed recordation, the examiner must apply the law to the chain of title in the same manner as would a court of law should it be called upon to declare title. Proof in this legal context is a determination of what dignity of evidence is to be afforded the public records.

[1] Title Repositories. There are two types of public (governmental) records for land titles. The first comprehends the judicial, legislative, and departmental affairs of state pertaining to lands, namely writings, memorials, correspondence, notations, and papers of public officials--including conveyances of public lands and interests in public lands--made in the performance of their statutory duties. These would include the records of the federal and state officials pertaining to patents, leases, rights-of-way, permits, and the other title instruments affecting federal, state lands, and Indian lands; and judicial probates, administrations of intestacy, and orders and decrees adjudicating interests in both public and private lands.\(^{17}\) The second comprises, the records of the county recorder,\(^{18}\) described as quasi-public records in that they contain conveyances of both private interests and interests in public lands. This distinction is singularly important, as the records of the county recorder are almost universally determined to have evidentiary primacy in the determination of priority of titles and interests therein either by statute or judicial decision.\(^{19}\) These distinctions are of critical importance to the title examiner, as the former are typically not repositories according constructive notice of their contents for bona fide purchaser purposes, unless expressly provided by statute; while the latter are the repositories for constructive notice.\(^{20}\) This is not to say that public judicial, legislative, and departmental records would not afford inquiry notice of the status of title reported therein.


There are three types of recording statutes--race, notice, and race notice--and the jurisdictions differ.\(^{21}\) The distinctions are important to the title examiner, but are beyond the scope of this paper. They are covered in other papers at this Institute. What is important is that with the exception of the pure race statute, the purpose of the recording statutes to protect *bona fide* purchasers. *Bona fide* in this context means those who take title to land in good faith and for valuable consideration (not a mere token) and who recorded without notice of a previous conveyance or of encumbrances.\(^{22}\)
Prior notice is of three types: actual, constructive, or inquiry (sometimes referred to as “implied actual” or “implied constructive”) notice. They arise by statute as with “record notice” or by court made or decisional (common) law, as will actual or inquiry notice. If a purchaser has notice of a prior conveyance, the statute will not protect him from challenges to the validity of his title.

[a] Constructive Notice. There are two types of constructive notice. One arises by statute and the other arises by common law. The first is “record notice,” meaning that notice imparted by a recorded instrument pursuant to recording statutes. It places the world (public) on notice of its contents, whether one is actually aware of the document or not. Hence, the notice is constructive, because notice of what exists in the records is imputed by operation of statute and not by actual knowledge of its existence. The second is notice presumed by personal knowledge of certain facts that should impart to him or lead him to knowledge of the ultimate fact. This is common law constructive notice, and courts often refer to this type of constructive notice as “inquiry notice.” Inquiry notice is addressed separately, infra. Many states recognize both types of constructive notice. Constructive notice is the conclusive presumption of law that a person has actual knowledge of a party who asserts an interest in land.

Whether records, any records, give constructive notice is purely a matter of statute. This raises the question of the role of federal, Indian, and state land title records. It is here that many who request title opinions covering [state-owned, federal-owned] public or Indian lands and even some title examiners misunderstand the nature of records. For example, records of the State Offices, Bureau of Land Management (“BLM”) do not impart constructive notice of their contents. Except for the assertion of “bona fide purchaser status” under the cancellation provisions of departmental regulations, and the exception of the right of the Secretary of the Interior to approve assignments of operating rights and record title, rights as between the parties and bona fide purchaser status are governed by state law. The Secretary’s approval responsibility runs primarily to verification of acreage limitations and qualifications to hold leases. Thereafter, the BLM’s interest is to document who holds leases and interests therein, permits, rights-of-way, and other use rights and to whom the sovereign may look for compliance with federal laws pertaining to payment of rentals and royalties, reclamation, conduct of operation, and notification of competing uses. Since assignments of leases are generally effective between the parties subject to approval by the BLM, purchasers and title examiners would not have statutory constructive notice of BLM records unless those records were recorded in the county records. Consequently, if there are claims of competing titles and interests, resolution of ownership will be made under state law. These records will give the title examiner a basic chain of title of whom the BLM shows to be the owner of leasehold record title, operating rights, or even some owners of overriding royalty. But they do not show relative rights between or among owners under mortgages, deeds of trust, other financing documents, unfiled overriding royalties, net profits interests, calls on production, and production payments, which the BLM now refuses to file; or the limitation on rights that may be contained in purchase and sale agreements, general assignments of leases and operating rights, and the like. So unlike the records of the county recorder that afford constructive notice, the mere presence of a document in the files of the BLM, including field office records, does not give notice to the world. The same can be said of the agency land title records for state lands. They will provide a skeletal chain of title to the examiner, but will not accord constructive notice of their presence in the records or of their contents to any person. Still, these records must be examined to yield a complete chain of title and title opinion. No title examiner would think of rendering an opinion without examining these records.
The same is true of the land and title records maintained at agency offices of the Bureau of
Indian Affairs (“BIA”) for tribal and allotted lands. Indian title records also fall under
the jurisdiction of the Secretary of the Interior. The nine BIA Land Title and Records Offices are repositories of constructive notice, while agency records are not. Mineral leases are typically maintained in agency records, records maintained for the primary use of the BIA for the same reasons and in like manner as federal and state records. Agency records do not afford statutory constructive notice, but assuredly would impart implied (inquiry) notice. Yet, how many title examiners will search the agency records, but ignore the records of the BIA Land Title and Records Offices; and how many companies will pay for the Land Titles and Records Office examination? Be that as it may, access to BIA title records has been problematic of late, given restrictions of Cobell and local misunderstandings regarding the workings of the federal Privacy Act of 1974. Nevertheless, the BIA acknowledges that companies who currently lease or use Indian lands or who seek to lease, use, or consolidate Indian lands or interests in lands or who seek to lease or use Indian lands meet the “routine uses” exception to Privacy Act and are entitled to access. Presumably, this includes abstracters, title examiners, and title attorneys who would on behalf of the lessee or user or prospective lessee or user require access to title records.

[b] Actual Notice. Actual notice arises when a purchaser has personal knowledge of a prior unrecorded deed or possession adverse to his claim. Courts sometimes confuse the distinctions the author is attempting to draw here, by holding that facts that would lead purchaser to inquire and thereby gain actual knowledge of the chain of title is “actual notice,” while the author categorizes them as inquiry notice.

[c] Inquiry Notice. “Inquiry notice” is sometimes referred to as implied actual notice or common law constructive notice. It is that notice arising from facts that would prompt a reasonable person (often referred to in the law as a prudent person) to make further inquiry. Examples might include a party assessed and paying taxes other than the record owner; unassessed taxes in the name of one other than the record owner; recitals and references made in a recorded document to an unrecorded agreement, deed, or other conveyance or encumbrance; and adverse possession by non-record owner. Sometimes inquiry notice is referred to as implied actual notice.

[d] Judicial Notice. Finally, there is judicial notice—that notice courts impute to ministerial acts of government and government records to facilitate the presentation and authentication of evidence in court. Implied notice and judicial notice are court-made (common law) doctrines. However, they have application to the title examination.

It is beyond the scope of the paper to address title examination approaches and techniques for federal, state, and Indian title repositories. They are covered in other papers presented at this institute. The purpose of this paper is to alert title examiners that they must examine those records that give constructive and give rise to inquiry notice, as those are the repositories that cloak a purchaser (grantee, assignee, mortgagee, lienor, et al.) with bona fides.

§ 1.04 Title Assurance.

[1] Types of Title Assurance. Generally speaking, there are four types of title assurance in real property transactions: the warranty deeds (the oldest), title certificates under the Torrens land registration system (outmoded), an attorney’s title opinion based upon an abstract or stand-up search, and title insurance. This section focuses on abstracts/title
opinions and title insurance, as the role of the warranty deed is obvious and title certificates under the Torrens system have already been discussed.

[a] Abstracts and Title Opinions. Historically, attorneys prepared title opinions from abstracts assembled by licensed abstracters. Initially, abstracters searched the records and handwrote or typed an "abstract" or summary of the essential elements of each recorded document in the chain of title.31 As technology advanced, abstracters compiled photocopy or photographed copies of each document. The abstract provides evidence of the title, but does not declare or identify ownership. The attorney examines the abstract and renders a title opinion. Abstracts are still used as a practical source of title in many states52 even when not required by statute, and particularly in oil and gas producing states for the reasons addressed infra in the discussion of mineral titles. Historically, abstracts were used extensively for mineral titles.

Formal abstracting has fallen out of vogue in some states and lately with mineral titles, because compilation takes too long, closing deadlines required stand-up searches, or abstracters limited the risks for errors and omissions to the cost of the abstract.53 Sometimes companies engage landmen to perform the stand-up search and assemble all documents in the chain of title for an attorney's examination, or the attorney himself both performs the search and renders the opinion. Except when required by statute, abstracting and even stand-up examinations have been truncated by the advent of the computer age, as title counsel can now access the recorder's records from his desk-top in many jurisdictions.

Land titles are legal rights. Determining who owns the title is a legal conclusion. Courts and authorities often distinguish between "searching" title and "examining" and "rendering title." Searching is defined as the mechanics of identifying and extracting those instruments constituting the chain of title, while "examining" is the process of analyzing title evidence and rendering an opinion.54 For example, non-lawyers are statutorily authorized to search title for title insurance in most states55 and abstracters are licensed to compile abstracts. Hence, abstracters are title searchers, while attorneys are title examiners. In practice, the terms are used interchangeably.

Title attorneys are responsible for disclosing all discoverable defects and explaining their impact. Title insurance commitments, on the other hand, are construed to merely notify the potential insured what the company is willing to insure, and title companies need not search for those defects expressly excepted or excluded.56 The assurance does not arise until the policy of insurance is purchased and issued. The difference in protection afforded by abstracts/attorney's opinions and title insurance is summarized in 1 Patton & Palomar on Land Titles.57

Abstracters are required to be licensed and bonded in most states, and the abstracter's liability runs to all those who own the land or lenders who rely upon the abstract to extend credit. Even in states where abstracters are not licensed or required to give bond, courts extend the abstracter's liability to those who foreseeably rely on the abstract of title.58 Non-lawyers who "render title"--declare ownership in mineral reports, mineral certificates, or take-off sheets--may be charged with the unauthorized practice of law and are held to the same standard as lawyers.

A discussion of professional responsibility and attendant liability for abstracters and title attorneys appears infra.59
Title Insurance. Title insurance is an American invention. Title insurance companies examine the recorder’s records from the inception of title to current date (or more likely update a prior search conducted on the same property—a practice known as “tacking”) and issue preliminary title reports or commitments to insure. Title insurance companies are governed by statute. The scope of their duty is not to abstract and declare the status of title, as would a title attorney based upon an abstract or stand-up search; but rather to insure or guarantee the prospective purchaser or lender a position in the chain of title that it is willing to insure. Insuring titles is geared to a lesser—a “minimalist” standard—when compared to a “status of title” standard. These searches are performed by non-lawyer employees of the title company—often from “title plant” records reproduced from the recorder’s offices and physically located in the title company offices. Sometimes title insurance companies will run a chain of title and commission an attorney to render a title opinion or have the attorney run the chain and render an opinion, which the company then insures. The preliminary report or commitment to insure and the policy covers the ownership; enumerated title defects and encumbrances; unmarketability; and lack of access, among others. The insurance covers those title defects not generally or specifically excluded by the insurance policy. Anyone who has read Schedule Bs recognizes that policies of title insurance differ widely in their scope and their exclusions can be very broad.

Liability for error sounds in contract rather than tort in most states, while other states impose an abstracter’s negligence (tort) standard to title searches. The important distinction is that upon title failure or unmarketability damages for breach of contract are limited by the contract, while damages based upon negligence (tort) have no such limitation.

Mineral Titles.

However, title insurance does not work with mineral titles. Most title companies will not write a policy of title insurance for minerals, because mineral titles are more obscure. Mineral titles arise from exceptions and reservations in patents and deeds and are burdened by more limitations and conditions than surface estates. It does not matter whether the surface and mineral estates are consolidated or severed. Moreover, mineral titles are not subject to the usual indicia of use and occupation as surface titles with their homes, cabins, farmland, ranches, and other visible uses. Mineral titles are not subject to real property taxes in the same manner as surface estates, and mineral owners do not appear in records of the assessors and treasurers, unless they are also the owners of the consolidated estate. Mineral titles are not platted by the recorder, as the recorder’s plats are primarily designed and utilized for ad valorem taxation purposes. Hence, the extra-record indicia of ownership of mineral titles are not open to view and inspection in the same manner as normal land titles.

For these reasons, title opinions are universally required for the acquisition, drilling, distribution of revenues from production, and financing for the reason that other methods of title assurance are not available or up to the task.

Marketability and Marketable Record Title Acts.

This brings us to a discussion of the nature of title to be purchased, leased, drilled, produced, or mortgaged. The assurance the buyer wants is that the title is marketable. Courts of equity coined the term “marketable title” to characterize the character of title that was sufficiently good (devoid of material defects) that a reasonable buyer would accept it in a suit for specific performance. "Marketable title,” “merchantable title,” “good title,” “good
and marketable title,” “indispensable title,” and even “perfect title” are now used synonymously and interchangeably. These definitions apply equally to mineral titles.

Twenty states have enacted marketable title acts with the view to rendering land titles more secure, and several state acts are patterned on the Model Marketable Record Title Act circulating in the 1960's. These acts serve several purposes. They serve as statutes of limitation by establishing a period barring any claims not filed during the period. They act as curative statutes in that they purport to extinguish defects in title arising beyond the statutory period.

The Model Act, for example, provides that any owner of land or an interest in land who has an unbroken chain of title of record for forty or more years has marketable title, if the records disclose a conveyance or other title transfer purporting to vest title in the claimant during the forty-year period immediately prior to the search. The vesting document is called the “root of title.” If the vesting document is older than the forty-year period, all rights, titles, and interests under the root of title are preserved by recording a notice of interest referring to and incorporating the root-of-title instrument. All documents recorded earlier than the statutory period are extinguished, with certain exceptions. The act does not bar or extinguish titles or rights of a person in possession during the statutory period; rights preserved by filing a notice of claim (when the root of title is beyond the statutory period); rights arising under adverse possession or prescription; title defects recorded during the statutory period; reversions under a lease; easements held by utilities; federal and state titles and rights; and mineral titles and rights exercisable in connection with the minerals. However, states have added other exceptions. Utah, for example, expressly excepts certain types of water rights and extends the minerals exception to rights appurtenant to the mineral titles themselves, which arguably, would include access roads and other easements. Consequently, mineral titles, including consolidated estates from which the minerals have not been severed or in which the minerals have been reunited with the surface estate must be searched from inception of title or tacked to an opinion previously rendered.

Marketable title acts do not obviate the need for title searches in excess of the statutory period precisely because of the stated exceptions and because the statutes were never intended to resolve competing chains of title to the same lands.

§ 1.05 Mineral Title Opinions and Reports: An Overview.

Title opinions have been defined as:

[A] statement of opinion by an attorney, often in the form of a letter, as to the state of the title to land, mineral, royalty or working interests. The opinion will often recommend that curative instruments be obtained before the property interest is purchased, drilled on, or otherwise dealt with.

Reports and opinion letters come in all shapes and sizes and vary from location to location and title examiner to title examiner. Some of the more basic formats for abbreviated searches include the take-off report, title memorandum, status report, and mineral certificate. Formats stemming from “full-blown” searches and resulting in formalized, broad-based “opinions” include acquisition, drilling or explorations, division order or production distribution, and security or financing opinions, and the more narrowly focused bonus and delay rental opinions. Bonus and delay rental opinions are beyond the scope of this opinion, but are addressed in the legal literature. Irrespective of nomenclature, these categories
cross interdisciplinary lines and are conceptually the same for both the oil and gas and the mining industry. Each format has a specific purpose among the genre of reports and opinions. It is important that the corporate counsel and landman properly and clearly communicate the type of report or opinion desired or the reason for which title examination is required so that the examiner may accurately determine the scope of his examination and fashion the desired product. A brief description of each of the reports and opinion letters is meaningful here to define the procedural aspects of the title examination in each instance. More detailed treatment, including discussions of chaining title and fashioning title opinions and reports are found in other papers of this and other Special Institutes and Practicing Law Institutes. 83


[a] Take-Off Reports. “Take-Off Reports” are typically used at the lease acquisition phase of a natural resources project to establish apparent mineral ownership for lease plays. They are the least thorough and comprehensive of title reports. The searches consists of determining possible ownership from the federal, Indian, state, or recorder’s ownership plats and then examining the tract index (in those states which have statutorily mandated tract indices) in order to determine who has granted the most recent mineral leases. The examiner then works backward in the tract index to find the conveyance which purports to vest the mineral title in the apparent lessor. When no tract index is maintained by the recorder, the title examiner must proceed from the ownership plat backward in the grantee/grantor indices to determine who has given the most recent mineral lease and to identify the conveyance which purports to vest the mineral title in the apparent lessor.

With respect to mining claims, the Take-Off Report would serve the same purpose, but would generate from a search of apparent title in the records of the BLM State Office, focusing on the historical index, plats, LR-2000 (Mining Claim Report for unpatented mining claims and Geographic Report for all other land actions), coupled with an apparent title search of the county records.

A Take-Off Report is frequently prepared by the landman or lease broker. It can take the form of a written report identifying apparent mineral ownership by tract, or it can take the format of a standard BLM use plat or other map shaded or otherwise marked to denote mineral and ownership.

[b] Title Memoranda. “Title Memoranda” may also be used at the acquisition phase of a project. In addition to reciting apparent mineral and surface ownership, they may reflect material conveyances, reservations, exceptions, unreleased leases, and encumbrances. Therefore, they are more thorough than the Take-Off Reports, but less thorough than the formal status report or title opinion. They are most often prepared by an abstracter or landman, but may be prepared by an attorney.

[c] Status Reports. “Status Reports,” as defined for purposes of this paper, set forth the status of the lands as reflected by the title records of one or more title repositories, such as the status of lands disclosed by the records of the BLM State Office, or the records of the state agency that administers state lands within that jurisdiction. What they do not include is an abstract of the county records. The Status Reports contain an itemized listing of all historical index entries for the lands covered; relevant statutes and executive, secretarial, and public land orders; contents of corporate files pertaining to business entity lessees in the chain of title; and a written abstract of the relevant contents of the applicable lease files. Often, the examiner attaches photocopies of the relative orders, patents, surveys,
plats, and serial register pages (or the current LR-2000) to the report. Status Reports prepared in the Rocky Mountain West typically set forth the surface, mineral, and leasehold ownership. Comments are limited and abbreviated, if not non-existent.

Historically, companies requested Status Reports at the acquisition or drilling stage of a project. Status Reports are prepared by attorneys for delivery to in-house or the ultimate outside title examiner--an example of form following function--to be used in conjunction with an abstract of the county records to prepare a title opinion. The author was called upon during the 1970s and 1980s to prepare such reports, but has not prepared or used Status Reports in rendering a title opinion for over twenty-five years. Perhaps one reason for this is the availability of most all underlying documents and records, albeit not the lease, mining claim, and patent files, on the BLM State Office and state land agency Websites.

[d] Mineral Certificates. “Mineral Certificates” are sometimes available from abstract title companies. For example, in the author's state of Utah, where policies of title insurance exclude mineral titles, Security Title and Southeastern Title & Abstract Company are known to have issued mineral certificates for a tract of land. These certificates are generally one or two pages long, contain a tabulation of ownership, and identify encumbrances affecting title. They are signed and certified to by an attorney who is typically an employee of officer of the title company. Today, if the author's experience is any indication, they are rarely, if ever, used by the minerals industry.

[2] Oil and Gas Title Opinions.

Each type of opinion is structured for its purposes and addresses different issues. For example an acquisition title opinion in an asset sale of proven and producing properties may not identify surface ownership, as the lessee's title and net revenue stream are of primary focus; while the acquisition title opinion for unproven properties might take surface ownership into account. The drilling title opinion identifies both surface and mineral ownership, analyzes the mineral leases, addresses encumbrances such as easements, grazing leases, and other mineral leases that may limit or condition the mineral lessee's use of the lands, and identifies which of the mineral title curative issues may be deferred until a successful well is drilled and revenues are to be distributed. The division order title opinion is interested exclusively in the calculation and distribution of revenues from production, and does not concern itself with regulatory and surface issues, except to the extent that they might affect the allocation of production and revenue stream. The financing or security opinion is written for lenders to support mortgaging the owner's interest in proven and producing properties for project exploration or development.

An attorney's opinion discusses four basic elements of title. First, it identifies the ownership of lands, both surface and mineral estates. Second, it identifies the evidence upon which he relied for the legal conclusions drawn. Third, it identifies the defects in title represented by clouds on title, defective instruments, defective recordings, judicial decrees and orders, tax sales, leases, easements, encumbrances, and liens. Fourth, it recommends how the defects might be cured. Typically, the attorney does not address rights arising by persons in possession, and expressly excepts them, together with rights under mechanics' and materialmen's liens, and unrecorded instruments.

The underlying purpose of a title examination molds the form of the resulting report or opinion in which the examiner's conclusions on title are memorialized. This is a perfect example of form following function.\[4\]
[a] **Acquisition Opinions.** The acquisition title opinion is obtained in the context and often prior to closing of an asset sale or stock acquisition of the owner (depending on the provisions of the purchase and sale agreements). The acquisition title opinion in an asset sale of proven and producing properties may not identify surface ownership, as the lessee's title and net revenue stream are of primary focus; while the acquisition title opinion for unproven properties might take surface ownership into account.

[b] **Drilling Title Opinions.** “Drilling Title Opinions” report surface and mineral ownership based upon a thorough examination of all title repositories affecting the proposed drill-site lands. They result from an examination of the records of the BLM State Office; counterpart records of the state agency that administers state lands in those instances when title to the mineral fee is or once was owned by the state; the records of the county recorder of the county in which the prospect is situated; and the records of the county clerk, assessor, or treasurer for unsatisfied judgments, tax liens and sales, and probate files and records. A Drilling Title Opinion should accurately reflect “record” ownership of both the surface and mineral estates, subject to rights held under unrecorded instruments or by parties in possession, and includes the examiner's comments upon title defects and his recommendations for corrective actions. Also, the Drilling Title Opinion should focus on those types of title and regulatory restrictions that might influence, affect, or restrict the nature of exploratory or developmental operations, such as zoning restrictions, spacing and pooling orders, wilderness designations and the like. Drilling Title Opinions are always prepared by attorneys.

[c] **Division Order Title Opinions.** “Division Order Title Opinions” report ownership of minerals produced from a property for purposes of distribution of proceeds. They tabulate the lessor's royalties, working interests, overriding royalties, production payments, net profits interests, and other lease burdens. Surface ownership is generally not a concern at this stage. While the Drilling Title Opinion is often tabulated in percentages, the Division Order Title Opinion usually reports the “net revenue interest” interest of each owner in decimal format, using a base of 1.0 to represent the whole mineral pie. The corporate landman or division order analyst uses the Division Order Title Opinion to prepare and circulate the division orders to owners of mineral or leasehold interests entitled to proceeds of production. The Division Order Title Opinion is always prepared by an attorney and is sometimes considered to be the highest state of the title examiner's art.

[d] **Security or Financing Opinions.** “Security Opinions,” also known as “Financing Opinions,” are rendered in connection with mortgages of mineral properties or current or future production for project exploration and development. These opinions take the tabulation form of either Drilling Title Opinions or even Division Order Title Opinions inasmuch as the mortgagor's net revenue interest is pivotal to determining the value of the collateral. However, these opinions have been rendered in hybrid formats to meet the needs of financing institutions. The title repositories to be examined are the same as for drilling or division order title opinions.

[3] **Mining Opinions.**

As with oil and gas opinions, mining opinions are prepared for acquisition, exploration, production and distribution, and financing stages of projects.

[a] **Acquisition Opinions.** Acquisition opinion may cover existing mineral leases, lands open to leasing, patented mining claims owned in fee, and unpatented mining claims. When examining unpatented mining claims, the examiner must not only address compliance with
mining claim location law and the priority of competing and overlapping claims, but also the validity of the claims pursuant to recordation and maintenance (now rental payment) requirements. One thing this author has learned, even when preparing opinions for sophisticated mining companies, is to dedicate a portion of the opinion to discussions of location and claim maintenance law and the ephemeral nature of unpatented mining claims.

[b] Exploration Opinions. The Exploration Opinion is important when the miner or developer holds leasehold interest, exploration license, or profit a’ prendre, because, like with oil and gas drilling opinions, governmental regulations may limit or even preclude exploration. It is one thing to have a squeaky-clean title. It is yet another to undertake operations if governmentally restricted. Regulatory prohibitions are most likely to be found on public lands, although zoning or even access across adjacent lands may be restricted even if the target properties are privately owned.

c] Production and Distribution Opinions. Division of interest opinions are primarily creatures of the oil patch, but can be used in a mining context, especially when the mining rights are subject to a lease with several mineral owners or there have been several mesne assignment of the lease in which various royalty, net profits of net smelter returns, or other lease burdens have been reserved or assigned.

d] Financing. Miners and developer may use their minerals in place and revenue streams as collateral for project financing, improvements in mine capital assets, or other purposes, in the same manner as the oil and gas industry. Financing or security opinions would use the same format as financing opinions in the oil and gas sector, although terminology may differ. The same principles and rules apply. However, when the collateral is unpatented mining claims, it is important to alert the lender to the nature and quality of title to an unpatented mining claim, as the distinction between a diligence title, as compared to a leasehold or fee title, most likely will not be fully understood and appreciated.

[4] Tying Opinions Together. It is important to understand that with mineral titles generally, and oil and gas titles, specifically, each opinion is a stepping stone to the next stage or phase of title surety. However, if the preparer of the base opinion defers identification and comment on title defects requiring no title curative until the production stage and the succeeding title examiner comes forward from the effective date of the base opinion, the succeeding examiner will be required to re-examine title evidence already examined for the base opinion. An example might be adverse claims by mineral owners to the same royalty interest or gaps in the chain of title occasioned by death of a mineral owner. In other words, the title examiner must be sensitive to form (the purpose of the opinion), but not blind to form (failing to include information that a subsequent title examiner may need to meet the purposes of the next-stage opinion.

It is beyond the scope of this paper to discuss the contents and formatting of title opinions in greater detail, as they are discussed in other papers presented at this and earlier Special Institutes.


While to industry the title opinion represents a medium, to title counsel it risks becoming an art form. As one authority cautions, the examiner must strike the balance between communicating information and parading scholarship and erudition.
With regard to professional responsibility and the attendant liability, abstracters and lawyers are treated differently. Abstracters and attorneys are obliged to indemnify their clients for errors and omissions in their searches and opinions only--failing to disclose title defects that an abstracter or title examiner would have found and addressed exercising reasonable care. By contrast, abstracters are liable to whomever might have foreseeably relied upon their abstracts, while title attorneys are liable to their clients only--those with whom they stood in privity of contract. That being said, neither abstracters nor title attorneys are guarantors of title.

Absent a contract limiting liability, the abstracter and attorney's standard of care and the resulting liability for breach of that standard is based upon negligence. When "abstracts" are compiled by landmen who are not licensed abstracters, it would appear that they would be held to the same standard of care as the abstracter or even a title attorney who examined the records and would be liable under a negligence (malpractice tort) standard of care.

It is axiomatic that while abstracters, landmen, and other non-lawyers may prepare take-off reports and title memoranda for their own use or as an employee for a mining or oil and gas company, they cannot prepare title memoranda, reports, or opinions for a client or customer without being subject to a challenge for the unauthorized practice of law and any consequences that might flow therefrom. As noted earlier, errors they make in reporting subject them to the same liability standard as lawyers.

§ 1.05 Ordering the Opinion.

Companies generally have policies regarding when and by whom opinions are ordered. Nowadays, most title opinions are prepared by outside counsel. Typically, in-house counsel or more likely land departments, order the title opinions. Because companies have differing policies respecting title assurance needs, it is important that both the company landman and the outside attorney clearly communicate what is sought and what is to be delivered when the order for a title opinion is placed.

If the landman does not volunteer, then outside counsel must inquire after, at least the following information regarding the scope of the search and content and format of the title opinions:

(a) The purpose for which the opinion is intended;

(b) Whether the opinions are to be original or updated;

(c) Whether examination is "stand-up" or "sit-down"--meaning from abstracts or personal records search;

(d) When public lands are involved, whether status reports from the BLM State Office, state land department, or equivalent records will be provided or whether title counsel is to perform the search;

(e) Whether the scope of title search is to be limited to record title or expanded to include repositories of inquiry or judicial notice, such as conservation commission spacing records; conservation commission well, production, and sales records; BLM and state agency field
offices records for similar information; and zoning commission, water rights, and other records;

(f) Whether the search is to include “extra-record” documents and records from company lease, division order, and agreement files;

(g) In the context of Indian titles, whether the company wishes to rely on agency title records or requires BIA Land Titles and Records Offices in addition to the agency records;

(h) Whether, in the context of stand-up search, a photocopy abstract of all records should be provided;

(i) Whether a copy of the chain of title diagram should be included with the title opinion;

(j) Whether surface inspections are contemplated and if they are, whether they will be conducted by the company or a consultant (most notably in the context of unpatented mining claims);

(k) Whether the tabulation of ownership should declare ultimate title—who owns it now—or recite each link in the chain of title, or both;

(l) What the format for the tabulation of ownership should assume, as with how many spaces should appear to the right of the decimal in division order title opinions and whether allocation formula should appear in division order title opinions;

(m) Format and content of the comments and requirements—terse identification of defects without legal analysis or broader reporting with legal analysis;

(n) Whether addresses of owners should be included in the division order title opinions;

(o) Whether counsel may utilize junior attorneys or paralegals to conduct the search;

(p) What the drop dead date is for the opinion delivery.

In addition, title counsel should request any ownership plats, mining claim maps, or other demonstrative representation of the land and lease ownership picture be provided, as well as confirm the lands to be search, the mineral lease or mining claim serial number, existing spacing or well-location and siting rules, whether the lands are unitized, and other information that would assist the title attorney to structure and implement his search. Other questions may become apparent in the course of the conversation. It is a good idea for the title examiner to memorialize the counsel's understanding of the order in a confirming letter to the landman. Answers to the foregoing questions should frame the confirming letter.

If a stand-up search is contemplated, the answers to these questions will allow the title examiner to more efficiently structure and manage the title project. It is beyond the scope of this paper to discuss title project management. That topic will be addressed at the end of this Institute, and the paper appears at the back of the binder.
§ 1.06 Conclusion.

The "whos" in this paper are the company title players—the company, the abstracter, the title attorney, the owners, and the holders of liens and encumbrances on title. The "whats" are the title evidence identified, extracted, and analyzed; the title laws that govern them; and the opinions to be delivered. The "whens," if you did not know, are always the "yesterdays"—the dates upon which the company wanted the title opinions. The "wheres" are the title repositories, those public records contain the evidence of title upon which the opinions will be based. The "whys" all involve the security of title—the ultimate goal—and the determination of bona fides of the seller-owner or user of the lands. The "hows" you will learn as this institute.

Hopefully you now have a foundation upon which subsequent speakers will build, with confidence that you now possess a working vocabulary of title terms and title practices. Remember, everything you learn during this institute has as its be-all and end-all title assurance.

FOOTNOTES


3See 1 Patton, supra note 1, § 3, at 4-5.

4See Black's Law Dictionary 945 (7th ed. 1999).

5See id. at 634.

6See 1 Patton, supra note 3, § 3, at 4.


8See 1 Patton, supra note 1, §§ 681-691. This system bears the name of Sir Robert Torrens of Ireland. Id. § 41 n. 5.

9Id. § 681, at n. 2 (Colorado, Georgia, Hawaii, Massachusetts, Minnesota, New York, North Carolina, Ohio, Virginia, and Washington).
Id. (Hawaii (statewide), Massachusetts (statewide), Minnesota (select counties), and Ohio (select counties)).

27 Hen. VIII, ch. 16, 2 Blackstone, 338.

See 1 Patton, supra note 1, § 3, at 7.

See id. § 4, at 12-14.

See id., § 4, at 14.


See, e.g. id. § 17-21-12(1)(b)–(1)(k) (2005).

For example, mineral title examiners customarily search records from the State Office, Bureau of Land Management, the county clerk, the county treasurer, the state agency charged with managing mineral development, and the Bureau of Indian Affairs, if applicable. However, as discussed infra, not all records from these public sources give constructive notice to subsequent purchasers. See infra text accompanying notes 28-36.


See, e.g., 1 Patton, supra note 1, § 4 at 18; Paul E. Bayse, Clearing Land Titles § 13 (2ed. 1970).

See infra text accompanying notes 28-36 for a discussion of constructive notice in the context of federal, state, and Indian title repositories.


See, e.g., Salt Lake County v. Metro W. Ready-Mix, 2004 UT 23, ¶ 13, 89 P.3d 155, 158 (Utah 2004), where the court stated:
To be in good faith, a subsequent purchaser must take the property without notice of a prior, unrecorded interest in the property. See Ault v. Holden, 2002 UT 33, ¶ 31, 44 P.3d 781. In addition, to be in good faith a subsequent purchaser must also take the property “without notice of any infirmity in his grantor's title.” Pender v. Bird, 119 Utah 91, 96, 224 P.2d 1057, 1059 (1950); see also Paldevo Ltd. P'ship v. City of Auburn Hills, No. 202134, 1998 WL 1988569, *2, 1998 Mich.App. LEXIS 626, at *5 (Mich.Ct.App. Dec. 18, 1998) (unpublished per curiam decision) (noting “[a] good-faith purchaser is one who purchases without notice of a defect in the vendor's title” and that “[n]otice need only be of the possibility of the rights of another, not positive knowledge of those rights”). This notice is not confined to situations in which a subsequent purchaser has actual notice of an unrecorded interest or infirmity in the grantor's title. Rather, it includes circumstances where a purchaser has constructive notice of such information, including both (1) record notice “which results from a record or which is imputed by the recording statutes,” and (2) inquiry notice “which is presumed because of the fact that a person has knowledge of certain facts which should impart to him, or lead him to, knowledge of the ultimate fact.” First Am. Title Ins. Co. v. J.B. Ranch, Inc., 966 P.2d 834, 837 (Utah 1998) (quoting 66 C.J.S. Notice § 6 (1950)). Id. at ¶ 13, 89 P.3d at 158. See generally, 1 Patton, supra note 1 § 11, at 49.


23aSee, e.g., First Am. Title Ins. Co. v. J.B. Ranch, Inc. 966 P.2d 834, 837 (Utah 1998) (that notice “which results from a record or which is imputed by the recording statute . . . .”).

24See id.

25See, e.g., id.; Salt Lake County v. Metro W. Ready-Mix, 2004 UT at ¶ 13, 89 P.3d at 158 (“inquiry notice which is presumed because of the fact that a person has knowledge of certain facts which should impart to him or lead him, to knowledge of the ultimate fact”); Grose v. Sauvageau, 942 P.2d 398, 402-03 (Wyo. 1997) (a purchaser who has actual knowledge of fact that would have led a reasonable person to inquire further is held to have actual notice of what a reasonable inquiry would have revealed).

26See infra text accompanying note 44.


30 See Sw. Petroleum Corp. v. Udall, 361 F.2d 650, 657 (10th Cir. 1966).


34 See id. § 150.2(m) (designating Land Titles and Records Offices as repositories of constructive notice); id. § 150.6 (providing for the recordation of documents).

35 See Hill, supra note 29 at 779-81.


38 See, e.g., Notice, Bureau of Indian Affairs System of Records, 72 Fed. Reg. 8772-76 (Feb. 7, 2007) (authorizing access to land title and records by private companies who lease, use, or seek to lease or use Indian trust and restricted lands, and to); 3 ALM supra note 33, at § 96.01[5]. Prior notices expressly identified title insurance and abstract companies. See id.


40 Richard R. Powell, 14 Powell on Real Property § 82.02[1][d][i] (Michael A. Wolfed., 2007).

41 Johnson v. Bell, 666 P.2d 308, 310 (Utah 1983).

See Salt Lake County v. Metro W. Ready Mix, Inc., 2004 UT 23, ¶ 13, 89 P.3d 155, 158; First Am. Title Ins. Co. v. J.B. Ranch, Inc., 966 P.2d 834, 838 (Utah 1998) ("Whatever is notice enough to elicit attention and put the party on his guard and call for inquiry is notice of everything to which such inquiry might have led. When a person has sufficient information to lead him to a fact, he shall be deemed conversant of it . . ." (quoting Salt Lake, Garfield & W. Ry. v. Allied Materials Co., 291 P.2d 883, 885 (Utah 1955)). See Hill, supra note 29, at 477 and cases cited therein.


See, e.g., County Bd. of Equalization v. State Tax Comm'n, 789 P.2d 291, 294 (Utah 1990) (purchaser had notice of unassessed taxes).

See, e.g., Salt Lake, Garfield & W. Ry. v. Allied Materials Co., 291 P.2d 883, 885 (Utah 1955) (documents in chain of title referred to unrecorded court decree quieting title in railroad). An important caveat is that mere reference to an unrecorded instrument is not sufficient in some states. The reference must also include an address where a copy of the unrecorded instrument may be examined, the name and telephone number of the contact person, and times when the document will be made available. See id.


See Fed. R. Evid. 201; Black's Law Dictionary 851 (7th ed. 1999) ("A court's acceptance, for purposes of convenience and without requiring a party's proof, of a well-known and indisputable fact.").


The buyer invokes the warranty of title as recourse for failed title and defects.

See, e.g., Culp Constr. Co. v. Buildmart Mall, 795 P.2d 650, 654 (Utah 1990) (defining an abstract as follows: [A condensed history of the title] to land, consisting of a synopsis or summary of the material or operative portion of all the conveyances, of whatever kind or nature, which in any manner affect said land, or any estate or interest therein, together with a statement of all liens, charges or liabilities to which the same may be subject, and of which is in any way material for purchasers to be apprised. An epitome of the record evidence of title, including maps, plats, and other aids.) See also Banker v. Caldwell 3 Minn. 94 (Minn. 1856).
Arkansas, Alabama, Georgia, Iowa, Illinois, Kansas, Indiana, Oklahoma, Maine, Maryland, Massachusetts, Minnesota, Montana, New Mexico, North Carolina, North Dakota, South Dakota, Texas, Utah, and Wyoming; and in parts of Florida, Kansas, and Wisconsin See 1 Patton, supra note 1, § 41, at n.8 and accompanying text.

53 See, e.g., Telephone Interview with John R. Nelson, Coastal Oil & Gas Corporation (Aug. 1990) (discussing Coastal's preference for stand-up title examination due to timing and abstracters limiting contract liability to the costs the title search and abstract compilation).

54 See 1 Patton, supra note 1. § 47, at 157.

55 See id. § 41 (Supp. 2007).

56 See 1 Patton, supra note 1, § 41, at 130-31 (citing Joyce D. Palomar, Title Insurance Law § 12:2 (West Group 2002).

57 See id. § 41, at 136.

58 See id. § 46, at 153.

59 See infra text accompanying notes 90-96.

60 See id. §§ 1:1-1:4.

61 See, e.g., Utah Code Ann. § 31A-20-110(1) (2005) (“No title insurance policy may be written until the title insurer or its agent has conducted a reasonable search and examination of the title and has made a determination of the insurability of title under sound underwriting principles.”).

62 See, e.g., Culp Constr. Co. v. Buildmart Mall, 795 P.2d 650, 653-54 (Utah 1990) (stating that preliminary title reports and commitments for title insurance are no more than statements of terms upon which the insurer is willing to issue a title policy); Chapman v. Uintah County, 2003 UT App 383, ¶ 18, 81 P.3d 761, 767 (standard of care for title insurer is that of an ordinary title insurance company and is liable only under the principles of contract).

63 See David A. Thomas & James H. Backman, Thomas & Backman on Utah Real Property Law § 13.04(b), at 605 (ed. 2005) [hereinafter Utah Real Property Law]. See also supra text accompanying note 64.

64 See, e.g., Am, Land Title Ass'n, “Owner's Policy of Title Insurance,” 6/17/0, at http://www.alta.org/forms/#2 [hereinafter ALTA Policy] (last visited September 5, 2007). See also, Utah Real Property Law, supra note 63, § 13.04(b), at 606. Covered risks include (1) title vested other than in the insured; (2) defects and encumbrances; (3) unmarketable title; (4) lack of access rights; (5) violation or enforcement of law pertaining to occupancy, enjoyment, character, dimensions, or location of land, subdivision of the land, or environmental protection; (6) enforcement action based upon police power; (7) eminent domain documented in the county records; (8) other takings affecting the purchaser but not apparent from the records; (9) title not
vested in the party as the result of a court order, preferential transfers under the bankruptcy laws or similar creditor's rights laws, insolvency; (10) defects or liens arising subsequent to the date of the policy and prior to recording of the insured transfer. ALTA Policy, *supra* note 66 at 1-2 (delineating “Covered Risks”). Covered defects include: (1) forgery, fraud, undue influence, duress, incompetency, incapacity, or impersonation; (2) failure of any person or entity to have authorized a transfer or conveyance; (3) document affecting title not properly created, executed, witnessed, sealed, acknowledged, notarized, or delivered; (4) failure to perform those acts necessary to create a document by electronic means authorized by law; (5) document executed under a falsified, expired, or otherwise invalid power of attorney, (6) document not properly filed, recorded, or indexed in the public records including failure to perform those acts by electronic means authorized by law; or (7) defective judicial or administrative proceeding.

65 Exceptions include regional exclusions and variable exceptions such as taxes, CC&R's listed on Schedule B. This is where the minerals exclusion is inserted in many states when titles are based upon mineral patents or the area is known for mineral development and potential. *See id.* at 5 (containing Schedule B and the “Exceptions from Coverage”).

66 *See, e.g.,* Lawrence v. Chicago Title Ins. Co., 192 Cal.App.3d 70, 76-77, 237 Cal.Rptr. 264, 267-68 (Cal.App.1987) (the California Supreme Court upheld White v. Western Title Ins. Co., 40 Cal.3d 870, 221 Cal.Rptr. 509, 710 P.2d 309 (1986), which applied abstracter liability to title insurance companies, but the court noted that the cause of action arose in the *Lawrence* case after the California legislature had passed a law eliminating abstracter liability for title insurance companies); *see also* Brown's Tie & Lumber v. Chicago Title Co. of Idaho, 115 Idaho 56, 59-60, 764 P.2d 423, 426-27 (1988) (upholding *Anderson* and stating that to fall outside of the *Anderson* rule it must be shown that abstracter duties were voluntarily assumed); Anderson v. Title Ins. Co., 103 Idaho 875, 879, 655 P.2d 82, 86 (1982) (refused to impose the liabilities of an abstracter upon a title insurance company merely because it issued a preliminary title report); Horn v. Lawyers Title Ins. Co., 89 N.M. 709, 711, 557 P.2d 206, 208 (1976) (no duty of title insurance company to search records unless express or implied in the policy). Tort liability arises only when a title company takes upon itself additional duties, such as acting as an escrow agent.

67 *See, e.g.,* Moore v. Title Ins. Co. of Minn., 148 Ariz. 408, 411-12, 714 P.2d 1303, 1306-07 (Ct.App.1985) (title company can be held liable in tort for its negligence when it holds itself out as a searcher of titles and provides the information for the applicants to act upon); McLaughlin v. Attorneys' Title Guaranty Fund, Inc., 61 Ill.App.3d 911, 18 Ill.Dec. 891, 895, 378 N.E.2d 355, 359 (1978) (when a person seeks title insurance, he expects to obtain a professional title search legal opinion as to the condition of title and a guarantee); Dorr v. Mass. Title Ins. Co., 238 Mass. 490, 495, 131 N.E. 191, 192-93 (1921) (title insurance company held to have acted not merely as a title insurer but also as a paid agent in examining the title); Heyd v. Chicago Title Ins. Co., 218 Neb. 296, 235 N.W.2d 154, 158-59 (1984) (when rendering a title report and issuing a policy, a title insurance company assumes the two distinct duties of abstracter and title insurer); Sunset Holding Corp. v. Home Title Ins. Co., 172 Misc. 759, 763, 16 N.Y.S.2d 273, 276-77 (1939) (purchaser of realty was entitled to recover against title insurance company for negligent examination of title where title report was inaccurate on dimensions of property).
A consolidated estate is one in which the surface and mineral estates have never been \textit{severed} or separated by deed, devise, or decree or have merged or re-consolidated into the same ownership by the same devices. One is said to own the lands from the surface to the center of the earth. \textit{See}, \textit{e.g.}, Texas Co. v. Daugherty, 176 S.W. 717, 719-20 (Tex. 1915). For a discussion of split estates, see generally Phillip Wm. Lear & Stephanie Barber-Renteria, \textit{“Split Estates and Severed Minerals: Rights of Access and Surface Use after the Divorce (and Other Leasehold Access-Related Problems),”} 50 \textit{Rocky Mt. Min. L. Inst.} 10-1, 10-4 to 10-31 (2004).

Minerals are not taxed in most states until produced, and they often are assessed by a central (state) authority. \textit{See}, \textit{e.g.}, Utah Code Ann. §§ 59-5-102, 59-4-101(3)(e) (2006 & Supp. 2007) (ad valorem taxation of minerals is based upon gross production for the prior tax year and severance tax is based upon a percentage of production.).

For one court's black letter definition, see \textit{Mostrong v. Jackson}, 866 P.2d 573, 577-578 (Utah App. 1993), where the court stated: Marketable title is that title that “may be “freely made the subject of resale” and that can be sold at a “fair price to a reasonable purchaser or mortgaged to a person of reasonable prudence as security for the loan of money.” Moreover, marketable title must be “as free from \textit{apparent} defects as from actual defects, one in which there is no doubt involved either as a matter of law or fact. Every title is doubtful which invites or exposes the party holding it to litigation.” The issue of whether marketable title exists may be a question of law or a mixed question of law and fact, depending on the circumstances. \textit{See id.} Determination of the issue is not on the basis of “whether title ultimately might be adjudged free of defects. Rather, it is “whether a reasonably prudent [person], familiar with the facts and apprised of the question of law involved, would accept the title in the ordinary course of business.” (citations omitted). \textit{See also} Booth v. Attorneys' Title Guarantee Fund, Inc., 2001 UT 13, ¶ 33, 20 P.3d 319, 325; Kelley v. Leucadia Financial Corp., 846 P.2d 1238, 1243-44 (Utah 1992). For a compilation of cases, see \textit{1 Patton supra} note 1, § 48 (and cases cited therein).

\textit{See 1 Patton, supra} note 1, § 48 at 162-63 (and cases cited therein).

\textit{See, e.g.,} Scheitlin v. R & D Minerals, 701 P.2d 1388 (Mont. 1985); Curtz v. Park City Chief Mining Co., 175 P.2d 491, 492 (Utah 1946) (stating that parties agreeing to recognize contractual obligations did not waive right to require seller to prove marketable title); Watts v. Elmore, 176 P.2d 220, 223 (Okla. 1947) (referring to perfect title).

In chronological order of adoption the states are Iowa, Illinois, Wisconsin, Minnesota, Indiana, Michigan, Nebraska, Rhode Island, South Dakota, North Dakota, Ohio, Oklahoma, Florida, Utah, Connecticut, Vermont, Kansas, North Carolina, and Wyoming. See generally \textit{3 Patton, supra} note 1, § 563 for an in-depth discussion of Marketable Record Title Acts.


75 See 3 Patton, supra note 1, § 563, at 86.


77 See, e.g., id. § 57-9-3(2).

78 See, e.g., id. § 57-9-2 (forty-year possession, notices of interest, instruments recorded during the statutory period, and exceptions listed in § 57-9-6); id. § 57-9-6(1-6) (lease reversions, easements held by utilities, and minerals and associated rights).

79 See id. § 57-9-6(3), (6) (reversions under a lease, utility and railroad easements, water rights, and federal and state ownership or interests).

80 See, e.g., Holland v. Hattaway, 438 So.2d 456, 468 (Fla.App. 1983).

81 Section 1.04 is drawn from an earlier rendering on the subject found in Phillip Wm. Lear & Robert P. Hill, “Examination of Title to Fee Lands,” Mineral Title Examination II, 2-3 through 2-5 (Rocky Mt. Min. L. Fdn., 1982) [hereinafter Mineral Titles II] and is updated herein to reflect the discussions of other authors.


84 See Morgenthaler supra note 83, at 68.

85 See, generally, Morgenthaler, supra note 83, at 68-70.

86 See id.

87 See Christopher Mangen, Jr. & Ken G. Hedge, “Title Opinions on Indian Lands and Leases,” Mineral Title Examination IV Paper No. ___ (Rocky Mt. Min. L. Inst., 2007) [hereinafter Mineral Title IV]; Paul Upsons, “Putting It All Together: Incorporating the Information Obtained from a Title Examination into A Title Opinion,” Mineral Title IV, Paper No. ___; Sheryl L. Howe, “Preparing Title Opinions, Comments, and Requirements: Deciding What's Important (Is This the Baby or the Bathwater)?,” Mineral Title IV Paper No. ___.

23

89 See *Morgenthale*, supra note 83, at 79-80.

90 See *1 Patton*, supra note 2, § 41, at 125.

91 See *id.* § 54, at 201.


93 Landmen or brokers who provide abstract compilations to companies or to attorneys may be conducting the unauthorized practice of law in some states. See, e.g., *Beach Abstract & Guaranty Co. v. Bar Ass'n of Ark.*, 326 S.W.2d 900 (Ark. 1959) (performing title examination, compiling abstracts, and preparing documents of title constitute unauthorized practice of law).

94 See, e.g., *Perkins v. CTX Mortgage Co.*, 969 P.2d 93, 100 (Wash. 1999) (holding that layman practicing law even under authorized circumstances are held to the same standard of care as lawyers). It follows that it would be the same standard for those laymen conducting the unauthorized practice of law.


96 See *supra* text accompanying note 58.

97 This has not always been the case. The author recalls the days in the glory days of the 1970's and 1980's when he would visit in-house counsel at then Shell Western E&P, Inc. in Houston to see Deister, Ward & Wicther, Inc. abstracts adorning, if not covering, every free space of the office floor.

98 See *Manual of Terms* supra note 82, “Title Opinion,” at 1081.