

Resolving Title Issues in Shale Development

May 10-11, 2012

Wheeling Island Hotel
Wheeling, West Virginia

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Signature

Date

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Resolving Title Issues in Shale Development

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This program assumes an understanding of basic abstracting and title search principles and will address *intermediate and advanced issues* to include standards for reasonable and diligent searches; resolving ownership and development issues, particularly those peculiar to horizontal and directional drilling; seeking solutions where gaps in the chain of title exist or where owners may be missing; analyzing impediments to development where co-tenancies exist and less than one hundred percent of the owners can agree on development; transfers of leases and the investigation necessary to determine the viability of existing leases; evaluating liens, understanding tax titles, assessing the regulatory environment for Marcellus development, pooling and unitization, and Dormant Mineral statutes. The analysis under each of these topics will include the laws in the four-state region encompassed by the Marcellus Shale and Utica formations: New York, Pennsylvania, Ohio and West Virginia.

Schedule

Thursday, May 10, 2012

7:00 a.m. Registration opens

8:00-9:00 a.m. **Gaps in the Chain of Title and What Constitutes a Diligent Search**

■ Sean Cassidy, *Sean Cassidy & Associates*, Greensburg, PA
A common occurrence in mineral title examinations is to encounter a gap in the chain of title. This topic will address (1) the standard for a reasonable and diligent search of owners using existing records available at the court house and in a modern world of electronic communication and data sites, the additional searches which a prudent examiner would make; (2) the standard for certifying that a diligent search has been made in the context of a legal proceeding, such as a partition case or statutory proceeding to obtain the interest of "missing" owners; (3) and property descriptions and the importance of understanding legal descriptions in a title examination with an analysis of ambiguous or erroneous descriptions and the effect on title. Also included are helpful tips and use of checklists and forms to prevent oversight and error.

9:00-11:00 a.m. Ownership Determination and Resolving Ambiguities

■ J. Thomas Lane, *Bowles Rice McDavid Graff & Love LLP*, Charleston, WV

This topic will address conveyances where inherent ambiguities may exist, to include (1) deed conveyances of combinations of “Surface,” “Oil and Gas” and “Minerals” and various combinations of these terms and will sort out what the terms mean in the context in which they are used. Guidance will be provided to such questions as: when does the word “surface” also include oil and gas; and when does the term “minerals” in Pennsylvania include oil and gas; (2) conveyances in which the interest conveyed is misdescribed. All too frequently conveyances will be made of “rent” or “royalty” or possibly other terms and in some cases these words have been construed to mean the oil and gas in place. In other cases recognition is given the intent to subdivide incidents of ownership: Rent, royalty, bonus, development rights and executive rights, so that each can possibly be owned by separate owners; (3) distinguishing “Royalty” and Ownership: What is the difference between a royalty” interest and a “mineral” interest?; (4) conveyances of fractional interests in which a 1/16th royalty can be interpreted to mean 1/2 the oil and gas; (5) conveyances with prior exceptions of fractional interests and application of the *Duhig* rule in determining reserved interests as opposed to the conveyed interests; (6) reference back to a prior non existence reservation; Two Grants Problems.

11:00-11:15 a.m. Break

11:15-11:55 a.m. Adverse Possession

■ Andrew J. Sonderman, *Kegler Brown Hill & Ritter*, Columbus, OH

Where a gap in the chain of title cannot be satisfactorily resolved, the doctrine of adverse possession may serve to perfect title in subsequent claimants. This topic will include the basic principles of adverse possession, applicability to severed mineral title and the unique issues involved when adverse possession occurs during or after a severance of mineral title.

11:55 a.m.-1:00 p.m. Hosted Luncheon

1:00-2:00 p.m. Divided Ownership and the Ability to Develop Oil and Gas with Less Than 100% of Owners

■ Britt A. Freund, *Bowles Rice McDavid Graff & Love LLP*, Charleston, WV

Where ownership is divided among multiple owners either as co-owners or successive owners (future interests), the several states have different fundamental rules which apply to the ability to develop where less than all of the owners will agree. In a majority of states any mineral owner can develop the common property but has a duty to account to the other owners. This topic will address the laws of those states where this doctrine applies and the duties of the developing owner and the options the non developing owner may have to participate on a carried basis or as a royalty owner. A minority of jurisdictions have waste statutes which effectively make it actionable for any owner of property to develop the common property. This topic will address the laws in those states adopting the minority rule, waste statutes that may apply and remedies available for those owners who wish development to occur, including (1) missing and abandoning owner statutes; (2) partition; and (3) pooling and unitization agreements. With respect to either jurisdiction, what special considerations apply when horizontal or directional drilling will involve multiple separate tracts with different ownership?

2:00-3:00 p.m. Transfers and Assignments of Leases Which Are Held By Production

Carl F. Staiger, *Buchanan Ingersoll & Rooney PC*, Pittsburgh, PA

In many instances operators will obtain acreage for development by securing assignments of existing leases which generally are held by producing wells. This topic will include the following: (1) analysis of the due diligence investigation necessary to conclude that leases remain in effect, to include acts or operations necessary to maintain leases both during the primary and extended terms, and conversely, the conditions (generally cessation of production during the extended term) which will cause a lease automatically to terminate. Once terminated, an analysis will be made of the ability to revive the lease; (2) outstanding working interests – oftentimes existing leases will have assignments of working interests to other parties. An analysis will be made of the nature of working interests, the rights of outstanding working interest owners, the ability of outstanding working interest owners to participate or prevent new development, and the nature of the working interest owners’ rights (wells vs. leases); (3) industry agreements affecting title to include an overview of joint operating agreements, farmouts and farmins, participation agreements, exploration agreements, area of mutual interest agreements. Discussion will include how these agreements may affect title, whether recorded or not, and how assignments of title may be made subject to these agreements. Where preferential rights are identified, an analysis will be made as to their effect and at what point they expire; and (4) prohibitions against assignment: in some instances leases will have prohibitions against assignment and the analysis will include the validity of such prohibitions and how the courts interpret and apply the prohibitions.

3:00-3:15 p.m. Break

3:15-4:15 p.m. Liens and Actions Necessary to Proceed With Development, Probate and Intestate Succession, and Notice and Consent Requirements in New York, Ohio, Pennsylvania, and West Virginia

■ Keith A. Zabela, Michael K. Vennum and William T. Fahey, III, *Burleson LLP Title Group*, Canonsburg, PA

Where liens exist against title to property, subordination or other rights from the lien holder may be necessary. This topic will analyze the types of liens which can exist, the duration of the lien, the impediments they cause to development, and the types of rights which will need to be secured for an operator to proceed with development. This analysis will serve to guide the period of time which must be covered by title searches. This topic will also address those instances where only limited rights from the owner may be necessary, such as consent for drilling a well or securing ancillary rights such as the right to use one tract for the development of minerals from another tract. This session addresses procedures for probate, intestate succession laws, including the effect of statutory changes over time, imposition of inheritance tax liens and an analysis for resolving transfer of title and the documents which should be analyzed to ensure that successive owners are ascertained and whether any potential liens could exist. An evolving requirement in the several states under consideration is that notice be provided to surface owners and coal owners in connection with obtaining permits for drilling oil and gas wells. This topic will address the notices which must be given in the four-state region as well as consents which may become necessary before drilling oil and gas wells. Such requirements may require that a title examination include the title to the surface, coal and possibly other interests in the land.

4:15-4:55 p.m. The Ohio Dormant Mineral Statute and Ohio Title Examination Standards

■ Gregory D. Russell, *Vorys, Sater, Seymour & Pease LLP*, Columbus, OH

■ Sheila Nolan Gartland, *Vorys, Sater, Seymour & Pease LLP*, Columbus, OH

The Ohio Dormant Mineral Statute will be analyzed along with discussion of the validity of dormant mineral statutes generally. West Virginia, New York and Pennsylvania do not have statutes, although failure to enter and pay taxes can result in loss of title through tax sales. The second portion of this presentation covers the Ohio Title Standards, how they were adopted, the effect (if any) on malpractice claims and the reliance courts have placed on such standards in cases involving title disputes and malpractice claims.

5:00 p.m. Benedum Chapter Cocktail Reception

6:00 p.m. Benedum Chapter Monthly Dinner Meeting

Friday, May 11, 2012

8:00-9:30 a.m. Tax Titles

■ Professor John W. Fisher, *West Virginia University College of Law*, Morgantown, WV
Panelists:

■ Lester L. Greevy, *Greevy & Associates*, Montoursville, PA

■ John H. Heyer, *Attorney at Law*, Olean, NY

■ Douglas C. McElwee, *Robinson & McElwee PLLC*, Charleston, WV

■ William J. Taylor, *Kincaid, Taylor & Geyer*, Zanesville, OH

Professor Fisher will provide an overview of the constitutional issues which will guide the validity of all tax sales and titles. This presentation will include owners and interests entitled to notice, the nature and type of notice which is required, minimal safeguards to ensure due process in the sale process, and the time period in which an owner of property may have to challenge a tax sale and deed where due process requirements are not met. Each presenter from the four states will analyze state specific issues: (1) basic property tax system, duties of owners of property to have property entered for taxes, procedure for the assessment and payment of taxes and procedures for sale when taxes are not paid; (2) unique questions existing with severed mineral title and the requirements for assessing and paying taxes on severed interests, and conversely, the consequences of failing to have mineral interests separately assessed, or failing to have a correct description or interest in the property or failing to pay taxes; (3) duties of tax purchasers or county officials for identification of former owner and providing notice of sale before deeds may be issued; (4) owners and interests in land entitled to notice; (5) time periods of a former owner to challenge the sale and statute of limitations for challenges; (6) the interests in land included in a tax sale, especially where the mineral ownership is severed and there is no separate assessment of the minerals; (7) what is a "title wash" in Pennsylvania and what unique issues arise when different assessors arbitrarily elect to assess or not assess separately owned minerals and what is the reach back period for declaring delinquencies for non-payment of taxes?; and (8) in instances where defects exist, the analysis will address whether the deed is void *ab initio* or from the date voiding the sale.

9:30-10:30 a.m. Title to Minerals Under Rivers and Streams, Railroads and Public Roads

■ Charles F. W. Saffer, *Robinson & McElwee PLLC*, Charleston, WV

Drilling units often have lateral legs that run under the beds and banks of rivers and streams, railroads and public roads. Accordingly, the owner of the minerals under these areas must be identified. This topic will summarize each state's statutes and case law regarding ownership of minerals underlying these areas. In addition, each state's official agency position regarding ownership of minerals underlying beds and banks of rivers and streams and public roads will be provided and a brief history of each state's road system will be reviewed. Specific to West Virginia, there will be an analysis of the status of pre-civil war turnpikes and county roads brought into the state road system in 1933 including interpretation of specific instruments by WVDOH. In addition, in situations where the public or a railroad possesses only an easement interest, the topic will address methods to determine which adjacent land owners have the best claim to ownership of the minerals underlying these areas.

10:30-10:45 a.m. Break

10:45-11:45 a.m. Other Means to Prove Title: Affidavits and Deed Recitals

■ James W. Adams, Jr., *Sadler Law Firm, LLP*, Houston, TX

Affidavits: What are the critical elements and to what extent have courts recognized the proof intended by affidavits, especially when the affiants are not available to testify? Are affidavits recordable, and if so, how do clerks index and record? Included will be statutes such as Pennsylvania's which prescribe forms and the effect of a title attorney relying on an affidavit. Recitations in deeds: To what extent can reliance be made on recitals found in deeds, especially when they are made by successors with a self interest in the property?

11:45 a.m.-1:00 p.m. Hosted Luncheon

1:00-1:45 p.m. Recording Requirements and Local Issues

■ Kevin C. Abbott and Robert M. Jochen, *Reed Smith LLP*, Pittsburgh, PA

This session covers disputes over the recording of lease documents in the Marcellus and Utica era. The wave of leasing activity has caused a corresponding wave of increased recording of oil and gas leases, memoranda of leases, assignments of leases and numerous other documents. In some counties the recorders of deeds have enacted policies to either frustrate that recording or to benefit from it. That has resulted in litigation challenging the right of recorders to enact policies and fees that vary from state law. The paper examines the decisions on various issues in *Chesapeake v. Golden* and the issues in other cases. This session will also cover the requirements for recording deeds, leases, and assignments of leases, including forms, taxes, recording fees, where maps are recorded, and the need for a surveyor or engineer certificate.

1:45-2:45 p.m. Litigation as a Curative Tool for Title Defects

■ Russell L. Schetroma, *Steptoe & Johnson PLLC*, Meadville, PA

This session covers the types of procedures which can be used to quiet title, judicially declare ownership and rights and otherwise resolve title issues, the procedure involved in such actions, proof required, ability to use title experts and substantive issues. This will include actions seen in Pennsylvania where surface owners have instituted civil actions to quiet title where minerals are known to be severed, but no activity has occurred for many years. Also included are actions and prerequisite to foreclosing on liens.

2:45-3:00 p.m. Q&A for Friday's speakers

3:00 p.m. Adjourn



Resolving Title Issues in Shale Development

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Registration fee covers all educational sessions, looseleaf handbook with written materials by speakers, CD containing all written materials and PowerPoint presentations plus selected mineral titles articles previously published by the EMLF. Continental breakfasts, refreshment breaks and lunch on both days are included in the registration fee.

<i>Registration fees</i>	<i>Early Bird (by April 6)</i>	<i>After April 6</i>
Non-member Registration Fee	\$575	\$675
EMLF and Benedum Chapter Members	\$450	\$550

Program Materials (Available after conference)

Looseleaf Manual and CD	\$200
Looseleaf Manual, CD and Audio CD	\$300

Three ways to register

- If registering online, go to www.emlf.org
- If registering by fax, call 859.226.0485
- If registering by mail, send form and payment to EMLF, 340 South Broadway, Suite 101 Lexington, KY 40508

Accommodations

The conference is being held at the Wheeling Island Hotel, 1 South Stone Street, Wheeling, WV. There are a limited number of rooms and no room block is being held, so make your reservations early. Call 877.943.3546 for reservations.

Alternate lodging nearby may be found at the Hampton Inn Wheeling, 795 National Road, 304.233.0440.

Mandatory CLE

and Professional Credit

The EMLF program, Resolving Title Issues in Shale Development, May 10-11 at the Wheeling Island Hotel in Wheeling, WV, contains 770 minutes of professional education. Credit application has been made to states with Mandatory Continuing Legal Education (MCLE) requirements and with the AAPL. This is approximately 12.8 hours of CLE credit in “60-minute” states and 15.4 hours of CLE credit in “50-minute” states.

Cancellation policy

Full refunds less a \$75 administrative fee will be given for registration cancellations received by May 1. No registration refunds will be made thereafter, but substitutions can be made by calling the Foundation at 859.231.0271. Persons not entitled to any refund will receive a copy of the handbook, CD and meeting materials. EMLF members who cancel their registrations after May 1 will receive program materials and a \$100 credit toward a future program.