LAND AND TITLE DUE DILIGENCE FOR MINING TRANSACTIONS

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I. Introduction

The objective of due diligence is two-fold. First, it is intended to provide in-depth knowledge about the asset or entity involved in a proposed transaction, which is not often publicly available at the time of the negotiation. Secondly, it is to confirm the representations and warranties made by the target in the relevant transaction agreement, as well as to identify any major or significant "gaps" in such representations and warranties. Both of these aspects go directly to the price of the transaction and the risk that the acquiring or investing party is willing to assume. As to the land or title portion of due diligence, the purpose of the inquiry is to confirm that the "target" of the transaction in fact owns the interest in the real property it is claiming to own, identify any third party interests in the property, and identify any other issues that could affect the target's interest in the property.

Determining the appropriate scope of any land due diligence project is in many ways the most important, and most challenging, aspect of the due diligence process. On one hand, the party performing due diligence needs to be thorough enough in the inquiry to ensure that he or she has correctly answered the fundamental questions identified above, while on the other hand must keep in mind the sometimes competing interests of budget and the timeline of the proposed transaction. Complex title examinations can take weeks or months to complete, and the party performing the due diligence may not have the luxury of time (or budget) to examine all facets of title to all of the property involved in the transaction.

Therefore, at the outset of the project, the party performing the due diligence should spend some time with the available documents to determine what title work has been done in the past and whether there are any ways to limit or tailor the scope of the inquiry. For example, if title opinions or title reports have previously been prepared for some or all of the property in question, then it is likely appropriate to limit the title due diligence to updating or "brining down" those existing title reports. If there are no prior title reports for the property and there is a large land package involved, it may be appropriate to limit the inquiry to a subset of the most valuable or prospectively valuable lands. However, any limitations on the scope of the title due diligence to be undertaken will create the risk that a potential issue may be missed. Thus, significant care should be taken up-front to define the scope of the due diligence inquiry in a way that will minimize this risk. Then, the party for whom the project is being conducted must be fully informed of, and agree to assume, the risk that may come from limiting the scope of the diligence inquiry.

While the nature of the property in question, and the scope of the inquiry to be performed, will change based on the project and the objective of the due diligence, this paper provides a general overview of the matters that should be addressed in the land section of a due diligence report for a mining project, with a specific focus on unpatented mining claims.

II. Background

A. Land Tenure Systems in the United States

There are four main divisions of real property ownership in the United States: federal public lands, state public lands, private or fee lands, and tribal lands. Mining projects can be situated on lands comprised of any of these categories, or multiple categories, and the first action that any party conducting land or title due diligence should perform is to identify and categorize the types of land included in the project area. For obvious reasons, the type of land or lands in the project will determine what materials must be reviewed during due diligence.

Federal Public Lands—Federal public lands are what is left in the federal public domain of the land mass that the federal government acquired to assemble what is now the United States. The federal government assembled these lands through a number of treaties, purchases, cessations, and annexations. These include, among many others, the grant of the original thirteen colonies from Great Britain following the Revolutionary War, the Louisiana Purchase from France, the Spanish cession of portions of Florida and Colorado in 1819, the 1845 annexation of the Republic of Texas, the 1946 treaty with Great Britain to the Oregon Territory, and the 1848 Treaty of Guadalupe Hidalgo with Mexico that ended the Mexican War and that drew the boundary between the United States and Mexico at the Rio Grande and the Gila River.

Over time, through different mechanisms and laws, the federal government divested a percentage of these lands to private parties through the issuance of patents and other grants. Patents were used as an incentive to draw citizens to explore and develop new areas in America, including primarily the lands west of the 100th meridian. The way in which a given parcel of property made its way into private ownership continues to be important today and can have significant impacts on the extent of the property right granted. For example, under some laws, the federal government conveyed the surface estate to a private party but retained the minerals, or only retained certain minerals. Thus, depending upon the scope of the due diligence project and other title work that has been performed on the property, it may be necessary to review all documents in the chain of title to the particular parcel back to the document where the federal government transferred its right, title, and interest ("patent") to fully determine the scope of the rights associated with such property.

Particularly in the American West, however, the federal government continues to own significant lands and minerals, and much of the mineral exploration and development activity in the West occurs on federal public lands. For example, in Nevada, one of the most active states for hard rock exploration and development, the federal government owns approximately 84.9% of all land in the state.[1] As relevant here, the acquisition of minerals and right to mine minerals located on federal public lands is governed by the General Mining Law of 1872[2], as to "locatable" minerals and the Mineral Leasing Act[3], as to coal.

State Public Lands— The original concept under which new states were to be admitted to the United States was on an "equal footing" with the original thirteen colonies, including land ownership and title. For many of the western states, however, the enabling act that created a state

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[1] *Here's How Land is Used by the Federal Government in Nevada*, Caitlin Lilly, LAS VEGAS REVIEW-JOURNAL, February 18, 2016.

[2] 30 U.S.C. §§ 22 et seq.

[3] 30 U.S.C. §§ 181 et seq.

from the Federal territory contained a waiver of the equal footing principle. In most of the western states, in lieu of assuming ownership of lands pursuant to the equal footing principle, the states were granted specific land grants including sections of land for schools, hospitals and other uses.[4] Of these various grants, the most important for mining law purposes is the grant of state school land sections. Generally, if the same were available at statehood and had not previously been granted to other private interests (including settlers and miners), one or two sections of land in each Township was granted to the state being admitted, to support the common schools and other state institutions.

Many western states continue to own significant holdings, many of which contain valuable mineral resources. Acquisition of minerals and the right to mine minerals located on state public lands is typically through leasing, the components of which vary from state to state.

Fee Lands—As noted above, and with some historic exceptions, most fee property in the United States was initially owned by the federal government, or, less commonly, a state government, and was granted by patent to private parties. The most common type of fee property encountered in mining due diligence is the patented mining claim. As discussed in more detail, under the General Mining Law of 1872, a claimant could convert federal public lands to private ownership by complying with the requirements of the law and proving that the land in question contained a valuable mineral deposit. Upon the claimant's satisfaction of these requirements and the federal government issuing a patent, the lands became fee property and the claimant, now fee title holder, could use the lands for any purpose. While many patented claims are still used for mining purposes, many patented claims are now used for purposes completely un-related to mining, such as ski resorts, home sites, and, in some cases, towns.

Tribal Lands—A special case of property rights that is often not well-understood by mining companies is the rights of Native Americans on certain lands, known as "Indian Country." As defined in the U.S. Code, "Indian Country" means:

> (a) All land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation;
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> (b) All dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state; and
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> (c) All Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the

[4] Title to state land grants is anything but straightforward. The title often did not "vest" at statehood, but the vesting date often depends on whether the lands were known to be "mineral in character" or not, the date of the survey, the date of any "confirmatory patent" issued by the Federal government, and in the case of lands known to be "mineral in character", the later of the date of the survey or January 25, 1927 which was the date of the Jones Act, 43 U.S.C. § 870. Prior to vesting, the lands were subject to other divestment by the Federal government, including through the mining laws. *See* American Law of Mining, 2d ed. Chapter 95.

same.[5]

Under U.S. law, Indian tribes are "domestic dependent nations."[6] The Federal government, in its role as trustee, has significant control and approval rights for operations on tribal lands.

A discussion of mining on tribal lands is beyond the scope of this paper, but it is important to note this category of lands, and also note that specific authorizations from the tribe, which typically must be approved by the federal government, are required for mining operations on tribal lands. For the most part, mining on tribal lands occurs under a lease administered by the Bureau of Indian Affairs.

B. Unpatented Claims under the Mining Law of 1872[7]

The General Mining Law of 1872[8] ("Mining Law") allows an individual to locate mining claims on land owned by the Federal government. The interest is "self-initiated," meaning that no act of the federal government is necessary to establish the right. The locator has a valid interest in such land, as long as (i) the land was open to location; (ii) the location is properly made; (iii) a discovery of a valuable mineral deposit is made; and (iv) the claim is properly maintained through annual filings and/or payments. For millsites, similar requirements apply, except that the land must be *nonmineral* in character and the claim must be actively used for mining or milling purposes.

Until 1920, the Mining Law governed all federal minerals. However, now the Mining Law only applies to so-called "locatable" minerals. Locatable minerals include: gold, silver, copper, lithium, bentonite, ferrous metals, gems, platinum group metals, and uncommon varieties of pumice, silica and limestone. In 1920, through passage of the Mineral Leasing Act[9], Congress excluded so called "leasable minerals" from the Mining Law, including coal, oil, gas, phosphate, sodium, potassium, oil shale and gilsonite, among others. Similarly, Congress excluded common varieties of sand and gravel and similar types of materials from the Mining Law through the Materials Disposal Act of 1947.[10] The question of whether a mineral is locatable under the Mining Law can be a technical question that is beyond the scope of inquiry for most due diligence projects. However, if the mineral at issue is not within the types of minerals commonly considered locatable, further inquiry should be made as to the way in which the BLM has classified this material in the past, and whether there is any authority from the Interior Board of Land Appeals or other court

[5] 18 U.S.C. § 1151.

[6] This doctrine was established in the United States Supreme Court in the Marshall case trilogy brought before the Court from 1823 to 1832 - Johnson v. M'Intosh, 21 U.S. 543 (1823); Cherokee Nation v. Georgia, 30 U.S. 1 (1831); and Worchester v. Georgia, 31 U.S. 575 (1832).

[7] For an in depth discussion of the nature of the ownership right in an unpatented mining claim, *see* 2 American Law of Mining, Chapter 36.

[8] 30 U.S.C §§22 et seq.

[9] 30 U.S.C. §§ 181 et seq.

[10] 30 U.S.C. §§ 601 et seq.

decisions involving the mineral in question.[11]

The Mining Law allows for the owner of an unpatented mining claim to prove that the claim contains a valuable mineral deposit and receive a patent, or conveyance of fee title, to the claim. However, Congress has imposed a moratorium on the issuance of mining claim patents through the annual Department of Interior spending bill every year since 1995. Therefore, many full-scale mining operations are conducted on unpatented claims and the provisions of the Mining Law specific to the patent process, while still on the books, are not relevant unless and until the moratorium is lifted. If a patent to an un-patented claim was issued by the federal government, then the property becomes fee property and is no longer subject to the requirements of the Mining Law. However, unless and until a patent issues, the unpatented claim remains subject to the Mining Law and its specific requirements for maintaining the claim.

Subject to federal and state statutory and regulatory requirements, the owner of a valid unpatented mining claim or millsite has the exclusive right to use and possess the property for mining purposes and to develop and sell the mining products from the same free of any royalty to the federal government. A mining claim can be sold, mortgaged, inherited and otherwise treated like other real property interests.

1) Types of Mining Claims

The Mining Law provides for four types of claims: lode mining claims, placer mining claims, millsites and tunnel sites. It is important to distinguish among these types of claims and sites as each has its own, quite different, characteristics. Moreover, the location of the wrong type of claim or site on any particular parcel of land can invalidate the claim or site. For example, locating a lode claim on a placer deposit is invalid. Locating a placer claim on a lode deposit is generally invalid.[12] Finally, locating a millsite on land valuable for lode or placer deposits is not permitted by the Mining Law.

(a) *Lode Claims.* Lode claims are located on lands where the minerals are contained in veins or lodes of quartz or other rock in place. Generally this means that the deposit being located using a lode claim has to be a mineralized zone held in place by adjoining rock. Lode deposits are usually mined by drilling into the lode and blasting the rock to permit mucking, hauling and subsequent processing. Lode claims are limited to a maximum of 1500 feet along the length of the claim and 300 feet on either side of the middle of the vein.

(b) *Placer Claims.* Placer claims are located on "all forms of deposits, excepting veins of quartz, or other rock in place. . . ."[13] In other words, by using the negative, the placer deposit is defined as any deposit that does not qualify as a lode. These deposits are typically heavy metals that have been transported over time from their point of origin to a new point where they are

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[11] Interior Board of Land Appeals (IBLA) decisions may be found at https://www.doi.gov/oha/organization/ibla/Finding-IBLA-Decisions .

[12] *See, e.g.,* TAGS Realty, LLC v. Runkle, 2015 Mont. 166, 352 P.3d 616 (2015), in which the Montana Supreme Court in analyzing conflicting claims and citing 30 U.S.C. §§ 22-47, stated that "a valid, unpatented lode claim, supported by a proper lode discovery, includes with it all placer deposits found within its boundaries."

[13] 30 U.S.C. § 35.

concentrated mechanically. A classic placer deposit is one where gold is found in loose sand or gravel in a stream bed that can be mined using a sluice or pan and that does not require drilling and blasting. A placer claim is thus staked on any deposit that is not a lode or vein and covers deposits that are not fixed in rock, *i.e.*, those that are loose in the earth, sand or gravel. The maximum size of an individual placer claim is twenty acres, and the claims should, where practicable, be located in accordance with subdivisions of the public land survey system. Two or more locators may form what is known as an association placer claim, which allows a larger claim up to a maximum size of 160 acres, (six times larger than a single locater can stake) but there must be a separate, and bona fide, locator for each 20 acres of the claim.

(c) *Millsites.* The Mining Law also allows location of millsites, which are used for activities related to mining or processing minerals. A millsite can be located on up to five acres but cannot include more land than is necessary or used for mining or milling purposes, and must be located on lands that are non-mineral in character. There are two types of millsites: (1) dependent millsites, which are located in association with lode or placer claims; and (2) independent millsites, located by "[t]he owner of a quartz or reduction works, not owning a mine…."[14] Independent millsites are very rare, and are unlikely to be encountered.

(d) *Tunnel Sites.* The Mining Law also allows the staking of "tunnel sites." Section 4 of the Mining Law, called the Tunnel Site Act, is generally only of historic interest, as driving a tunnel is no longer an economic means of exploring for lode deposits. Thus these are rare, and it is unlikely a miner will ever have cause to consider them.[15] The Tunnel Site Act, however, grants a possessory right to veins and lodes that might be discovered underground through the tunnel with a priority attaching from the date of commencement of the tunnel. The right applies to all veins or lodes discovered for a distance of 3,000 feet along the tunnel. Once discovered, the owner of the tunnel then locates a typical lode claim on the surface to provide evidence of the subsurface discovery.

2) <u>Extralateral Rights.</u>[16]

One of the most unique aspects of lode mining claims, and one which is very different from other real property concepts that define the ownership by the surface boundaries, is that the property right created by the lode claim *is not necessarily limited to* the vertical boundaries of the claims.[17] A miner has the right in certain instances to follow a vein *outside* the vertical side lines of a lode claim. This right is called an *extralateral* right and generally exists when: (1) the lode claim has parallel end lines; (2) the vein follows a continuous downward course; and (3) the apex of the vein is within the claim boundaries.

Whether extralateral rights exist is a highly technical question that most title examiners and

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[14] 30 U.S.C. § 42.

[15] *See* 2 American Law of Mining, Chapter 32 for an in-depth discussion of the types of locations and their attributes.

[16] *See* 2 American Law of Mining, Chapter 37 for a comprehensive discussion of extralateral rights.

[17] The normal concept of real property ownership starts with the assumption that the title holder owns the property within the vertical converging planes formed by the boundaries downward to the center of the earth and upwards by the vertical diverging planes through the sky.

parties performing transactional due diligence do not have the expertise to answer, and it is also beyond the scope of inquiry for most due diligence projects. However, it is important for the party performing due diligence to be aware of the concept of extralateral rights, if only to inform the business decision-makers about the potentiality that either third party owners of adjacent lode mining claims could have rights in the property in question, or that the unpatented claims being reviewed could have rights in adjacent properties.

The Mining Law adopted and expanded the provisions of the Lode Law of 1866[18] relating to the right of the miner to follow the vein downward. What this means, and what locators often find odd and surprising, is that the nature of a mining claim may well extend ***outside of the boundaries of the claim itself.*** The applicable provision of the Mining Law states:

> The locators of all mining locations made on any mineral vein, lode, or ledge, situated on the public domain . . . shall have the exclusive right of possession and enjoyment . . . of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward *as to extend outside the vertical side lines of such surface locations*. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges (emphasis added).[19]

Note that the concept of extralateral rights does not only apply to unpatented claims, but also applies to *patented* lode claims, depending upon the language used in the patent. The standard language in most patents issued under the Mining Law expressly provides that the grant of real property in the patent quotes some variation of the statutory language quoted above.[20]

As noted above, determination of the existence or extent of extralateral rights as to specific claims is rarely necessary for title examiners when conducting mining title due diligence. By way of example, the primary instance when a title examiner needs to investigate the existence or assertion of extralateral rights is when there is an active or planned mining operation adjacent to the lands being examined. While it is important to know that extralateral rights may, in certain circumstances, attach to the claims at issue, such determination will not affect *validity* of title to the claim but may expand that interest of claim onto adjacent land, or, as applied to third party adjacent claims, may detract from the claim under review.

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[18] Section 4 of H.R. 365, enacted July 26, 1866, entitled: "An Act Granting the Right of Way to Ditch and Canal Owners over the Public Lands and for other purposes."

[19] 30 U.S.C. § 26.

[20] *See, e.g.*, Patent No. 52643, Mineral Survey No. 4859, Grayhound, Grayhound No. 1 and Grayhound No. 2, October 5, 1962.

C. Leaseable Minerals

As noted above, until the passage of the Mineral Leasing Act in 1920, all minerals on federal lands were subject to the Mining Law. However, with the passage of the Mineral Leasing Act, coal, oil and gas, and other forms of hydrocarbons were removed from location under the Mining Law, and now must be acquired pursuant to a valid lease from the federal government.

Depending upon the type of leasable mineral in question, different procedures govern obtaining a mineral lease from the federal government and the terms of that lease. Nonetheless, the commonality for all leasable minerals, and the fundamental difference between obtaining rights to extract locatable minerals and leasable minerals, is that all extraction of federal leasable minerals must be made pursuant to a valid lease, under which the lessee acquires the right to extract, process and sell the minerals, but the federal government retains ownership. This is in contrast to locatable minerals which, subject to certain limitations discussed above (such as the current moratorium on the issuance of locatable mineral patents), can be conveyed by the federal government to individuals in fee and are not subject to federal royalties. However, like unpatented and patented claims, a federal lease is a real property interest that can be assigned between parties, pledged, and mortgaged.

An in depth discussion of the Mineral Leasing Act is beyond the scope of this paper, but, as to mining operations, it is important to note that coal is a leasable mineral, and as such is subject to a federal royalty. As discussed in more detail below, the primary role of the party conducting due diligence on a coal mining project located on federal public lands is to determine whether the lease is in good standing, whether the party purporting to own the leasehold interest in fact owns such rights, and whether the lease is subject to any liens or encumbrances.

III. Title Diligence Process

In any land due diligence exercise, the three most important questions are (1) does the party claiming to own an interest in the property at issue in fact own such interest; (2) is the property subject to any liens, encumbrances, or third party royalties; and (3) are there any matters that would invalidate all or a portion of the purported owner's rights in the property. Answers to these three questions should form the basis of the land section of any due diligence report. The due diligence report does not typically contain the same level of detail or description of how curative actions should be undertaken as would be contained in a title opinion or title report. Instead, the due diligence report should clearly identify the owner of the property in question, contain a summary of any liens, royalties and encumbrances, and contain a succinct summary of material agreements affecting the property, issues that could affect validity of the property interest, and any issues that could affect the purported owner's interest in the property.

The process necessary to identify each of these items depends in many respects on the type of real property in question, whether fee land, unpatented mining claims, or federal or state leases. However, there are certain common principles that apply to each kind of real property.

A. Principles Applicable to All types of Lands

In all cases, a title due diligence inquiry must include examination of the relevant county real property records for the property in question. Whenever an action affecting real property is taken, whether it be a conveyance, a mortgage, a grant of a royalty, or a third party lien, among other things, notice of this action must be recorded in the county records of the county embracing the property for such action to have an effect on third parties. This is true regardless of the nature of the real property in question, whether it be fee lands, an unpatented mining claim, or a leasehold interest. Thus, while there may be additional matters for which BLM records (as to unpatetend claims or federal leases) or state land agency records (as to state mineral leases) must be consulted, every title due diligence inquiry must involve examination of county real property records.

Depending upon the scope of the due diligence inquiry, precisely what documents, and for what time period, need to be reviewed will change. A complete review of title to any particular real property interest, which may or may not be necessary for the due diligence project in question, should begin with locating the "inception" document in the county records. For fee lands (including patented mining claims), the inception document will typically be a patent. For unpatented claims, the inception document will be the certificate of location; while for federal or state mineral leases, the inception document will be a recorded copy of the lease or a notice or memorandum of lease. Then, from the inception document, the party performing due diligence will "chain" all actions affecting this property forward, which should include following all conveyance of interests in the property (whether by deed or otherwise), notices of lis pendens, liens, deeds of trust, leases, judgements, judgement liens, mechanics liens, tax liens, grants of royalties, and reservations that may encumber the lands or claims.

The precise manner in which the county records should be examined vary by state and county and depend upon the types or indices maintained in each county. For example, in some states, the grantor-grantee index is the official record of the property, while other states and counties provide tract indices specific to the property in question. Still other counties maintain mineral indices, which for certain periods of time may have been the official records. A review of these different recording systems and recording laws is beyond the scope of this paper. Nonetheless, the party performing due diligence needs to be aware of these various requirements and ascertain from the official records (1) the identity of the owner or owners of the property in question, referred to as the "record title owner" and (2) all unreleased liens, encumbrances, royalties or similar interests affecting the property, as well as the identity of the party owning such interest or claim. For every kind of real property, these questions can only be answered through examination of county real property records.

B. Issues Specific to Fee Lands

From the perspective of a due diligence project, the primary difference between fee lands and unpatented claims and federal or state mining leases is that fee lands are subject to state and local property taxation.[21] Therefore, in addition to examining the county real property records, the

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[21] Note that minerals extracted from unpatented claims or federal or state leases may be subject to various taxes, which should be covered separately in a due diligence report. These taxes are beyond the scope of this paper, which discusses only state and county real property taxation generally.

records of the county agency charged with assessing and collecting property tax (typically the county assessor or treasurer) should be reviewed to determine whether taxes have been timely and properly paid. Failure to pay county taxes as required can result in a lien and eventual sale of the property. Accordingly, if the due diligence project includes fee lands, regardless of whether the target's interest in the lands is as owner or lessee, the party performing due diligence should ensure that county real property taxes were properly paid.

C. Issues Specific to Unpatented Mining Claims

In addition to examining the county real property records to determine the record title owner of unpatented claims, and the existence of any liens, encumbrances or defects, the party performing due diligence on unpatented claims will need to examine various additional records to ensure that the specific requirements of the Mining Law have been properly discharged. Failure to properly locate and maintain an unpatented claim can result in the invalidation of the claim. Thus, it is important for the party performing due diligence to ensure that each action was taken in strict compliance with the statutory requirements.

The process for due diligence on unpatented mining claims is best thought of as a series of questions, each one of which must be answered to determine whether the claim is valid. Each of these questions is outlined below.

1) <u>Was the land open to location</u>?

Mining claims must be located on federal land that is "open to location" *at the time the claim was located*. The first task is to identify, from the BLM records, whether there have been prior federal actions or conflicting mining claims that may have closed the land to location at the time the claim was staked. If a location is determined to be defective and the claimant relocates the mining claim, the land must also be open *at the time of relocation*. Generally, an unpatented claim is valid even if it overlaps with certain lands not open to location, but the claim is invalid as to those portions that overlap. However, if the claim's discovery monument is located on lands not open to location, then the entire claim is *void ab inito*.

The determination that the land is "open to location" is accomplished by reviewing the Master Title Plats ("MTP"), Historic Indices ("HI") and the Mining Claim Geographical Indices. The process is rather straightforward and in most cases, can be accessed through the BLM's website.[22] The party conducting due diligence should first review the relevant MTPs and HIs to ensure that the lands have not been withdrawn from location and, if they have been withdrawn, whether such withdrawal was prior to or after the claim in question was located. If the withdrawal was made after location, then such withdrawal will not typically invalidate the claim as withdrawals are typically made subject to valid existing rights, but may pose other issues from an operational standpoint.

Next, the party conducting due diligence should examine the Mining Claim Geographic Indices for the relevant quarter section or sections to see if the land is currently encumbered by active mining claims held by a third party. The Geographic Indices can be accessed via the BLM's

[22] https://www.blm.gov/services/land-records

LR2000 database. The Geographic Indices only identify use of property by quarter section, thus, even if it appears that there may be a conflict between uses, the party performing due diligence will need to examine the claim map contained in the official BLM file for each claim (discussed below) to determine the location of the claim on the ground and whether there does in fact appear to be a conflict.

Whether claims do in fact conflict is not typically a determination that can be made by a title examiner or party performing due diligence, and will instead require an accurate survey. In active mining regions, it is not uncommon to find that a given mining claim conflicts with a number of other claims. The task of the party performing due diligence is to sort through the various conflicts to determine if the claim being examined has "paper priority" over the conflicting claims. Given all of the non-record reasons that a mining claim might be invalid, the party performing due diligence examiner should recognize and advise the client that paper priority does not necessarily equate to actual priority.

The extent of a claim conflict cannot be determined with certainty unless a surface inspection is made with a qualified person. If it appears that a claim conflict is possible based on the examiner's desk top review, this matter should be noted in the due diligence report, along with a recommendation that an accurate survey of the area be done.

Claim conflicts may also occur between different types of mining claims. If lode claims and placer claims are located on the same deposit, one or the other is void. The title examiner may also encounter millsites that have been located on the same land covered by lode or placer locations. Because land cannot both have a "discovery" and be "non-mineral" in character, such land cannot support both types of locations and one or the other claim is void. However, determination about whether lands are properly categorized as placer or lode deposits or non-mineral in character (millsites) is beyond the scope of a due diligence report, but the party performing the due diligence should note any such potential conflicts and refrain from taking a position on claim superiority.

As noted above, if potentially conflicting claims are found, it does not necessarily mean that the claims are invalid if the location monument is on open ground, but it could lead to a legal dispute over claim conflict and validity and is a matter that should be noted in a due diligence report, with a recommendation that further technical inquiry be made.

In examining title to older unpatented claims, the party performing due diligence must also be aware that prior to 1954, with certain exceptions, a mining claim could be not located on land subject to an outstanding oil and gas lease. The Multiple Mineral Development Act[23], effective August 13, 1954, authorized mineral development for leasable and locatable minerals on the same tract of federal land, but did not have retroactive effect. Thus, for pre-1954 unpatented claims, the party conducting due diligence should review the HI to confirm that no oil and gas lease was in effect at the time the unpatented claim in question was located.

Finally, it is important to note that patents for the surface estate where the federal government reserved the minerals require special consideration. For split estate lands in which

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[23] 30 U.S.C. §§ 521 et seq.

the federal government reserved the minerals, the statute under which the patent was issued and the governing regulations must be reviewed to determine if the federally reserved minerals are open to location. Under many statutes, reserved minerals are not subject to location unless the Department of Interior has adopted regulations authorizing such locations. The Stock Raising Homestead Act[24], under which surface patents were issued to third parties, but the mineral estate was reserved to the federal government, is the most significant statute that allows location of reserved minerals, but the party performing due diligence must be aware that, with respect to *locations made after 1992*, special rules apply to entry on these lands and consider the location of such claims complied with those rules.

2) Was the claim properly located?

After looking into whether the unpatented claim or claims in question are situated on land open to location, the next step for the party performing due diligence is to review the BLM and county records to confirm that, at least according to the recorded evidence, a valid location was established. These paper requirements have varied over time and arise from a combination of state and federal law.

Under the Mining Law, the locator must prepare a certificate of location ("COL") for each unpatented claim, as well as performing certain actions in the field to mark the claim boundaries. The typical due diligence review will not involve inquiry into the actions in the field, but will instead be confined to confirming that the paper requirements for location have been satisfied.

The COL must include the name of the locator, the date of location, a description of the claim sufficient to locate the claim on the ground and any additional information required by state law.[25] The description of the claim contained in the COL must be specific enough that a person could find the claim on the ground with reasonable certainty. It also must be made with reference, or a "tie," to a natural object or permanent monument, which can be any variety of objects or monuments, including an adjoining claim, a building, a mountain or the public land survey. If the description does not satisfy this standard, the claim is void.[26] The party performing due diligence should review each COL to confirm that it at least facially satisfies the statute, but a surface inspection would be required to verify whether it is, in fact, adequate to locate the claim.[27]

Beginning in 1976, the Federal Land Policy Management Act[28] ("FLPMA") imposed additional filing requirements not required under the Mining Law.[29] Under FLPMA, the owner of a mining claim is required to file with the BLM a copy of the "official record" of the claim, *i.e.*,

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[24] 43 U.S.C. §§ 291 et seq.

[25] *See, e.g.*, 43 U.S.C. § 1744(b).

[26] 43 C.F.R. § 3830.93.

[27] Certificates of location may also contain other information reflecting whether a valid location has been made. For example, many certificate forms indicate that the locator is a citizen. Similarly, most certificates indicate what type of mineral is being claimed. The size and configuration of the mining claim are also described in the recorded certificate of location.

[28] 43 U.S.C. §§ 1701 et seq.

[29] *See, e.g.,* Vol. 2 Rocky Mountain Mineral Law Foundation, American Law of Mining, 2d Ed. § 33.10.

the COL, that was recorded at the applicable local office, such as the county recorder.[30] For a lode or placer claim located on or after October 21, 1976, this filing must be made within 90 days after the date of location. Because the requirement that a copy of the recorded COL be filed with the BLM is a statutory requirement, party performing due diligence should ensure that the COL filed with the BLM is identical to the COL recorded in the county records, because if they are different, the claim could be deemed invalid.

In addition, the BLM's post-FLPMA regulations set forth more detailed requirements, including a requirement that the COL be accompanied by a claim map depicting the claim or a narrative or sketch describing the claim and "tying the description to a natural object, permanent monument or topographic, hydrographic, or man-made feature."[31] The description must show or describe the "boundaries and position of the individual claim or site by aliquot part within the quarter section."[32] Practically speaking, most certificates of location are accompanied by a detailed claim map that may include additional claims located by the claimant in the area.

In addition, the party performing due diligence should confirm that the COL and claim map, when taken together contains the following additional information required by BLM regulations: (1) the claim name or number, or both; (2) the names and current mailing addresses of the locators of the claim; (3) the type of claim; (4) the location date; and (5) a description of the lands as required by statute and regulation.[33]

State laws supplement federal mining law and often impose additional requirements for locating mining claims, performing development work, and recording certificates of location. State location procedures usually require several steps: (1) discovery of the mineral resources; (2) posting a notice on the land; (3) performing discovery or development work; (4) marking (or "monumenting") the claim on the ground; (5) preparing and filing a map of the claims; and (6) recording the COL in the local recorder's office.

In performing due diligence, it is often impossible to establish that all of these requirements have been satisfied, *e.g.*, a title examiner cannot know whether the notice was in fact posted on the ground. Nevertheless, the due diligence report should note anything in the record that suggests that one of the necessary steps was not taken. Because state location requirements have changed from time to time, the party performing due diligence must measure the record against the state statutes that were in existence at the time of location.

State requirements for recording location documents also vary. Each state has specific requirements for information to be contained in the recorded document. State statutes also include deadlines for recording certificates. These filing periods may vary from thirty days to three months. State law also varies as to the effect of a defective certificate, a failure to file, or a late filing. In some states, these statutes have been strictly construed, with courts, at least ostensibly, ruling that the mining claim is void in the absence of full compliance. In other cases, courts have

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[30] 43 U.S.C. § 1744(b).

[31] 43 C.F.R. §3832.12(a)(2)(i)(B).

[32] 43 C.F.R. §3832.12(a)(2)(ii).

[33] 30 U.S.C. § 28; 43 U.S.C. § 1744(b); 43 C.F.R. § 3832.11(a); 43 C.F.R. § 3832.11(c)(3).

held that so long as the statutes have been substantially complied with, minor defects will not invalidate the claim and that a subsequent locator with knowledge of a claim generally cannot question the sufficiency of a recorded certificate of location. Accordingly, it is important for the party performing due diligence to be familiar with the applicable state laws, not just the federal law applicable to unpatented claims.

2) <u>Has the claim been properly maintained</u>?

Federal and state laws have always required that a mining claimant undertake certain activities in order to maintain a mining claim. The requirements have varied over time. The Mining Law provides that not less than $100 worth of labor be performed or improvements made on each claim during each assessment year. Prior to the enactment of FLPMA, a claimant had to perform such "assessment work" and record an affidavit attesting to the performance of such work in the county records in order to maintain the claim in good standing. Such work was not required for millsites, which were maintained by the claimant's continued use and occupancy for mining purposes. The "year" for performing assessment work commenced at noon on the 1st day of the September following the date of location, and runs from September 1 of each year, through the following August 31. This period of time is often referred to as the "Assessment Year."

Accordingly, for pre-1976 unpatented claims, if the scope of the due diligence analysis includes confirming proper maintenance of claims, the party performing the analysis should review the relevant county records to confirm that an affidavit of assessment or similar document was timely and properly recorded for each year prior to 1976.

In 1976, FLPMA imposed a new claim maintenance requirement under which, in addition to performing the assessment work and recording an affidavit of assessment in the county records, the owner of the claim was also required to make filings with the BLM and the county recorder each Assessment Year. Section 314(a) and (c) of the statute provided in relevant part that:

> (a) Filing requirements:
>
> . . . . The owner of an unpatented lode or placer mining claim located after October 21, 1976 shall, prior to December 31 of each year following the calendar year in which the said claim was located, file the instruments required by paragraphs (1) and (2) of this subsection:
>
> (1) File for record in the office where the location notice or certificate is recorded either a notice of intention to hold the mining claim (including but not limited to such notices as are provided by law to be filed when there has been a suspension or deferment of annual assessment work), an affidavit of assessment work performed thereon, on [sic] 1 a detailed report provided by section 28–1 of title 30, relating thereto.
>
> (2) File in the office of the Bureau designated by the Secretary a copy of the official record of the instrument filed or recorded

> pursuant to paragraph (1) of this subsection, including a description of the location of the mining claim sufficient to locate the claimed lands on the ground.
>
> (c) Failure to file as constituting abandonment; defective or untimely filing.
>
> The failure to file such instruments as required by subsections (a) and (b) of this section shall be deemed conclusively to constitute an abandonment of the mining claim or mill or tunnel site by the owner; . . . .(emphasis added)[34]

These filings, which consist of an affidavit of assessment work and a notice of intent to hold, often combined into a single document, are often collectively referred to as "maintenance filings." One source of confusion about the FLPMA filing provisions revolved around the fact that FLPMA filings were made on a calendar year basis, while assessment work obligations ran from September to September. In addition, FLPMA required a filing in the first calendar year following location, while the claimant's first assessment work obligations under the Mining Law commenced with the first September following the date of location and did not need to be completed until the following September.

The FLPMA filing requirements have been strictly construed, and any failure to comply with the statute results in forfeiture of the mining claim. In performing due diligence on an unpatented mining claim that was active between the years of 1976 and 1993, the examiner must review both the county and the BLM's official records for the claim to ensure that the filing requirements described above were precisely complied with during such years.

Beginning in 1993, for most claims, assessment work and FLPMA's filing requirements were replaced with a yearly maintenance payment, which also applies to millsite claims. A new scheme for location and maintenance filings for unpatented mining claims was implemented in a 1992 Appropriations Bill ("1992 Act").[35] A year later, another appropriations bill (the "1993 Act") imposed this same basic fee scheme for the years 1994 through 1998 and codified the new fee structure at 30 U.S.C. §§ 28f–28k. Later appropriation acts have continued the fee scheme to the present (the 1992 Act, the 1993 Act and later acts are referred to as the "Appropriation Acts").

The purpose of the 1992 Act was to impose a new "claim rental fee" for unpatented mining claims, which would be paid *in lieu* of the Mining Law's assessment work requirements and FLPMA's requirement that affidavits of assessment be recorded in the county and filed with the BLM on a yearly basis. However, unlike the Mining Law's assessment provisions, which do not require any assessment work in the assessment year in which the claim is located, and FLPMA, which does not require maintenance filings until the calendar year after the year of the location, the 1992 Act required payment of the rental fee *in the year of location*. The payment was due

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[34] 43 U.S.C. § 1744 (a) and (c).

[35] Department of the Interior and Related Agencies Appropriations Act, Pub. L. No. 102-381, 106 Stat. 1374 (1992).

within 90 days of the location. Failure to make the required payment resulted in forfeiture of the claim.

A year later, the 1993 Act imposed this same basic fee scheme for the years 1994 through 1998 and codified the new fee structure at 30 U.S.C. §§ 28f–28k. Under the 1993 Act and the later Acts, the required fee is referred to as a "maintenance fee." As in the 1992 Act, the later Appropriation Acts required payment of the fee within 90 days after a claim is located. The 1993 Act and the later Appropriation Acts also imposed an additional "location fee" of $25 for each claim staked. Although all of the Appropriation Acts allowed exemption from payment of later maintenance fees for so-called "small miners," the exemption does not apply to the initial maintenance fee or location fee. Later Appropriation Acts have extended the initial maintenance fee and location fee requirements. Failure to timely pay the maintenance and location fees results in a forfeiture of the claim.

On December 23, 2011, Congress modified the statute to provide that placer claimants must pay the maintenance fee for each 20 acres of the claim. Thus, the statute has eliminated the incentive that placer claimants previously had to stake larger association placers in an attempt to pay lower fees than they would have paid had they staked individual 20-acre claims.[36]

Although the statute continues to refer to a $100 maintenance fee and a $25 location fee, these fees are subject to periodic adjustment by the BLM to reflect changes in the Consumer Price Index. The agency has adjusted the fees several times and will continue to do so periodically. The current maintenance fee is $155 for each unpatented lode claim and each 20 acres of any placer claim.[37]

The Appropriation Acts permit an exception to the maintenance fee requirements for "small miners," who are able to elect either to (1) pay the rental fees required by the Act or (2) perform annual assessment work and make the filings required by FLPMA. Under the current laws, a "small miner" is defined as a claimant that owns fewer than ten unpatented claims of any type.[38] To claim the exemption, the small miner must file a certification with the BLM on or before the date the maintenance payment is otherwise due that stating that it: (1) holds (with all related parties) no more than ten mining claims, millsites, tunnel sites or any combination thereof; and (2) has performed the assessment work required under the Mining Law during the just ending assessment year. Parties who seek small miner status must also comply with the annual filing requirements of FLPMA. Failure to do this will result in forfeiture of the mining claims. Therefore, the party performing due diligence on claims on which the small miner exemption was utilized must confirm that each filing was timely made.

It is worth explicitly noting that maintenance fee payment provisions operate *prospectively*. This is different from both the Mining Law "assessment work" requirement and FLPMA filing

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[36] 30 U.S.C. § 28f(a)(1). That clarification was needed due to significant confusion as to whether the maintenance fees had to be paid for both 2012 and 2013. *See, e.g.,* Silver Buckle Mines, Inc. vs. United States, 117 Fed. Cl. 786 (2014), in which Silver Buckle sued the BLM for the payment of maintenance fees in 2012 for the 2013 assessment year.

[37] 43 C.F.R. §3830.21

[38] 30 U.S.C. § 28f (d).

requirements, both of which operate *retrospectively*. Prior to enactment of the maintenance fee statute in 1993, a claimant filed an affidavit of assessment work prior to December 31 of each year, reflecting that it *had* conducted the requisite assessment work for the *prior* assessment year that ended on September 1 of that calendar year. However, under the claim maintenance fee statute, a claimant is required to pay maintenance fees on or before September 1 of each year, which operates to hold the claim for the *next* 12 month period. Accordingly, if the scope of the due diligence requires confirming that a claim has been properly maintained, a major component of this inquiry will be in ensuring that, for each applicable year, the correct filing was properly and timely made, bearing in mind the different timelines applicable to each type of filing.

Finally, the party performing due diligence must be aware of the state law requirements imposed on unpatented mining claims. Federal laws do not preempt state law governing assessment work and yearly recording requirements applicable to mining claims. In general, prior to 1992, the public land states had mining law statutes that echoed federal requirements and contemplated that a mining claimant would record in the local recording office either an affidavit that assessment work was completed during the preceding assessment year or a notice of intention to hold a mining claim. These retrospective statutes did not mesh well with the prospective nature of the new maintenance fee requirements. Most of the public land states have now amended their statutes to reflect the new maintenance fees requirements, making it easier for mining claimants to comply with both Federal and state law. The party performing due diligence must be conversant with both the current and historical versions of the applicable state statutes in order to assess whether the claimant complied with state law every year and, if not, what the effect of noncompliance might be.

In sum, for maintenance filings made prior to the 1976 enactment of FLPMA, the party performing due diligence need only evaluate whether the yearly assessment affidavits recorded in the county reflect that adequate assessment work was performed. For maintenance filings made after FLPMA but before 1993, the party performing due diligence must consider both whether adequate assessment work was performed *and* whether the filing requirements of FLPMA were satisfied. For maintenance filings made from 1993 to the present, unless the claimant has obtained a "small miner's" exemption, the party performing due diligence must consider whether the necessary payments were made on a timely basis and the required federal and state filings were timely made. For claims held under a small miner's exemption from 1993 to the present, the party performing due diligence must examine the adequacy of assessment work, FLPMA filings and the small miner exemption paper work.

3) Have the claims been properly conveyed?

Finally, the party performing due diligence should confirm that the unpatetnted claims have been properly conveyed between parties, if the target of the transaction is not the original locator. As with other kinds of real property, unpatented mining claims can be conveyed, encumbered, mortgaged, liened, and carve out various sticks of the proverbial "bundle of sticks" that comprise unpatented claims as an interest in real property. The US Supreme Court has characterized the property right in a valid, unpatented claim as "property in the fullest sense of that term," and has

observed that the right may be "sold, transferred, mortgaged, and is taxable . . . and [is] subject to the lien of a judgment recovered against the owner . . . ."[39]

No *consent* from the BLM or any other agency is required for the record title owner of the claim to convey all or a portion of its interest in the claim to a third party. In addition, notice to, or consent of, any federal agency is not required for liens, judgements, or other encumbrances to be placed on the unpatented claim. Instead, unpatented mining claims are essentially treated in the same manner as other types of real property for these purposes. All instruments affecting title to the unpatented claim should be recorded in the county real property records.

BLM regulations require the record title transferee of an unpatented claim to notify the BLM of the transfer.[40] However, BLM regulations do not require any notice for grants of royalties, liens or similar interests. The notice of transfer to the BLM should include the serial number for each mining claim and the name and address of the transferee. Failure to file a notice of transfer does not invalidate the claim, but without such a filing, the transferee will not receive notice of the BLM's actions with respect to a claim. Thus, the BLM case file does not necessarily reflect a chain of title to a mining claim. This by itself is not problematic because the BLM records are not an official repository of all documents necessary to establish record title. If, however, the BLM records do not reflect the current record title owner as ascertained through examination of the county records, the due diligence report should note this fact and recommend that a notice of transfer of interest be filed with the BLM.

D. Issues Specific to Federal Leasable Minerals and State Mineral Leases

Depending upon the type of federal leasable mineral in question, different procedures govern obtaining a mineral lease from the federal government and the terms of that lease. Nonetheless, the commonality for all leasable minerals, and the fundamental difference between obtaining rights to extract locatable minerals and leasable minerals, is that all extraction of federal leasable minerals must be made pursuant to a valid lease, under which the lessee acquires the right to extract, process and sell the minerals, but the federal government retains ownership. This is in contrast to locatable minerals which, subject to certain limitations discussed above (such as the current moratorium on the issuance of locatable mineral patents), can be conveyed by the federal government to individuals in fee and are not subject to federal royalties.

If the due diligence project involves a federal coal lease, for example, the party performing due diligence should examine the relevant county records to ensure that the lease or some notice thereof was recorded and to determine the record title matters discussed below. Most importantly, the party performing due diligence must perform a thorough examination of the lease, noting the term of the lease, any required rental or royalty payments, and any other provisions relevant to maintaining the lease in good standing.

In addition to the county records, the BLM's official file for the lease in question should be examined. This examination should include confirmation that the BLM considers the lease to be in good standing, there are no adverse administrative decisions affecting the lease, all rental and

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[39] Wilbur v. United States ex rel. Krushnic, 280 U.S. 306, 316-17 (1930).

[40] 43 CFR §3833.32.

that royalty payments have been properly made. As with unpatented claims, BLM regulations require that BLM be given notice of transfers of record title and royalties in federal coal leases.[41] Failure to give notice of assignment to BLM will not invalidate the lease, but because there are specific actions required to maintain leases in good standing, as well as qualifications for parties permitted to own a coal lease, the BLM must approve the assignment of the lease. Thus, the party performing due diligence should (1) confirm that all transfers of record title and conveyances of royalties as documented in the county records have been filed with BLM and (2) that BLM has approved all such transfers. Note, however, that BLM does not require, or indeed accept, the filing of mortgages, deeds of trust or other liens encumbering the property.

The party performing due diligence should also be aware that federal regulations restrict the total overriding royalty interest burden that can be placed on federal coal leases to no more than "50 percent of the royalty first payable to the United States under the federal coal lease."[42] Accordingly, the party performing due diligence should confirm that, if any overriding royalties have been conveyed, these royalties do not cumulatively exceed the cap.

E. Leasehold Interests in, and Option Agreements for, Unpatented Claims and Fee Property; Earn-In Agreements.

1) Leasehold Interests and Option Agreements

It is very common for mining operations to occur on fee property or unpatented mining claims that are leased from a third party to the miner. Likewise, the "package" of properties involved in many transactions often include option agreements, where the target may have an option to purchase specific properties. In many respects, the due diligence inquiry for leased or optioned fee lands or unpatented claims will be the same process as that described above. However, the party performing the due diligence will additionally need to confirm that the lease or option agreement or a memorandum of such agreement has been recorded in the county real property records. The examiner will also need to review the lease or option agreement to understand its material terms and what actions are necessary to keep the lease or option in good standing.

Accordingly, the party performing due diligence must confirm that the purported lessor or optionor of the property in question owns the interest claimed and has the right to lease or option such lands (i.e., they are not already leased or optioned to a third party and/or are not subject to any preferential rights), as well as determining whether the underlying interest is valid, in the case of unpatented claims, and whether there are any liens, royalties or other encumbrances of the property that affect title. The due diligence report should clearly identify these items, and also contain a succinct summary of the material terms of the option or lease. This will allow the party reviewing the due diligence report to quickly understand the nature of the interest in the property and any potential issues associated with that interest.

2) Earn-in Agreements

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[41] 43 CFR §3453.2-2.

[42] 43 CFR §3473.3-2.

Many mining properties, typically in the exploration stage, are acquired through earn-in agreements. The earn-in arrangement generally involves an exploration (investment) commitment followed by an option or right to enter into a joint venture with the owner of the property, or sometimes, an outright purchase. Earn-in arrangements are typically between a larger operating mining company that has the ability to bring the property into production, and a smaller "junior" exploration company that has located or acquired the mining interest for its exploration potential. Usually the nature and extent of the mineral interest on such a property is not sufficiently well advanced as to make a development decision. Hence, the mining company that is "earning into" the property is one that the exploration company believes to have sufficient resources and financial viability to advance the drilling and exploration on the property further to a development decision status. Earn-in arrangements often involve not only an "up front" payment to the holder, but also expenditure and work commitments that must be met on an annual basis in order to continue the arrangement, with certain of those commitments mandatory for the first period.

An earn-in agreement does not itself create a real property interest in the property that is the subject of the agreement. Instead, it creates a path for the earning party to eventually acquire an interest in the property. Therefore, the earn-in agreement will not typically be recorded in the county records, and copies must be obtained from the target.

As with leases and option agreements, if the transaction involves an earn-in agreement, the party performing due diligence should confirm all of the same matters identified above, i.e., that the party claiming an interest in the property in fact owns such an interest, that the underlying property is valid and whether there are any liens, royalties or encumbrances on the property, but must also review and analyze the earn-in agreement itself. In addition to identifying the record title owner of the property and any encumbrances on the property, the due diligence report should contain a concise summary of the earn-in agreement, and specifically what up-front payments may be due, and the scope and timeframe for any required expenditure or work commitments.

IV. Conclusion

In many ways, performing title due diligence is more of an art than a science, and the scope of the inquiry and the matters that must be looked into will change from transaction-to-transaction. However, in order for the party performing due diligence to understand how to appropriately scope the inquiry, and help his or her client understand the potential risks associated with a certain property, the attorney needs to understand and be conversant with the various issues identified in this paper.