# MINERAL TITLE REPORTS FOR SURFACE DEVELOPERS:
## HOW FAR DOWN THE RABBIT HOLE SHOULD YOU GO?

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## I. Introduction

When a real estate developer envisions a new project, what lies beneath the surface of the land might not be their first concern. Yet, it's important to consider that the underlying minerals could be owned by someone else entirely, and those mineral owners also hold valuable property rights. Surface development could effectively eliminate access to the mineral estate, and this fact creates conflicting interests in the same parcel of land. In 2001, attempting to address these conflicts, Colorado enacted the Surface Development Notification Act[1] requiring notice to mineral owners of impending surface development. This Act was amended in 2007, in part to limit the sources of title information that must be examined in order to identify the mineral estate owners entitled to notice under the Act.

A title search performed to the minimum standards required by the Act only identifies those mineral owners that are entitled by law to notice of surface development. Such a limited search rarely identifies all of the owners and lessees of the mineral estate. This leads to the question of whether it is sufficient for a developer to have the minimum title search performed to comply with the Act, or whether they should have a more extensive mineral title opinion prepared.

With the explosive population growth in areas of Colorado rich with oil and gas resources, there has been increased public focus on conflicts between surface development and mineral development, typically oil and gas. It may therefore be prudent for a real estate developer to go beyond the statutory minimum to determine who actually owns the minerals and the related surface rights, as those rights could conflict with their development plans. If this is done early in the development process, then all necessary parties can be involved in crafting a solution that offers certainty to both the surface and mineral owners.

This paper will first discuss the reasons that surface developers should care about subsurface ownership, the various levels of mineral title research that can be performed, and factors for determining what level of inquiry is appropriate to a specific parcel of land. A discussion of the more technical aspects of performing a mineral title search in the State of Colorado will follow, and finally, this paper will provide options for using the information contained in a mineral title report to obtain greater certainty for a surface developer.

## II. Why a Surface Developer Should Care about What Lies Below

In order to understand why a surface developer should care who owns the subsurface rights, it's important to have some background on the common law rights that apply when the surface and minerals are under separate ownership, how those rights have been codified and altered by state and local regulation, and the fact that they can be modified by contract. While the history of how

[1] COLO. REV. STAT. §§ 24-65.5-101, et seq. (2023).

this body of law has developed will only be given brief treatment here, entire papers have been devoted to this subject.[2]

A. Common Law of Split Estates and Implied Rights of Surface Use

When mineral ownership is severed from the surface, resulting in separate ownership of the surface and mineral estates in the same parcel of land, it creates a situation known as a "split estate." In a split estate, the owner of the minerals, or any lessee under a lease made by that owner, generally has an implied easement to use so much of the surface as is reasonably necessary for the development of its mineral interest.

The surface owner has the concurrent right to develop its surface estate in a manner consistent with this implied easement for the benefit of the mineral owner. In addition, the surface estate owner holds rights in that amount of the subsurface as is required for subjacent support of its surface development activities, unless that right to subjacent support is contractually waived or conveyed by express and unambiguous language. Historically, the mineral interest was the dominant estate with the surface being the servient estate, although this balance has been shifting in favor of surface owners in recent years.

B. Legislative Modification of Common Law Implied Rights

In 2007, Colorado incorporated the rule of "reasonable accommodation" into the Colorado Revised Statutes ("C.R.S.") at § 34-60-127. This section codified the rule adopted by the Colorado Supreme Court in *Gerrity v. Magness*.[3] The statute provides in part that an oil and gas operator may use that amount of the surface that is reasonable and necessary to its operations, but that in doing so, it must also accommodate the surface owner by minimizing its intrusion upon and damage to the surface.[4]

Shortly following the adoption of statutory reasonable accommodation in 2007, technological advancements in horizontal drilling of oil and gas wells, paired with hydraulic fracturing, led to a boom in oil and gas drilling in the Denver-Julesburg Basin, located in Weld

[2] *See, e.g.*, David E. Pierce, *The Common Law of Surface Use to Develop Oil and Gas*, Oil and Gas Agreements: Surface Use in the 21st Century 1-1 (Rocky Mt. Min. L. Fdn. 2017); Kendor P. Jones, John F. (Jeff) Welborn, Chelsey J. Russell, *Split Estates and Surface Access Issues*, Landman's Legal Handbook Ch. 9 (Rocky Mt. Min. L. Fdn., 5th ed. (2013); Bruce M. Kramer, *The Legal Framework for Analyzing Multiple Surface Use Issues*, 44 Rocky Mt. Min. L. Fdn. J. 273 (2007); Phillip Wm. Lear and Stephanie Barber-Renteria, *Split Estates and Severed Minerals: Rights of Access and Surface Use After the Divorce (and other Leasehold Access-Related Problems)*, 50 Rocky Mt. Min. L. Inst. 10 (2004).
[3] *Gerrity Oil & Gas Corp. v. Magness*, 946 P.2d 913 (Colo. 1997).
[4] Because oil and gas development is the most common type of mineral development that will be encountered along Colorado's Front Range, this paper will focus primarily on oil and gas ownership and leasehold interests.

County and other portions of the highly-populated Front Range of Colorado. This increase in oil and gas activity in close proximity to residential areas led to high-profile political and legal clashes over the following decade that ultimately led to the adoption of Colorado Senate Bill 19-181, signed into law on April 16, 2019, which significantly changed the law governing surface use for mineral development in Colorado.

One key provision of SB 19-181 changed the mission of the Colorado Energy and Carbon Management Commission ("ECMC")[5] in a manner that made protection of public health and environmental resources paramount. This change led to a series of rulemakings that, among other things, increased setbacks for oil and gas operations from surface features such as residential buildings and schools or other sensitive locations and introduced an alternative location analysis process for oil and gas facilities that are proposed near populated areas.

Another significant aspect of SB 19-181 was a change to historic state preemption of local law in the area of oil and gas surface operations with the addition of C.R.S. § 34-60-131 – No land use preemption. The new section states that local governments *and* state agencies have regulatory authority over oil and gas development and expressly provides that a local government's regulations may be more protective or stricter than state requirements. As a result of this change, closer examination of local land use codes must be made to determine possible oil and gas well locations since there is no longer a statewide standard.

In determining the level of mineral title review that is appropriate for a proposed surface development, state and local regulations should be examined to determine how likely it is that a particular property might be targeted for mineral development. However, the recent pace of change in this area of the law highlights the fact that those regulations cannot be relied upon to rule out mineral development. Although the trend has been toward tightening regulations for the siting of oil and gas facilities, it is possible that a change in the geopolitical, technological, or societal climate could result in changes in perception toward the development of oil and gas resources and yet further regulatory changes. Therefore, even if a property is currently ineligible for mineral development, it may still be advisable for a surface developer to have an in-depth understanding of mineral ownership, leasehold status, and contractual agreements affecting surface use.

### C. Contractual Modification of Common Law Implied Rights

In addition to statutes and regulations that affect surface use for mineral development, owners can also modify common law rights by contractual agreement. This can occur by the inclusion of provisions in the deed severing the minerals from the surface, in surface use agreements, in agreements waiving the right to subjacent support by a surface owner, in

[5] Formerly known as the Colorado Oil and Gas Conservation Commission ("COGCC").

relinquishments or waivers of surface rights by mineral owners, or in any other instrument affecting title to the subject lands. In order for these agreements to be binding on successors-in-interest, they must be recorded in the property records for the county in which the property is located.[6]

Examples of contractual language that the author has encountered in recorded documents are included on Addendum A, attached hereto. Any of those provisions could have a significant impact on a surface owner's development plans, and none of those instruments would necessarily have been discovered without a mineral title examination of the lands in question that covered the period of time from patent[7] to the present day.

A modification of common law rights of surface use and subjacent support can appear in any instrument affecting title to a particular parcel, going back to the inception of records covering the land. For this reason, a surface developer should care about what is contained in the historical property records.

D. Colorado Surface Development Notification Act ("SDNA")

If risk avoidance alone doesn't motivate a real estate developer to investigate mineral ownership, Colorado state law mandates a certain level of inquiry and notice to mineral owners when a surface developer submits an "application for development"[8] to the local planning department. In 2001, the Colorado legislature enacted the Surface Development Notification Act at C.R.S. §§ 24-65.5-101, et seq. (the "SDNA" or "Act") in order to head off conflicts between surface and mineral developers by requiring that notice of surface development applications be provided to "mineral estate owners."[9]

In its original form, the statute did not limit the mineral owners entitled to notice, and therefore it was necessary for a surface developer to have a patent-to-present mineral title examination conducted. The SDNA was amended in 2007, in part to relax the mineral owner notification provisions of the Act following complaints that the requirements were too burdensome. Surface developers had argued that obtaining a full mineral title opinion in order to identify owners entitled to notice was too costly and time-consuming.

[6] COLO. REV. STAT. § 38-35-109 (2023).
[7] A "patent" is the conveyance instrument from the United States government to the first private-party owner of a parcel of land. A search of property records back to the patent is called a "patent-to-present" search, or in the alternative, an "inception-to-present" search, referring to a search from inception of records to the present day.
[8] The phrase "application for development" is defined at COLO. REV. STAT. § 24-65.5-102(2)(a) (2023).
[9] A "mineral estate owner" is defined in the Act as the owner or lessee of a mineral estate underneath a surface estate that is subject to an application for development. COLO. REV. STAT. § 24-65.5-102(5) (2023).

As a result of the 2007 changes, C.R.S. § 24-65.5-103(1)(a)(I), defines a mineral estate owner entitled to notice as one who either:

> (A) Is identified as a mineral estate owner in the county tax assessor's records, if those records are searchable by parcel number or by section, township, and range numbers or other legally sufficient description; or
>
> (B) Has filed in the office of the county clerk and recorder in which the real property is located a request for notification in the form specified in subsection (3) of this section.

Therefore, compliance with the SDNA no longer requires a mineral title opinion based on a patent-to-present search. A surface developer need only review the county assessor's records to determine if there is a severed mineral tax parcel associated with the lands in question and review the records of the county clerk and recorder back to 2001, when the SDNA was enacted, to locate any recorded requests for notification of surface development.

While the SDNA requires that a real estate developer take limited steps to identify mineral owners, the question remains whether the minimum title examination required by the Act is sufficient to protect a developer from problems down the road. One reason for this is that mineral owners not entitled to notice under the Act can still: (i) object to the application for development within thirty days following the initial public hearing;[10] or (ii) file a claim for compensatory damages for one year following publication and notice of an approved application.[11] This is discussed in further detail in Section IV(F), below.

Another reason a developer may be better-served by a more extensive mineral title search is that compliance with the SDNA only provides protection to a surface developer from claims raised in connection with the application for development if that application creates an impediment to developing the mineral estate. It does not prevent the property from being used for mineral development in the future if there are portions of land where setbacks and zoning regulations would permit mineral development.

## III. Types of Mineral Title Reports

A surface developer contacting a title attorney for the first time is often unaware of the various levels of mineral title examination that can be performed and the types of reports that are available. This section describes the different reports, the extent of the title examination that is

[10] COLO. REV. STAT. § 24-65.5-103(5) (2023).
[11] COLO. REV. STAT. § 24-65.5-104(1)(a)(III) (2023).

performed for each type, the ownership that is identified in each report, and the limitations on the information contained in each.

A. Title Insurance Commitment Cannot Be Relied Upon for Mineral Ownership

Before going into detail on title reports specific to mineral rights, it should be noted that a commitment for title insurance is not sufficient to identify mineral owners or leasehold status. A title company is only required by law to perform a "reasonable examination of the property records" to determine insurability, and reasonableness is to be determined by the company insuring the transaction.[12] A patent-to-present search of title is not required, nor is one normally conducted, and because severed mineral rights are often excluded from insurance coverage, contractual provisions in agreements made by severed mineral owners affecting implied surface use rights may be omitted from the encumbrances disclosed in the commitment.

A title commitment does include a list of recorded instruments affecting the subject property which are found on Schedule B-2, referred to as the "Exceptions" to coverage. The effect of the Exceptions on title to the property are expressly excluded from insurance coverage. Because preparation of a title insurance commitment rarely involves a patent-to-present search, the title company will instead build upon prior lists of Exceptions documents involving the subject property or nearby lands. Further, once an instrument that creates a mineral severance is found and included as an Exception, thereby excluding the effect of that mineral interest on the interest being insured, later instruments recorded by the severed mineral owner can be omitted from the Exceptions, whether or not the commitment expressly alerts the proposed insured to such omissions. Therefore, the list of Exceptions is rarely exhaustive and cannot be relied upon for mineral ownership or leasehold status.

A title insurance commitment is useful for providing an indication of whether there are severed minerals under the lands in question or whether the mineral rights have been leased or produced historically. If documents appear as Exceptions on Schedule B-2 creating or relating to severed mineral rights, that should lead to additional inquiry into whether a mineral title report should be obtained, and if so, the appropriate level of review.

B. Surface Development Notification Act Reports

Although this type of report may be titled differently depending on who prepares it, this author refers to a Surface Development Notification Act Report, or SDNA Report, as one involving a title search that complies with the minimum requirements of the Colorado Surface Development Notification Act. An SDNA Report involves a search of the county assessor records

[12] 3 CCR § 702-8, Regulation 8-1-2, Section 5.A. (2023).

and a search of the clerk and recorder property records in order to identify the mineral estate owners entitled to notification of an application for development made by a surface owner as required by the Act. Also note that recorded instruments are only required to be reviewed back to 2001 when the SDNA was enacted. Such a limited search does not necessarily identify the mineral owners and lessees underlying a parcel but only identifies those mineral owners entitled to notice under the Act.

Often surface developers don't understand why this type of search may not identify all mineral owners. The answer lies in historical practice of county assessor offices in tax assessment of severed mineral estates, and the Colorado recording statutes.

State law provides that severed mineral interests shall be subject to property taxation.[13] However, this only applies to mineral interests that have been identified by the assessor or voluntarily reported by the surface owner[14] or mineral owner or lessee. While some counties have diligently tracked severed mineral ownership over the years and assessed mineral interests for tax purposes, others have not, or have only started doing so in recent years.

County-by-county practice by assessors' offices of maintaining severed mineral tax account records also varies widely. In some counties, a title examiner can access severed mineral tax accounts online by searching for the relevant section, township and range, or even by severed accounts relating to a specific surface parcel,[15] while in others, no severed mineral tax account information is available online, and that information can only be accessed by assessor's office staff who will provide it on request.[16] Given the disparate practices used by Colorado's county assessors for tracking and assessing severed minerals, assessor records cannot be relied upon to identify all mineral owners underlying a specific surface parcel.

In addition to severed mineral tax accounts, the second criteria for identifying mineral estate owners entitled to notice under the SDNA involves a search of the county clerk and recorder records going back to 2001 for recorded requests for notification in the form specified by the Act. As with county assessor practice, county clerk and recorder offices in Colorado have different methods of indexing documents that are submitted for recording and making that information available to the public.

While the SDNA states that "[t]he clerk and recorder shall file request for notification forms in the real estate records for the county and shall also keep an index of requests for

[13] COLO. REV. STAT. § 39-1-106 (2023).
[14] COLO. REV. STAT. § 39-1-104.5 (2023).
[15] Weld County is one such county. *See* https://apps.weld.gov/propertyportal/ (April 2, 2024).
[16] Adams County is one such county.

notification forms by section, township, and range numbers or by subdivision lots and blocks,"[17] this author has not encountered any county that maintains a separate index of requests for notification. Rather, these "request for notification" forms are recorded like any other document submitted for recording, and whether they can easily be located in the public record depends largely on the method for indexing used by the county.

Pursuant to the recording statutes in our state, Colorado is a "grantor-grantee" indexing state for property records. This means that documents are only required to be indexed by grantor and grantee name, rather than by legal property description.[18] Almost every county now utilizes digital databases of recorded instruments, and when indexing an instrument by party name, the recorder may also have the option to index the instrument by legal description.

The ability to search for requests for notification by legal description, or even by document type, varies widely from county to county. Despite the fact that the SDNA requires county recorders to maintain an index of requests for notification by legal description, such requests are often not indexed by tract in conformance with the Act. This was especially true in the early years following the enactment of the SDNA in 2001.

Whether requests for notification are fully indexed by legal description depends on many factors, including whether an online database is being utilized where indexing by property description is an option and the skill and training level of the clerk and recorder employee that indexes the instrument. In many cases, the database used for indexing only allows the first section, township, and range to be indexed, and if the request for notification contains a long list of sections, none of the subsequent properties will be identified in a search by legal description.

In addition, while certain counties have a specific document type category for "Requests for Notification,"[19] others do not. In counties without a Request for Notification document type, these requests are often categorized under the document type "Notice," which is a catch-all category that normally returns a large number of documents in a search.

As a result of the above considerations, a title examination undertaken to prepare an SDNA Report cannot be relied upon to identify all mineral owners or lessees in a particular parcel of land. An SDNA Report merely allows the surface owner to comply with the Act by identifying those mineral estate owners entitled to statutory notice of an application for development.

[17] COLO. REV. STAT. § 24-65.5-103(3) (2023).
[18] COLO. REV. STAT. § 30-10-408 (2023). This issue is discussed in greater detail in Section V.B of this paper, below.
[19] Weld County has a document type labeled "Request for Notification Form (Minerals)."

C. Limited Mineral Title Opinions

A Limited Mineral Title Opinion ("LMTO") is based on an extensive search of title and identifies the mineral ownership and leasehold status underlying a surface parcel, including all mineral and leasehold owners holding rights of surface use to develop the mineral estate. An LMTO will also identify all contractual provisions found of record affecting surface use for mineral development. The title of such a report may vary depending on the drafter. When prepared for a surface owner or real estate developer, the report is "Limited" in the sense that owners of mineral rights that do not hold rights of surface use are excluded, as discussed below.

An LMTO involves an examination of title from inception of records to the present day. As mentioned above, a mineral severance, or a provision governing surface use for mineral development, can be found in any document recorded from patent to present, which is why an LMTO involves such a lengthy search.

The title information included in an LMTO can be tailored to the client's objectives. In general, most surface developers either have, or will be obtaining, title insurance coverage for their interest in the surface. The title insurance policy will list, as Exceptions to coverage on Schedule B-2, all instruments of record that the title company has identified as affecting the surface of the lands. This includes easements, covenants, special district, and similar document types, as well as instruments containing mineral reservations or related provisions to the extent identified by the title insurance company. Those severed mineral interests are excepted from title insurance coverage either by standard preprinted exception or by reference to a specific recorded document.

Given the fact that the surface developer will carry title insurance covering surface title, and will obtain a survey showing surface easements and similar interests, it is almost always the case that the title examination conducted for purposes of an LMTO will be limited to instruments affecting the subsurface. The only instruments relating to surface use that will be examined will be those directly relating to surface use for development of the mineral estate.

When a mineral interest is leased for oil and gas, the terms of the lease will grant rights to the oil and gas operator, as lessee, to develop the mineral estate. Standard lease forms provide that the lessee has the right to use the surface of the leased premises to develop the oil and gas, including the right to build roads, lay pipelines, drill wells, and construct tanks, pumps and related facilities.

It is also common for the oil and gas operator holding the lease as lessee to enter into assignments, joint operating agreements, pooling agreements, and similar oil and gas industry agreements that assign and convey its leasehold rights to additional parties. A lessee or lessor might also assign a certain portion of its royalty to third-parties in the form of non-participating or overriding royalty interests.

Any assignee of a leasehold interest that carries with it the right to drill and develop the minerals, and the corresponding obligation to bear its share of the cost to drill and develop, receives what is described as a "working interest." On the other hand, an assignee that receives an interest in the revenue from oil and gas produced, but that does not acquire the right to drill, only owns what is described as a "royalty interest" or "net revenue interest." [20]

The goal of an LMTO prepared for a surface owner with plans to develop its property is to identify all mineral owners and lessees holding rights to use the surface of the lands. Having made that determination, the LMTO will discuss options available to the developer for negotiating arrangements with the mineral owners that will ensure certainty of future use. Therefore, an LMTO will strive to include all mineral owners and working interest owners but exclude leasehold owners that only hold a royalty or net revenue interest. Finally, the LMTO will include comments that describe any issues or defects affecting title to the ownership shown and provide recommended curative measures to the extent such defects impact surface use for mineral development.

## IV. Factors for Determining the Appropriate Report Type

The following factors should be weighed in determining whether a Surface Development Notification Act Report will suffice for the surface developer's needs or if a Limited Mineral Title Opinion should be obtained.

### A. Timeline for Development

Whether the real estate developer is targeting a property for immediate development or plans to hold on to the land for future development years down the road, is one consideration in determining the appropriate report type. As a general rule, especially with vacant land, the longer the surface owner plans to delay construction, the more important it is that they understand the mineral ownership and leasehold status of the property. One reason for this is that Colorado courts have held that a mineral owner or lessee need only accommodate the present surface use of a property, and not speculative future uses.[21]

If a real estate developer acquires a large vacant property, the land could remain available for oil and gas development until such time as construction begins. This is because a primary factor

[20] For a thorough discussion of the types of mineral ownership interests that exist, and which carry with them rights to drill, see Richard H. Bate, *Oil and Gas Title Searches and Notice Under the Surface Development Notification Act*, 31 Colo. Law. 113 (October 2002). However, bear in mind that the article was published in 2002, thus it reflects the law in effect prior to the 2007 amendments to the SDNA.
[21] *See Amoco Prod. Co. v. Thunderhead Invs., Inc.*, 235 F. Supp. 2d 1163, 1173-4 (D. Colo. 2002).

affecting oil and gas well locations are setback requirements.[22] Setbacks are the minimum allowable distance from an existing structure or surface feature to a drilling site. With vacant land, there is nothing to set back from, and until there is, in the absence of any other factor that would restrict mineral development, an oil and gas operator will have the right to apply for a drilling permit and move forward with operations.

Even where setbacks or other land use regulations render a property ineligible for an oil and gas facility, bear in mind that those regulations can change or be legally challenged as a taking of the mineral owners property rights, as discussed in Section II(B), above. This is another reason that the timeline for development is an important consideration in determining the appropriate level of mineral title review. The longer the property remains vacant, the more vulnerable the property could be to future mineral development due to changes that could affect any of the other factors determining the appropriate report type listed in this paper below.

A Limited Mineral Title Opinion ensures that the surface developer has all the information needed to determine whether an oil and gas operator could potentially apply for a drilling permit before the property is developed. The surface owner would also know what steps to take in order to mitigate that risk and prevent any race to develop.

### B. State and Local Oil and Gas Well Location Rules that Render Property Ineligible for Mineral Development

While much of the discussion in this paper has argued in favor of a surface developer obtaining an LMTO based upon a patent-to-present search of title, there are situations where a title examination performed to the minimum requirements of the SDNA would be sufficient. One example of this is where development is imminent and, under current setback regulations for oil and gas operations, the subject property is ineligible for oil and gas surface activities.

The Colorado Energy and Carbon Management Commission ("ECMC") is the entity that establishes state setbacks applicable to oil and gas operators. ECMC Rules 604(a)(1) and (2) provide that new wells must be located at least 200 feet from buildings and public roads and 150 feet from a surface property line, absent a waiver from the offset surface owner. Rule 604(a)(3) prescribes a minimum setback of 2,000 feet for a Working Pad Surface[23] from a School Facility. Rule 604(a)(4) requires a minimum 500-foot setback from Residential Building Units absent a waiver or informed consent. Rule 604(b) contains exceptions that apply to proposed well sites within 500 and 2,000 feet of Residential and High Occupancy Building Units. It is important to note that the setbacks do not preclude the ECMC from issuing a permit for oil and gas activity

[22] *See also* Section IV(B), below.
[23] All capitalized terms are as defined in ECMC Rules and Regulations, 100 Series – Definitions.

within the setback distance if it is determined that the operator can provide substantially equivalent protections for public health, safety and welfare.

ECMC Rules also provide that if a proposed oil and gas well location meets any of ten specified criteria, the proposal falls under a process of greater scrutiny known as Alternative Location Analysis, or ALA, detailed at Rule 304(b)(2). In addition to setbacks, ALA is another factor affecting the siting of oil and gas wells. Criteria that would trigger ALA include a proposed oil and gas facility that is within 2,000 feet of a School Facility or Residential or High Occupancy Building Units. Under the ALA process, the oil and gas operator must analyze all technically feasible alternative surface locations to access the target mineral estate in order to identify the location that would have the least amount of adverse impact. However, none of the criteria considered in the ALA process would rule out oil and gas development in a sensitive area if there is no other suitable location from which an operator would be able to drill to access their oil and gas rights.

Because the 2019 changes to Colorado law under Senate Bill 19-181 now allow local oil and gas regulations to be stricter than those under state law,[24] local well location and zoning regulations should also be reviewed to determine whether oil and gas operations would be allowed on the subject property under current law. If not, and development is imminent, it may be reasonable for the surface developer to rely on a mineral title report based on the minimum statutory standard. As noted above, however, the longer a property remains vacant, the less reliance should be placed on current regulations as eliminating the property as a potential mineral development site.

### C. Location of Property Outside Mineral-Producing Regions

Another situation that creates a lower level of risk for a surface developer, and may therefore make a title search performed to the minimum standards of the SDNA appropriate, is where the property is located in an area with no oil and gas or hardrock mineral development. This can be evaluated by a review of the records maintained by the Colorado ECMC and Division of Reclamation, Mining and Safety. These state agencies maintain maps depicting historic, current, and proposed oil and gas and hardrock mining activities, which can be useful in making a determination of the likelihood, or absence, of mineral development activities.

The SDNA applies to surface development in the entire State of Colorado, not just mineral-producing regions of the state. In an area with no current or planned mineral development activities, it may be appropriate for a surface developer to simply meet the minimum requirements of the SDNA in connection with its application for development. Once again, the timeline for

[24] C.R.S. § 34-60-131 – No land use preemption.

surface development becomes important, since geological and technological advancements can result in mineral operations moving into new regions over time.

D. Risk Avoidance vs. Expense of Obtaining a Mineral Title Opinion

For a surface developer investing significant capital in developing a piece of land where other factors indicate there could be some risk of mineral development, it is normally advisable to go beyond the statutory minimum and obtain a more extensive Limited Mineral Title Opinion. However, the question of the cost involved is often a concern. While not insignificant, the cost of such a report is often less than what a surface developer might expect, and if a problem hidden in the historical record that has the potential to hold up development is uncovered, it's undoubtedly worth the expense. The type of patent-to-present mineral title examination that forms the basis for an LMTO will provide the necessary information to allow the developer to determine the level of mineral development risk and to decide what steps should be taken to protect its interests and create certainty regarding its future development rights.

The cost of an LMTO is unfortunately very difficult to estimate given the widely different historical mineral ownership scenarios. The cost depends on factors that include: whether the minerals are owned by the federal or state government, the successors to the railroad companies, or private owners; whether there has been mineral production historically; and whether the minerals are covered by an active lease. Even in a worst-case scenario, however, the cost of the LMTO is almost always low relative to the risk of roadblocks to development. A mineral title attorney should be able to provide a rough estimate of cost prior to beginning work.

E. Local Notice Requirements to Mineral Owners

The requirements of the SDNA are contained in state statutes, but it's the local government approving the application for development that is responsible for certifying compliance with the Act. Some county and municipal codes have incorporated the requirements of the SDNA into their local planning codes by reference to the state Act, while others make no reference of the requirement at all in their code, and instead defer to the statute.

It appears that at least one county has incorporated the requirements of the SDNA together with language that could be interpreted to expand on the limited search provided for in the 2007 amendment to that Act. The Boulder County Land Use Code (the "Boulder Code") states that an applicant must make a "reasonable and diligent search of the public records to locate and identify, as part of the application, all owners and interest holders in the subject property...", expressly including mineral owners.[25] That same section of the Boulder Code goes on to state that "*[i]n*

[25] BOULDER, COLO., LAND USE CODE, § 3-203(H)(1) (2023).

*addition*, the applicant shall independently comply with any applicable requirements of Article 65.5 of Title 24, C.R.S., regarding the identification of and notice to any mineral estate owners or lessees that own less than full fee title in the property which is the subject of the application" [emphasis added].

While a literal reading of this section of the Boulder Code, and conforming language in other sections of the Boulder Code, can be interpreted as expanding on the minimum requirements of the state statute, no opinion is being made in this paper as to whether this expanded county requirement as it applies to mineral owners would be upheld if challenged. Counsel to surface developers should be aware, however, that language may exist in the planning and subdivision codes of the various counties and municipalities that expands on, or differs from, the requirements of the SDNA.

### F. Mineral Owners Not Entitled to Notice Can Still Object

Although it is true that the SDNA has provisions that protect a developer who has complied with the Act in good faith and in the absence of negligence, the Act still provides for remedies to mineral estate owners who only receive constructive, and not actual, notice.[26] The SDNA provides that a mineral estate owner who is not otherwise entitled to notice of surface development by their inclusion in the assessor's records, or by a recorded request for notification, nevertheless has the right to file an objection to the proposed development with the local government handling the application within thirty days following the initial public hearing.[27] In addition, a mineral estate owner not otherwise entitled to notice of the application for development, but who is deemed to have received constructive notice due to the publication and posting of the notice provided for by the Act, may file an action for compensatory damages within one year of the posting of the property with a sign notifying the public that final local government approval of the application for development was received.[28]

With the inclusion of this language in the Act, it may be advisable for a developer to obtain an LMTO, and then make an informed decision about whether to notify all mineral estate owners, or only those entitled to notice under the SDNA. By notifying all mineral estate owners underlying the surface, not only those entitled to statutory notice, the surface owner will ensure that they are protected against claims by mineral estate owners asserting damages in the year following approval of their application for development.

[26] COLO. REV. STAT. § 24-65.5-104(1)(a) (2023).
[27] COLO. REV. STAT. § 24-65.5-103(5) (2023).
[28] COLO. REV. STAT. § 24-65.5-104(1)(a)(III) (2023).

The risk a surface developer takes in notifying parties who are not entitled to notice is that it opens the developer up to the possibility that a nefarious mineral owner with no plans at all to develop may decide to object to the surface developer's proposed application and attempt to extort payment to withdraw those objections or relinquish their rights to surface use. The developer would then need to convince the local government that the objection is an empty demand by a mineral owner with no plans to develop.

Ultimately, however, if a mineral owner exists who would use such tactics, omitting them from notice may only be delaying the inevitable, as such an owner may decide to bring an action for compensatory damages after approval of the application is obtained. All of these factors will need to be weighed. But in order to make a threshold determination as to which mineral owners exist in the property that may have rights to the surface that need to be addressed at a certain point, an LMTO would need to be prepared.

### G. Time Constraints

While some experienced surface developers are aware of the statutory requirement of notification to mineral owners of an application for surface development, others first become aware of the requirement during the application submittal process. If the local planning department doesn't make the developer aware of the requirement during the pre-application phase, the requirement can take the developer by surprise late in the process when they are eager to finalize approvals in order to stay on schedule for their construction timeline.

If a surface developer finds out about this requirement late in the process, there will be pressure for them to obtain the mineral title report as quickly as possible, and they may have no choice but to opt for an SDNA Report to ensure the minimum compliance with the statute. Good counsel by real estate attorneys early on can help the surface developer ensure that a determination of mineral ownership does not have to be rushed.

## V. Exceptions and Limitations in a Title Report: Reading the Fine Print

One section of a mineral title report that can be overlooked as merely containing boilerplate language is the "Exceptions and Limitations" portion of the report. This section of the report defines the scope of the title examination performed and the materials reviewed. While the Exceptions and Limitations differ depending on the drafter, there are a few common themes.

### A. Information That is Included and Excluded

The Exceptions and Limitations will normally contain a description of the limitations on the information provided. This is where you will find the types of documentation the title examiner

reviewed, and whether the examiner excluded certain document types, like those relating to surface ownership, financing transactions, or court records.

In the attached sample from an SDNA Report contained in Addendum B hereto, the "Limited Report" section clarifies that the report is limited to identifying owners entitled to notice under the SDNA, and that a patent-to-present title search was not performed. In the next sample contained in Addendum C hereto from an LMTO, the "Limited Opinion" section states that the opinion is limited to subsurface mineral ownership. It goes on to describe the document types that the examiner did not review, including instruments only affecting surface rights, financing instruments, zoning, and land use matters.

These limitations are entirely open to modification. If a surface developer has a particular concern with a property or is aware of an issue that may not be fully covered by the title insurance policy, that can be added to the title examiner's review upon request, and removed as a limitation on the search performed.

B. Title Searches Performed Using Private Tract Indices vs. Grantor-Grantee Indices

The "Materials Examined" sections of the Exceptions and Limitations in both of the samples attached as Addenda B and C discuss the materials reviewed by the title examiner, and that the examiner's liability does not extend to errors and omissions contained in title materials prepared by third-party providers, like county recorders and title companies. Types of errors encountered in a search can include spelling errors in documents indexed by party name, and mis-indexing of documents indexed by property description, both of which can result in documents being mistakenly omitted from a title review.

The last sentence of the Materials Examined in both samples addresses the type of title search performed and limits the examiner's liability for use of what is termed a "tract index." At this point, it is important to discuss a key difference between the indexing of property records in Colorado as compared to many other states. Colorado is considered to be a "grantor-grantee" indexing state, meaning that by statute, a county clerk and recorder is only required to index property records by the name of the grantor and grantee contained in the instrument.[29] With the increased use of digital indexing of property records, many counties now also index documents by section, township and range, lot and block, or other legal description, which is known as indexing by tract. However, that was not historically how records in Colorado were indexed, and there is still no requirement that a county maintain a tract index.[30] As a result, the ability to search title by

[29] COLO. REV. STAT. §30-10-408 (2023). For a thorough discussion of the differences between searching title Grantor-Grantee vs. by tract index, *see* COLORADO REAL ESTATE PRACTICE § 4.2.1 (2014).
[30] *See Lakewood v. Mavromatis*, 817 P.2d 90, 95 n.12 (Colo. 1991).

tract in the official county records varies greatly depending on the county.

While it is possible to conduct a title search to a particular parcel by means of the official county grantor and grantee indices alone, it can be time consuming when there are multiple governmental sections of land involved, large numbers of owners, or where the subject tract is divided into multiple parcels historically, each with different "chains of title."[31] The availability of online digital databases of county property records back to inception in some counties, such as Boulder and Weld Counties, has made this information more accessible. However, transcription of the information which was historically maintained in physical handwritten books is vulnerable to human error. Incorrectly spelled names can make it impossible to complete a full chain of title back to patent by creating missing "links". An illustration of this problem is found on Addendum D, which is an excerpt of an actual search performed using an unofficial tract index, showing the errors in the official county grantor-grantee index.

Many title insurance companies have maintained their own proprietary tract indices back to inception of records. The difficulties with searching title using the official county grantor-grantee indices, together with the rise in oil and gas production, has created great demand for access to private tract indices. A few title companies have responded by making their records available for a fee.

It should be noted that a search in a privately-maintained tract index does not meet the standard for a proper examination of title as described in Colorado's Real Estate Title Standards ("CORETS"). The CORETS provide that examination of title to a piece of property shall include a grantor-grantee search of each person who has held title to an interest in the subject property during the period of time that person owned the interest of record, *and* for certain additional periods of time sufficient to reveal the existence of statutorily-created liens that could attach to the property.[32]

In Colorado, a document may be recorded with or without a legal description of a property. Certain categories of documents almost never contain a legal description, like personal judgments that attach to real property, certain probate documents, and corporate merger and name change instruments. These types of documents will therefore not be found in a search in Colorado performed solely by tract. When relying on a mineral title report prepared using only an unofficial tract index in Colorado, one should be aware of the limitations of such reliance.

[31] The process of reviewing all documents affecting title to a particular tract in chronological order and tabulating the historical sequence of ownership to that tract is known as creating a "chain of title." Each document creating a change in that ownership is another "link" in the chain of title.
[32] Colorado Bar Association, Colorado Real Estate Title Standards, Standard No. 1.1.3 (2023).

One suggested compromise between performing a search exclusively by tract or by grantor-grantee is to start with a privately-maintained tract index and supplement the tract-based chain of title with the official grantor-grantee index. To the extent that grantor-grantee records are available online, supplementing a title examination performed by tract index with the grantor-grantee records is a prudent practice. For periods of time prior to online availability of grantor-grantee records, the examiner might opt to only search the grantor-grantee records if there is a "gap" in title, or a missing link in the chain. Whether the examiner should go even further and perform a title search that meets the CORETS description of a proper grantor-grantee title search in Colorado back to inception depends on the risk aversion and financial resources of the surface developer.

The Materials Examined portion of the Exceptions and Limitations section of the mineral title report will often contain a disclaimer of liability for a search performed exclusively or partially by tract index. If the party obtaining the report is unwilling to accept the risk of relying on a search performed by tract index, that should be discussed with the preparer up front and this language in the Exceptions and Limitations should be modified.

## VI. Using the Information in the Mineral Title Opinion

Upon completion of a patent-to-present title examination, the examiner will be able to make recommendations to the surface developer that are tailored to the mineral ownership and leasehold status of the property. Depending on the particular risks identified in the examination, the following sections briefly address a few of the more common solutions that may be recommended in a Limited Mineral Title Opinion.

### A. Relinquishments of Surface Rights

With the contractual agreement of 100% of the mineral owners, working interest owners, and any other party holding an interest in the surface of a tract, the right to use the surface for development of the mineral estate can be relinquished. Where there are relatively few mineral and leasehold owners, this is a practical option. Because the mineral owners and lessees are effectively surrendering a key attribute of their property rights, they will likely expect to be compensated accordingly, with the price for the relinquishment being freely negotiable.

The availability of another surface location in the vicinity of an oil-and-gas-producing property that allows the mineral owner to access and develop their minerals using directional or horizontal drilling from a surface location up to a couple miles away will make this a much more palatable option. While the mineral owner would relinquish their right to use the surface directly above their mineral estate, they would not lose the potential financial value of the minerals since they could be developed from a remote surface location.

It should be noted that simply because a mineral owner has relinquished its surface rights does not exclude it from the list of owners entitled to notice under the Surface Development Notification Act. The SDNA contains a provision, however, that states that a mineral owner can waive its right to notice in writing to the applicant.[33] Therefore, one item that would be useful to include in the recorded relinquishment is an express waiver of the right to notice under the SDNA made in favor of the surface owner and its successors and assigns.

B. Surface Use Agreements

A surface use agreement ("SUA") is used to provide certainty to the surface and mineral owners when the surface owner agrees to allow the mineral owner access to the surface but wishes to contain mineral operations to a defined location or otherwise establish guidelines and conditions on the mineral owner's use. As with a relinquishment of surface rights, it's important to ensure that all surface and mineral owners and lessees holding rights to use the surface are made parties to the agreement.

Topics that are typically covered in an SUA include the prescribed location where mineral operations will be conducted, access to the operations site, standards for visual mitigation and restoration, and agreed-upon damage amounts for various categories of operations, such as a per-well liquidated damage amount. There have been many papers dedicated to the discussion of SUA's for those wanting to explore the subject further.[34]

C. Purchase of the Mineral Interest

Another option open to a surface developer is the negotiation of an outright purchase of the mineral interest. If the mineral owner has entered into a lease of its interest, the mineral interest purchased will remain subject to the lease, in which case the surface owner might consider buying out the lessees' interests as well. The likelihood of this being a viable option for the real estate developer depends in large part on the mineral production potential of the property and whether there are current or proposed operations to develop the mineral estate. If there is existing or planned oil and gas development, the cost to purchase the mineral interest would likely be prohibitive for a surface owner.

[33] COLO. REV. STAT. §24-65.5-103(5) (2023).
[34] *See e.g.,* Randall B. Reed & Lindsay A. Woznick, "Addressing Key Items in Surface Use Agreements," *Oil & Gas Agreements: Surface Use in the 21st Century* 8-1 (Rocky Mt. Min. L. Fdn. 2017); Joseph B.C. Fitzsimons & F. Parks Brown, "Surface Use Negotiations from the Landowner's Perspective," *Oil & Gas Agreements: Surface Use in the 21st Century* 11D-1 (Rocky Mt. Min. L. Fdn. 2017).

D. Mineral Deed to Separate Entity by Surface Developer with Mineral Ownership

If the Limited Mineral Title Opinion obtained by a surface owner planning to subdivide the lands reveals that they own a full or partial mineral interest underlying the property, it is strongly advised that they convey that interest to a separate entity prior to subdivision and sale of the various lots. The surface developer, by retaining the minerals, would be entitled to royalties if the property is developed for oil and gas, and would be in a position to provide input on future mineral development activities as a mineral owner or lessor.

With oil and gas operations moving into residential areas, mineral title attorneys have been increasingly faced with writing title opinions for lands that were subdivided into hundreds of lots where each lot owner acquired the minerals under the fractions of an acre on which their home is located. This happened primarily because the surface developer, unaware or unconcerned that they owned the mineral rights, conveyed the minerals together with the deed to the surface.

Although the developer could retain the minerals by inserting a reservation into each of the deeds conveying the subdivided lots, there is a risk that the reservation will be inadvertently omitted from one or more of the deeds. If the developer conveys the subdivided lots without severing the minerals, each of these new homeowners acquires a very small proportionate interest.

While preparation of subdivision mineral title opinions provides steady work for mineral title attorneys due to the immense volume of title documentation associated with a review of title to hundreds of separate lots, the conveyance of minerals to the owners of those lots does a disservice to the surface developer. This can easily be prevented by good legal counsel to a surface developer at the subdivision stage of a new development resulting in a severance of the mineral estate prior to conveyance of the individual lots.

E. Title Insurance Endorsements

A surface developer obtaining a title insurance policy could also consider requesting title insurance endorsements to cover certain defined risks associated with a severed mineral estate. While the use of title insurance endorsements should not be considered as a primary solution for managing surface use for mineral development, these endorsements can be used in conjunction with the other options discussed above, and provide additional protection to a real estate developer.

Endorsement language varies depending on the entity that produces the form. In Colorado, the forms used are either American Land Title Association (“ALTA”), California Land Title Association (“CLTA”), or Colorado versions of the CLTA forms. Different title underwriters have their own versions of the endorsements, and there are differences in the cost and requirements for issuance of the endorsements. If one underwriter will not offer the endorsement you want, it makes

sense to shop around. You could start by asking the title agent you are working with if they use more than one underwriter.

Certain endorsements will insure against damage to existing or future buildings and improvements resulting from the exercise by a mineral owner or lessee of its right to develop its mineral estate. Other endorsements may apply to insure the effectiveness of a surface rights relinquishment.[35] It would be prudent to examine the endorsement language carefully, however, to determine if the coverage provided is worth the often-significant cost. Also be aware that there is no endorsement to cover a situation where nothing can be constructed due to mineral development being commenced prior to surface development.

## VII. Conclusion

A surface developer is not required under current Colorado law to undertake a full patent-to-present search of title to identify all mineral estate owners and lessees. However, given the fact that covenants and provisions affecting the respective rights of surface and mineral owners can appear of record in any instrument back to inception, it may be advisable for a real estate developer to obtain a Limited Mineral Title Opinion based upon such a search, except in certain limited situations where meeting the minimum statutory requirements of the Surface Development Notification Act does not pose a significant risk. Only when armed with complete knowledge of the mineral ownership and leasehold status of a property can a surface owner take appropriate steps to work with those mineral owners to ensure that all parties' future interests are protected.

[35] For a thorough discussion of the various endorsement forms applicable to issues arising from a severed mineral estate, see Willis V. Carpenter, COLORADO TITLE INSURANCE PRACTICE § 6.33 (2014).

## ADDENDUM A: Examples of Language Contained in Recorded Documents

Examples of actual language that the author has encountered in historical recorded documents found in the course of mineral title examinations of properties being targeted for surface development:

> In a 1939 Royalty Agreement between the Surface Owner and the Railroad Company that owned the mineral estate, recorded in Weld County:
>
> *The [Surface Owner], for himself, his heirs and assign, . . . grants to the Railroad Company, its lessees, successors and assigns, the perpetual and irrevocable right to remove the adjacent and subjacent support from said premises, and forever releases and discharges the Railroad Company, its lessees, successors and assigns, from any and all liability from damages resulting from the withdrawal of the adjacent and subjacent support from these premises through the removal of coal therefrom.*
>
> In a 1977 Oil and Gas Lease which was held by production, recorded in Arapahoe County, but not listed as an exception on Schedule B-2 to the title insurance commitment for the subject property:
>
> *Lessor . . . hereby grants, leases and lets [the lands] exclusively unto Lessee for the purpose of investigating, exploring, prospecting, drilling and mining for and removing oil and gas . . . and associated liquid hydrocarbons, . . . laying pipelines, building tanks, power stations, telephone lines and other structures thereon to produce, save, take care of, treat, transport and own said products, and house its employees . . . .*
>
> In a 1996 Exploration Contract and Coal Lease with a 25-year primary term, recorded in Boulder County:
>
> *Lessor . . . has granted, leased and let exclusively unto Lessee . . . the above-described Premises for the purpose of prospecting, exploring, developing, mining, and operating for and producing by any method or methods deemed desirable by Lessee (including mining by strip mining, open pit, deep shaft, incline, adit or any other method) all coal and its constituent products and all other mineral substances associated or commingled therewith . . . .*

## ADDENDUM B: Sample Exceptions and Limitations from an SDNA Report

## SDNA REPORT - EXCEPTIONS AND LIMITATIONS

1. Limited Report: This Report is limited to identifying "mineral estate owners" entitled to notification of applications for surface development pursuant to the Colorado Surface Development Notification Act at C.R.S. § 24-65.5-101, et seq. At the request of the addressee (the "Client"), the examiner has not performed a full "patent-to-present" title search of the subject lands, and therefore the examiner makes no representations as to mineral or surface ownership or leasehold status of the subject lands. This Report does not reflect any litigation that may affect title to the subject lands unless a *lis pendens* has been recorded in the Office of the Clerk and Recorder giving notice of such action. This Report is not a title opinion and cannot be relied upon for determination of ownership of any surface or mineral interests in the subject lands.

2. Materials Examined: This Report is subject to, and conditioned upon, the completeness and accuracy of the title information available and provided to the examiner, as described in the "Materials Examined" section of this Report above. Certain title information provided to the examiner relating to the subject lands has been compiled and/or provided by third-parties through the use of (1) tract indices and computerized indices maintained by Heritage Title Company of Greeley, Colorado; (2) title reports prepared by SKLD Information Services of Denver, Colorado; (3) computerized indices and mapping programs maintained by the Offices of the Clerk and Recorder, Assessor and Treasurer of the county in which the subject lands are located; and (4) historical abstracts or title reports prepared by title companies and examiners for the Client, and upon which the Client has directed the examiner to rely. This office shall not be liable for any errors or omissions contained in third-party records, indices, abstracts or title reports. Unless the Client has instructed the examiner to chain title to the subject lands using the grantor-grantee index maintained by the county officer responsible for the recording and indexing of all title instruments affecting real estate in the county where the subject lands are located, (hereinafter referred to as the "recorder"), the examiner shall not be liable to the Client for any liability arising from or related to matters not disclosed in an "unofficial" tract index which purports to describe all title instruments recorded in a county wherein the recorder is required, under state law, to maintain a grantor/grantee index rather than a tract index.

3. Client: This Report has been prepared at the request and direction of the addressee, and is solely for the use and benefit of the addressee. As such, this Report may not be relied upon in any manner by any other person or entity without the written consent of the undersigned. Absent such consent, the undersigned shall not be liable to any third party for any harm, injury, damage, cost, expense or other form of economic loss incurred as a result of an error or omission in this Report.

## ADDENDUM C: Sample Exceptions and Limitations from an LMTO

## LIMITED MINERAL TITLE OPINION - EXCEPTIONS AND LIMITATIONS

1. Limited Opinion: This opinion is limited to mineral ownership in the subject lands. It does not cover interests in the surface estate, except to the extent such interests are related to mineral development, nor does it cover easements and rights of way, mortgages and deeds of trust, financing statements, zoning or land use matters, special district or improvement agreement documentation, agreements relating to gas gathering, processing or purchasing, or other matters normally covered by a title insurance policy or title opinion prepared for drilling or division order purposes. This opinion does not reflect any litigation that may affect title to the subject lands unless a *lis pendens* has been recorded in the Office of the Clerk and Recorder giving notice of such action. This opinion should not be used as a drilling, division order, security title opinion or an opinion as to the validity of the oil & gas leases, if any.

2. Materials Examined: This opinion is subject to, and conditioned upon, the completeness and accuracy of the title information available and provided to the examiner, as described in the "Materials Examined" section of this opinion above. Certain title information provided to the examiner relating to the subject lands has been compiled and/or provided by third-parties through the use of (1) tract indices and computerized indices maintained by Heritage Title Company of Greeley, Colorado; (2) title reports prepared by SKLD Information Services of Denver, Colorado; (3) grantor/grantee books and computerized indices maintained by the Office of the Clerk and Recorder of the county in which the subject lands are located; and (4) historical abstracts or title reports prepared by title companies and examiners for the client, and upon which the client has directed the examiner to rely. This office shall not be liable for any errors or omissions contained in third-party records, indices, abstracts or title reports. Unless the Client has instructed the examiner to chain title to the subject lands using the grantor-grantee index maintained by the county officer responsible for the recording and indexing of all title instruments affecting real estate in the county where the subject lands are located, (hereinafter referred to as the "recorder"), the examiner shall not be liable to the Client for any liability arising from or related to matters not disclosed in an "unofficial" tract index which purports to describe all title instruments recorded in a county wherein the recorder is required, under state law, to maintain a grantor/grantee index rather than a tract index.

3. Client: This opinion has been prepared at the request and direction of the addressee, and is solely for the use and benefit of the addressee. As such, this opinion may not be relied upon in any manner by any other person or entity without the written consent of the undersigned. Absent such consent, the undersigned shall not be liable to any third party for any harm, injury, damage, cost, expense or other form of economic loss incurred as a result of an error or omission in this opinion.

## ADDENDUM D: Misspellings in the Official Grantor-Grantee Index

The following excerpts from a county's official Grantor-Grantee Index show a list of documents all made by Frank J. Conway as a party. The instruments were found using an unofficial tract index. The misspellings illustrate why it would have been nearly impossible to locate these instruments in a grantor-grantee search of the official records.

| | |
|---|---|
| WARRANTY DEED<br>117196 | Rec. Date: 02/23/1907 12:00:00 AM Book Page: Related: Rel Book Page:<br>Grantor: PRITCHARD ERNEST<br>Grantee: CONWAY FRANK J<br>Num Pages: |
| WARRANTY DEED<br>118409 | Rec. Date: 04/01/1907 12:00:00 AM Book Page: Related: Rel Book Page:<br>Grantor: BONWAY FRANK J<br>Grantee: POWELL MURRAY M<br>Num Pages: |
| WARRANTY DEED<br>118510 | Rec. Date: 04/02/1907 12:00:00 AM Book Page: Related: Rel Book Page:<br>Grantor: CONNAY FRANK J<br>Grantee: POWELL MURRAY M<br>Num Pages: |
| WARRANTY DEED<br>122715 | Rec. Date: 09/26/1907 12:00:00 AM Book Page: Related: Rel Book Page:<br>Grantor: CONMAY FRANK J<br>Grantee: HARPER CHARLES S<br>Num Pages: |
| MORTGAGE DEED<br>122716 | Rec. Date: 09/26/1907 12:00:00 AM Book Page: Related: Rel Book Page:<br>Grantor: HARPER CHARLES S<br>Grantee: CONWAY FRANK J<br>Num Pages: |