



Troubleshooting Uncertain Mineral Ownership in Montana

By: [Amy Mowry](#) (Reprinted from DAPL Newsletter - January 2011)

Oil and gas operators in Montana may rely on several statutory provisions to deal with certain title obstacles to their development plans. A gap in record title may result, for example, when a mineral owner has died but his or her estate has not been administered in Montana. In this case, Montana's probate and administration statutes offer ways to establish ownership of unleased minerals for oil and gas leasing purposes.

As in many Uniform Probate Code ("UPC") states, if the record owner of unleased minerals in Montana appears to have died, a successor may establish his or her title to the interests in question, even if no administration of the estate has been completed. Under MONT. CODE ANN. § 72-3-911, "[i]n the absence of administration, ... [d]evisees may establish title by the probated will to devised property," while "[p]ersons entitled to property by homestead allowance, exemption, or intestacy may establish title to the property by proof of the decedent's ownership, the decedent's death, and their relationship to the decedent," subject to estate administration charges and any claims of creditors. The district court has exclusive jurisdiction of all probate matters under MONT. CODE ANN. § 72-3-111, so a district court order establishing heirship is necessary to meet the requirements of § 72-3-911. Where a party establishes his or her title this way, an oil and gas lease covering those minerals should include a warranty provision.

In some cases, proceedings to administer a deceased owner's estate may have begun but are still ongoing at the time of leasing. Under the UPC, the estate's Personal Representative ("PR") is presumed to have authority to perform most actions affecting real property interests, including executing an oil and gas lease or entering into pooling and unitization agreements. Any limitations on the PR's authority will appear in the court-issued letters of

appointment, which should be examined prior to leasing to ensure validity. If the decedent resided in another state, a PR appointed in foreign proceedings may be granted authority in Montana to lease the Montana minerals. An authenticated copy of the original letters of appointment from the other state may be filed in the Montana county where the minerals are located. *See* MONT. CODE ANN. § 72-4-309. If the estate is closed, however, the foreign PR's authority was terminated. In this case, ancillary proceedings must be conducted in Montana in order to transfer the decedent's mineral interests into his or her heirs or devisees. *See* MONT. CODE ANN. § 72-4-401.

Although developers commonly rely on heirship affidavits to establish a decedent mineral owners' heirs for leasing purposes, such affidavits do not legally establish record title in the identified heirs even if executed by disinterested parties. While the statements made in such affidavits are often reliable, under the UPC an adjudication of heirship may be held at any time, notwithstanding the 3-year time limit for informal probate or formal testacy proceedings established by MONT. CODE ANN. § 72-3-122. The many exceptions to the 3-year limit -- as in cases of foreign probate, prior appointment proceedings, doubt as to the decedent's factual death or date of death, will contests or proceedings to construe a will, and absence of proceedings within the 3-year period after death -- increase the likelihood that a subsequent judicial determination will negate the statements in a prior affidavit of heirship.

Unlike many other western states, Montana has no dormant mineral act or marketable title act to resolve uncertain ownership for parties in possession. Montana's 5-year adverse possession period (MONT. CODE ANN. §§ 70-19-401 to 427) and quiet title provisions (MONT. CODE ANN. §§ 70-28-101 to 113) may be useful for parties in possession of the surface estate but are effective only as to unsevered minerals below the claimed surface.

Once a tract is spaced for drilling, oil and gas developers may rely on Montana's forced pooling statutes to develop unlocatable owners' minerals. Under MONT. CODE ANN. § 82-11-202, Montana's Board of Oil and Gas Conservation has authority to force pool separately owned mineral tracts within an established well spacing unit even where all mineral owners do not consent, as in cases where mineral owners can not be located. Regardless of ownership certainty, however, MONT. CODE ANN. § 82-10-103 requires operators to pay mineral owners their proportionate shares of production as royalties within 120 days of initial production, subject to the rate of interest authorized by MONT. CODE ANN. § 31-1-107. In order to avoid any penalties or actions resulting from nonpayment, operators may establish trust for any

unlocatable mineral owners according to MONT. CODE ANN. §§ 82-1-301 to 306. After the “interested person’s” petition, the district court of the county of mineral location may declared a trust in favor of the unknown or unlocatable owner or owners. The court may appoint as trustee the clerk of court or, alternatively, the Montana Department of Revenue. MONT. CODE ANN. § 82-1-302 provides that the appointed trustee may execute an oil and gas lease or division order, “or any other related document or instrument on the terms and conditions as the court may approve.” Any royalties owing to the unlocatable mineral owner’s interest, as well as any bonus or rentals due on the lease may then be paid to the trustee. MONT. CODE ANN. § 82-1-305 requires the operator of a pooled interest to establish such a trust within six months of the procurement of any income owing to the interest or face possible penalties including court costs and interest. Under MONT. CODE ANN. § 82-1-304(4), the trust remains in effect until the unlocatable owner has successfully claimed his or her share of the trust funds after filing the required statutory notice.

The Montana Statutes can be found at
http://data.opi.mt.gov/bills/MCA_toc/index.htm.

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