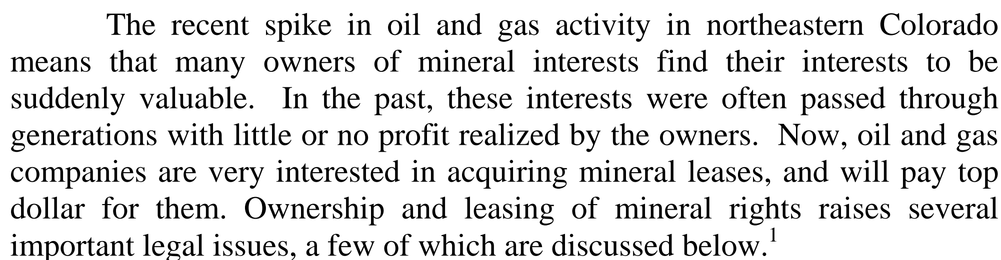
STOVER & SPITZ LLC
ATTORNEYS AT LAW

Striking Oil



The recent spike in oil and gas activity in northeastern Colorado means that many owners of mineral interests find their interests to be suddenly valuable. In the past, these interests were often passed through generations with little or no profit realized by the owners. Now, oil and gas companies are very interested in acquiring mineral leases, and will pay top dollar for them. Ownership and leasing of mineral rights raises several important legal issues, a few of which are discussed below.[1]

Mineral Interests are Real Property

Owners of mineral interests own an interest in real property. Ownership of real property is generally transferred by deed. Mineral rights may be severed from the land, meaning that the right to use the surface is held by one owner, while the right to the minerals is held by another owner. For example, you may own your house, but not the mineral interests underlying it. Often mineral rights are held by several owners, each one owning a certain percentage interest.

Reserving Mineral Rights

If you own the surface rights and mineral rights, and if you are selling your property, determine whether you want to convey your entire interest in the property, or whether you want to reserve minerals. If a reservation of mineral rights is not in the deed, the minerals will automatically pass with the surface interest.

Leases and Royalties

It is common for the owners of mineral interests to lease their mineral rights to drilling companies ("operators"). The owners of the mineral interests then have a royalty interest which entitles them to a certain percentage of revenue from oil and gas production. The leases can last for several years, so it is important to carefully negotiate the terms. Through negotiations, owners of mineral interests will often be able to secure a better deal than the original offer made by the operator.

Division Orders

Once a well is completed, the operator sends division orders to all of the owners. The division orders set forth the percentage interest of each owner. Each owner should review these division orders carefully before signing, to ensure they accurately describe the mineral interest and the owner's percentage interest. It is also in the owner's interest to limit the representations and warranties made by the owner in the division orders.

[1] This article discusses Colorado law. The laws of other states may be different.

WHAT EXACTLY IS PROBATE? The term "probate" refers to the court process of determining whether a decedent died with a valid will, and the appointment of a personal representative to administer a decedent's probate estate. However, the term is frequently used to encompass the entire estate administration process. When necessary, probate will occur whether or not a decedent has a will. A decedent's will directs the disposition of his or her probate assets, or they pass by intestacy if the decedent did not leave a will. With intestacy, the Colorado statutes provide a default distribution scheme for probate assets. Probate assets are assets held in the decedent's name only, or with another person in tenancy in common, without a named beneficiary or with the decedent's estate named as beneficiary.

Stover & Spitz LLC has once again been listed as a Tier 1 Trust and Estates law firm, as recognized by U.S. News Best Law Firms. Only 14 firms in Colorado received a Tier 1 ranking in the Trust and Estates category for 2012.

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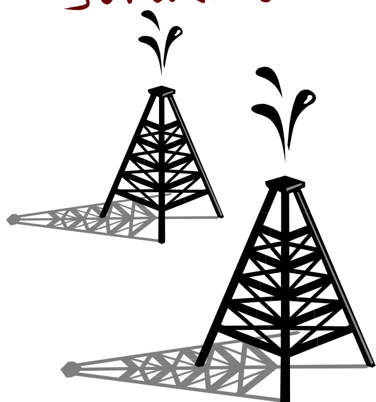

Transfers at Death

When the owner of a mineral interest dies, that interest needs to be conveyed to the decedent's devisees (if he or she dies with a will) or to the decedent's heirs (if he or she dies without a will). Regardless of whether there is a will, there are two means for transferring the interest. The first option is to open a probate. A personal representative is appointed by a court, who then conveys the mineral interest by a personal representative's deed.

A less common alternative to probate is a determination of heirship process. As with probate, a determination of heirship is a court process whereby the court determines the heirs or devisees entitled to the property. Among other requirements, a determination of heirship is not available until one year after death.

In many cases, mineral interests were not correctly conveyed when the owner died. Sometimes family members did not realize that the decedent owned mineral interests if they were not generating revenue, so the minerals were never transferred out of the decedent's name. Now oil and gas companies are seeking out these family members and offering to lease the mineral interests. In order for the family members to lease out the mineral interests, any problems with title must first be addressed. This can often mean that a probate must be opened or reopened years after the owner's death, or a determination of heirship must be obtained.

Estate Planning

If you have mineral interests, they should be considered in your estate planning. If your estate plan involves fully funding a revocable trust, then your mineral interest should be transferred to your revocable trust to avoid probate. Even if your estate plan does not involve avoiding Colorado probate, if you have mineral interests in another state, you may want to transfer those interests to a revocable trust in order to avoid ancillary probate in that state.

If your estate will be subject to estate tax at your death, you might want to give a share of your mineral interest during your life. It might be advisable to first transfer the mineral interests to a limited liability company (LLC) to centralize management, so that you do not have multiple family members each owning a small percentage interest directly in the mineral rights. The LLC can then negotiate the leases and receive the royalty payments.

Stover & Spitz LLC is located in Longmont, near the oil and gas activity in northeastern Colorado. Let us know if we can assist you with the estate planning and probate considerations for your oil and gas interests.

★ ★ ROLL CALL ★ ★

Thomas L. Stover and **Jennifer M. Spitz** were both named to the Colorado Super Lawyers® list as two of the top attorneys in Colorado for 2012. This is Jennifer's first appearance on the list and Tom's seventh annual selection to it. Less than five percent of Colorado lawyers are selected to be listed in Super Lawyers. Super Lawyers is a rating service of outstanding lawyers from more than 70 practice areas who have attained a high degree of peer recognition and professional achievement.

Tom continues to stay busy fulfilling his duties as Colorado State Chair of the American College of Trust and Estate Counsel (ACTEC). He recently returned from the ACTEC Annual Meeting in Miami, Florida. In February he presented a paper to Colorado attorneys on tax planning for distributions and devises in estate and trust administration. In March he presented a paper on estate and gift tax planning using the unlimited marital deduction under federal law. Tom continues to be listed in The Best Lawyers In America®.

Jennifer has been named to the Martindale-Hubbell® Bar Register of Preeminent Women Lawyers™. This registry exclusively lists women attorneys who have received the highest possible ratings in both legal ability and ethical standards from their peers. Less than five percent of women lawyers have been recognized with an AV Preeminent rating from Martindale-Hubbell. Jennifer has also been named again in The Best Lawyers In America®. Martindale-Hubbell and Best Lawyers in America both rely on peer reviews. Jennifer is completing her term as Chair of the Colorado Bar Association's Trust and Estate Section, and she recently gave a presentation about changes made to the Colorado probate code. When she isn't occupied with these endeavors, she enjoys the Colorado outdoors with her family.

Tax Law Uncertainty Persists Congress's inability to agree on much of anything, including tax legislation, coupled with the typical lack of meaningful legislation in a Presidential election year, has resulted in great uncertainty for taxpayers. What follows is a select (non-comprehensive) list of tax breaks expiring at the end of 2012, and tax increases taking effect in 2013.

Barring Congressional intervention, the top rate of 15% on long term capital gains and qualified dividends will expire on December 31, 2012. The top rate on long term capital gains will be 20%. The distinction between ordinary and qualified dividends will disappear, and all dividends will be subject to ordinary tax rates.

The top marginal income rate of 35% will be replaced with a top marginal tax rate of 43.4%.

A new 3.8% surtax on net investment income, a part of the recently enacted health care legislation, will apply to certain taxpayers, potentially increasing the federal tax on capital gains to 23.8%.

Not only will the estate and gift tax exclusion amount be significantly reduced in 2013 to $1,000,000 (from its current rate of $5,120,000), but the tax rate will increase from a flat 35% to a top marginal rate of 55%.

	Top Tax Rate		Increase
	2011-2012	2013	
Ordinary Income	35%	43.4%	24%
Long Term Capital Gains	15%	23.8%	59%
Qualified Dividends	15%	43.4%	189%
Estate and Gift	35%	55%	57%

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Spring 2012 e-Newsletter

Intentional and **Unintentional** Gifts

Gifts are commonly made out of pure generosity, or as part of an estate plan to reduce the value of your estate. However, in some cases, you might make a gift without realizing it.

For gift tax purposes, you make a gift if you bestow something of value on someone else without receiving fair payment or other "consideration" in return. Some examples of transactions that may be treated as gifts even if they are not intended as gifts include the following:

- Adding another person on the title to your real property
- Allowing another person to use your property rent free
- Paying another person's expenses
- Selling an asset to another person for less than the full fair market value of the asset
- Forgiveness of a loan or the interest on a loan

Recently the IRS has been investigating unreported gifts.

If you make a gift, intentional or otherwise, it may need to be reported on a gift tax return. Recently the IRS has been investigating unreported gifts. In particular, the IRS is obtaining information about intra-family transfers from county and state records in California and several other states to identify transfers of real property without payment in return. Deeds and other documents show the amount of payment, or lack thereof. The IRS has determined that many of these transfers were gifts that were not properly reported on gift tax returns.

In some cases, it is not clear whether a gift has been made, in which case a gift tax return can be filed reporting the transaction as a non-gift. Filing the return, and fully disclosing the transfer, starts the statute of limitations running on the time period for the IRS to audit the transaction.

This publication is intended only to provide general legal information.
The information contained herein should not be acted upon without professional advice related to specific situations.
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