MINERAL INTERESTS AND SURFACE DEVELOPMENT – THE PAST DOMINANCE OF MINERAL RIGHTS AND ROYALTY INTERESTS IN AN INCREASINGLY URBANIZED TEXAS

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I. INTRODUCTION[1]

The exploration and ultimate production of oil, gas and other minerals in Texas has been ongoing for well over 100 years. The precedents, rules and statutes that govern the extractive industries' conduct was and is today based on a legal construct that quick and unfettered exploitation of our State's natural resources was an aggregate social good. Natural resources in the form of oil, gas, coal, lignite, or uranium provided the basis for an agrarian economy to move quickly into the 20th century. However, as the community and political landscape of Texas has increasingly modernized — more urban than rural, less likely to have participated in oil and gas revenues, sensitive to environmental protection as a natural resource in itself – the law has slowly emerged to provide a balance more beneficial to surface owners. This redistribution of rights has dramatically complicated the review of land ownership, either recorded or implied, in light of both the fractionalization of mineral and royalty ownership and the spread of urban development.

This paper addresses use of the surface of the earth by mineral owners or their lessees in the conduct of exploration and production of oil, gas and other minerals, including substances removed by surface destructive activities. Who is or is not a mineral owner, and what rights do such owners hold will also be discussed. Finally, we will review statutes, ordinances and other regulations that seek to legislatively protect surface development.

[1] Special appreciation is extended to Mr. Jon R. Ray of Cox & Smith Incorporated for his professional guidance and experience in preparation of this paper.

II. THE MINERAL INTEREST AND ITS VALUABLE SUBSET THE ROYALTY INTEREST[2]

The creation of a mineral estate by reservation or conveyance necessarily creates a surface estate by implication. Ownership attributes of mineral estates can be substantively and quantitatively different depending on the terms and ultimate construction given the recorded instrument of conveyance. Irrespective of how the uncertainty in a mineral grant or reservation arose, only a limited amount of information is available to assist land title professionals in its resolution. With few exceptions[3], the words contained within the document coupled with various rules of construction are the only tools which may be used to determine the instrument's legal effect. Title companies, insurers, buyers and successive owners of estates in land are bound to the rights created or reserved by predecessors in interest to the particular tract of land at issue and any greater parcel from which the subject tract was carved.

From a surface owner's perspective, a mineral interest and a royalty interest are quite different. Generally, the mineral owner has a right to development

[2] The majority of this paper discussing the mineral/royalty distinction is drawn, with permission, from Mr. Jon R. Ray's presentation entitled *Conveyancing Issues and the Mineral/Royalty Distinction,* 14th ANNUAL ADVANCED OIL, GAS AND MIN. L. COURSE (State Bar of Texas 1996).

[3] The Texas Rules of Civil Evidence do not directly address the parol evidence rule. However, *Walters v. Pete,* 546 S.W.2d 871 (Tex. Civ. App.—Texarkana 1977, writ ref'd n.r.e.) holds that a written deed is not subject to amendment as to its meaning by parol evidence when the deed is unambiguous on its face. *See also Rutherford v. Randall,* 593 S.W.2d 949 (Tex. 1980) (absence of ambiguity in mineral deed precludes use of extrinsic evidence to ascertain grantor's intent).

of the specified minerals which are included in his estate, which include exploring, drilling, producing, transporting, storing and marketing. The right to develop also includes an implied right to use the surface estate in ways reasonably necessary to carry out the activities which will ultimately result in a severance and sale of the commodity.[4] The mineral owner can conduct these types of activities herself or authorize other persons to carry out the exploration and production activities. This is usually accomplished in the form of a written lease agreement by which the mineral owner is a lessor and the oil and gas company is a lessee. In Section V below, we will discuss what rights the mineral owner has to use the surface of the tract of land overlying his minerals.

A royalty interest, more commonly referred to just as a royalty, is a valuable subset of a mineral interest. But, from a surface owner's perspective, a royalty interest is less burdensome. Although a royalty is a real property interest under Texas law, generally, it is non-possessory and free of production and operating expenses or rights. Because the interest is incorporeal, the owner of the royalty has no right to enter upon the surface or subsurface of the earth to explore, drill or produce the minerals. The royalty is simply a right to receive part of production free of the mining costs of getting it to the surface of the earth, if, as, and when produced. The royalty interest is usually created by reservation and, as such, retains rights to use the surface and subsurface in saving, caring for and treating the interest, because the produced minerals can always be taken in kind.[5]

Consequently, it is important to determine whether an interest is a mineral fee or solely an interest in production as a royalty, prior to determining who may exercise rights to utilize the surface. Once an instrument can be categorized as creating either a mineral or royalty interest under Texas law, then an analysis can be conducted of what general mineral rights burden the subject tract, and who specifically is burdened by which activity. For unless a title reviewer understands the far reaching difference between a mineral estate and a non-possessory royalty interest, then no true underwriting can be conducted to evaluate the tract.

A. The Bundle of Sticks:

There are rules of construction to support virtually any adversary position regarding interpretation of mineral deeds and reservations[6], and application of the rules by our courts has resulted in a body of law fraught with inconsistencies and fact or word-specific results.

There has been a good deal of writing on the mineral/royalty distinction, including several well written current papers on the subject.[7] The Texas Supreme Court's early 1990's ruling in *French v. Chevron U.S.A., Inc.*[8] and its progeny have not provided definitive guidance as we enter the 21st Century.[9] This section will attempt to review the more traditional approaches our courts have taken in determining the nature or amount of a mineral or royalty

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[4] 1 E. SMITH AND J. WEAVER, TEXAS LAW OF OIL AND GAS § 2.1(A)1(b) (1998).

[5] *See Brady v. Security Home Inv. Co.*, 640 S.W.2d 731 (Tex. App.—Houston [14th Dist.] 1982, n.w.h.); *Neel v. Alpar Resources, Inc.*, 797 S.W.2d 361 (Tex. App.—Amarillo 1990, n.w.h.).

[6] *See, e.g.*, Bruce M. Kramer, *The Sisyphean Task of Interpreting Mineral Deeds and Leases: An Encyclopedia of Canons of Construction*, 24 TEX. TECH L. REV. 1 (1993).

[7] Andrew C. Rector, *Conveyancing Update*, UNIV. TEX. 22ND ANNUAL OIL, GAS AND MINERAL LAW INST. (3-1) (1996); Richard C. Maxwell, *Mineral or Royalty - The French Percentage*, 49 SMU L. REV. 543 (1996).

[8] 896 S.W.2d 795 (Tex. 1995).

[9] *See* discussion *infra* Part II(I) and accompanying notes.

conveyance or reservation. While some of the earlier decisions may only be helpful in construing instruments with virtually identical language, the basic principles involved probably remain useful in analyzing grants or reservations which are distinguishable from the existing authorities.

No particular significance is intended within this section of the paper with respect to the terms "other minerals." These were simply the words used in most of the cases which are analyzed below. The meaning of "other minerals" or "minerals" as encompassing substances beyond oil, gas and hydrocarbons is discussed in Section VIII below. Needless to say the ownership of minerals other than oil and gas is of the highest importance to a putative surface owner and her title insurance company.

The simplest form of ownership of oil, gas and other minerals is that held by the fee simple owner. In Texas, absent any conveyances or reservations, the owner of the surface of the land owns all the minerals underlying his property.[10] A conveyance or a reservation of the minerals by a grantor creates a severance from the surface. This results in two separate fee simple estates — the surface estate and the mineral estate. The initial severance and later conveyance or reservation of the mineral estate are subject to the same formalities as required for the conveyance of any real property.[11] Attorneys, courts and title companies look to the recorded written instrument of conveyance as the final recitation of intent and effect of the parties' transaction.

Texas observes the theory of mineral ownership in place.[12] This means that the landowner, or the mineral estate owner if the minerals have been severed from the surface, owns all of the substances, including oil and gas, which underlie the bounds of his tract. When the mineral estate is severed from the surface estate by conveyance or reservation, the mineral estate retains all of the rights, powers and duties appurtenant to it. In *Humphreys-Mexia Co. v. Gammon*,[13] the Texas Supreme Court stated that "where the minerals in place were severed by the conveyance from the residue of the soil,... the original land [was] as effectively divided into two tracts as if the division had been made by superficial lines, or had been severed vertically by horizontal plain." In *Altman v. Blake*,[14] the Texas Supreme Court described the mineral estate as a composition of five unique rights, commonly referred to as the "bundle of sticks." The five sticks of the bundle or components of the mineral estate have been described as consisting of:

i. the right to develop;

ii. the right to lease;

iii. the right to receive bonus payments;

iv. the right to receive delay rentals; and

v. the right to receive royalty payments.[15]

Although each right is distinct in and of itself, the nature of the mineral estate changes when the five attributes are variously combined. The inclusion or deletion of "sticks of the bundle" in conveyances or reservations, particularly in the earlier instruments, was usually intended to assist in defining what was

[10] *Texas Co. v. Daugherty*, 107 Tex. 226, 176 S.W. 717 (1915).

[11] *See* TEX. PROP. CODE. ANN. § 5.021 (Vernon 1984).

[12] *Texas Co. v. Daugherty*, 107 Tex. 226, 176 S.W. 717 (1915).

[13] 113 Tex. 247, 260, 254 S.W. 296, 302 (1923).

[14] 712 S.W.2d 117 (Tex. 1986).

[15] *French v. Chevron U.S.A., Inc.*, 896 S.W.2d, 795, 797 *citing Altman*, 712 S.W.2d at 118.

described in summary fashion in the granting clause of the document, *i.e.*, to aid the reader in deciding whether a mineral or royalty interest was intended.[16] Nonetheless, courts have attached particular significance to some of the combinations of sticks, resulting in hybrid mineral estates containing attributes of both mineral interests and royalty interests.[17] The intention was not to assist in defining what substances were conveyed and, thus, what substance and rights were left as part of the surface estate package.

The right to lease is otherwise known as the "executive right" and is sometimes denominated the "lease interest,"[18] particularly in earlier cases. The executive right is in many ways derivative of the right to develop.[19] However, the right to develop and the right to lease are, logically, mutually exclusive. The mineral owner can drill and produce oil and gas or the owner may execute an oil and gas lease authorizing another to develop, wherein the owner is entitled to receive the bonuses paid under the lease, the delay rentals paid for deferring drilling under the lease and a royalty on production. *Altman* also parenthetically refers to the right to develop as the right of ingress and egress.[20] Generally, a mineral estate owner cannot exercise both the option to lease and right to develop at the same time. But, as between the mineral owner and the surface owner, the mineral owner and his lessee both can exercise the right of ingress and egress.

Depending upon the view of the commentator, there are probably more than the traditional five components associated with a severed mineral estate, and there are possibly more sticks or rights associated with the mineral estate when it is retained with the surface estate.

The dominant right of surface use associated with a severed mineral interest is probably a lesser component of the right to develop, analogous to the right of ingress and egress. References to the rights of ingress and egress are factors which have been considered by the courts when construing a reservation or grant as encompassing mineral rights or royalty rights.[21] But, access to the mineral estate has given courts the most trouble when deciding the ownership of minerals, the excavation of which, or the drilling for, is surface destructive.

Several authorities have combined the right to receive bonuses and rentals as a single component, and denominated the right of partition as one of the original five sticks of the bundle.[22] However, the right of partition is rarely mentioned in the language of a grant or reservation and hence the courts determine first whether an interest is properly classified as mineral or royalty in order to establish whether the right to partition exists. For instance, in *Outlaw v. Bowen*,[23] the owner of an ambiguous grant was determined entitled to a partition of his interest once the court found that the interest was in fact a mineral interest. By contrast, the owner of a reserved interest seeking partition of his estate in *Hudgins v.*

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[16]*Alford v. Krum*, 671 S.W.2d 870, 873 (Tex. 1984), *citing various authorities.*

[17]*See* discussion *infra* part II(B).

[18]*Delta Drilling Co. v. Simmons*, 161 Tex. 122, 338 S.W.2d 143 (1960); *Garrett v. Dils Co*, 157 Tex. 92, 299 S.W.2d 904 (1957).

[19]*Altman*, 712 S.W.2d at 119.

[20]*Altman*, 712 S.W.2d at 118.

[21]*See* discussion *infra* part II (F).

[22]*See* Samuel A. Denny, *The Mineral-Royalty Distinction and Fractional Interests*, STATE BAR OF TEXAS PROF. DEV. PROGRAM, 7 ADVANCED OIL, GAS AND MINERAL LAW COURSE G (1989), *citing* WILLIAMS & MEYERS, OIL AND GAS LAW, § 303.2.

[23]285 S.W.2d 280 (Tex. Civ. App.—Amarillo 1955, writ ref'd n.r.e.).

Lincoln Nat'l Life Ins. Co.,[24] was denied relief when the court determined his interest to be a royalty.

B. Exclusion of Components:

The effect of the exclusion of sticks or attributes of a mineral estate is an important factor in interpreting a deed. When nothing is mentioned regarding the conveyance or reservation of an undivided mineral interest, all of the five attributes remain with the mineral interest.[25] Each individual stick or attribute can be reserved or conveyed by the mineral estate owner.[26] The mineral interest is not changed or mutated to a royalty interest solely because several or all of its component parts are separated from it. For instance, the court in *Grissom v. Guetersloh*[27] considered the reservation of:

> An undivided 1/16 of all the oil, gas and other minerals in and under the tract of land hereby conveyed; But the grantors waive all interest in and to all rentals or other consideration which may be paid to Grantees for any oil and gas lease on the land or any part thereof hereby conveyed.

The court, concluding that the reserved mineral interest was stripped of its right to participate in the making of leases, and to receive delay rentals or bonuses thereunder, nevertheless declined to conclude that the reserved interest was a royalty. A mineral interest stripped of all of its components other than the right to receive royalty was nonetheless mineral in nature, resulting in the grantor receiving 1/16 of the royalty payable under the lease in question rather than 1/16 of production. A similar result was reached in *Altman v. Blake*[28] in which the Texas Supreme Court construed the grant of:

> An undivided one-sixteenth (1/16) interest in and to all of the oil, gas and other minerals in and under and that may be produced from the following described land... [description]... but does not participate in any rentals or leases...

Here, the court concluded that the owner of the interest conveyed was entitled to only 1/16 of the royalty payable under the lease at issue, notwithstanding the grantee's assertion that the stripping away of the other benefits of lease participation rendered the interest a royalty, entitling the grantee to 1/16 of gross production. To the contrary, the court reasoned that "a mineral interest shorn of the executive right and the right to receive delay rentals remains an interest in the mineral fee."[29]

In *Delta Drilling Co. v. Simmons*[30] the Court construed the grant of an undivided 1/4 interest in oil, gas and other minerals in light of a claim by its owner that the stripping away of components of the mineral estate under a future lease clause rendered the interest a royalty with respect to subsequent leases. The grant in question was of a multi-part form, containing a granting clause, existing lease clause and future lease clause.[31] The granting clause

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[24] 144 F.Supp. 192 (E.D. Tex. 1956).

[25] *French v. Chevron U.S.A., Inc.*, 896 S.W.2d 795, 797; *Day & Co. Inc. v. Texland Petroleum Inc.*, 786 S.W.2d 667, 669 n.1 (Tex. 1990).

[26] *Elick v. Champlin Petroleum Co.*, 697 S.W.2d 1 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.) (mineral owner possesses bundle of interests which can be separately, conveyed or reserved).

[27] 391 S.W.2d 167 (Tex. Civ. App.—Amarillo 1965, writ ref'd n.r.e.).

[28] 712 S.W.2d 117 (Tex. 1986).

[29] *Id.* at 118-19.

[30] 161 Tex. 122, 338 S.W.2d 143 (1960).

[31] These types of deeds are often analyzed as multi-grant deeds where different interests are created in the mineral estate and in existing and future leases. For a discussion of the use and interpretation of multi-clause deeds *see* Laura H.

conveyed an undivided 1/4 interest in oil, gas and other minerals, and was consistent with the existing lease clause, which afforded the owner 1/4 of the royalty payable under the terms of the existing lease. The future lease clause represented an unusual manner of completing the spaces for insertion in a pre-printed form and read:

> It is understood and agreed that None of the money rentals which may be paid to extend the term within which a well may be begun under the terms of said lease is to be paid to the grantee and in event that the above described lease for any reason becomes canceled or forfeited, then and in that event an undivided None of the lease interest and all future rentals on said land for oil, gas and other mineral privileges shall be owned by said Grantee, owning 1/4 of all oil, gas and other minerals in and under said lands, together with No interests in all future rents.

The court determined that the future lease clause's elimination of the right to execute leases following termination of the existing lease, and the elimination of the right to receive certain of the benefits thereunder did not convert the grantee's ownership to a 1/4 royalty payable under the future lease. Consequently, it is apparent that the courts require more than the mere stripping away of components of the fractional mineral estate to convert a fractional interest to a royalty in gross production.

A 1/16 royalty interest was, however, determined to have been retained in *Watkins v. Slaughter*[32] in which the reservation of an undivided 1/16 interest in oil, gas and other minerals was followed by the statement that the grantor should not receive any money rental, and that the grantee would have the authority to lease the land and receive all cash bonuses and rentals. As distinguished from *Altman v. Blake* and *Grissom v. Guetersloh*, the reservation in *Watkins* went on to provide that:

> The Grantor... shall receive the royalty retained herein only from actual production of oil, gas and other minerals on said land.

Use of the word "royalty" and the reference to "actual production" distinguished the reservation from those in which components were merely stripped away and, as noted below,[33] these terms have taken on particular significance in the construction of a grant or reservation as creating a royalty.

As demonstrated, the stripping away of all components of the mineral estate with the exception of the right to receive royalty, coupled with some distinguishing factor, can result in construction of the grant or reservation as a royalty interest. Nonetheless, it is conceded generally that, if the right to receive royalty is coupled with at least one other stick of the bundle, a mineral interest is the result.[34]

In the more recent decisions, the courts have shown an increased willingness to construe an interest as having hybrid characteristics, reflective of both a mineral interest and a royalty interest. Probably the best example is in *Elick v. Champlin Petroleum Co.*[35] in which the court considered a reservation of a 1/32 royalty interest with a

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Burney, *The Regrettable Rebirth of the Two-Grant Doctrine in Texas Deed Construction*, 34 S. TEX. L. REV. 73 (1993).

[32] 144 Tex. 179, 189 S.W.2d 699 (1945).

[33] *See* discussion *infra* parts II(G) and II(H).

[34] 1 E. SMITH AND J. WEAVER, TEXAS LAW OF OIL AND GAS § 3.5(B) (1998).

[35] 697 S.W.2d 1 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.).

reservation of 1/2 of future bonus monies and delay rentals, with the right to join in execution of future leases.[36] The grantees contended that the interest must be construed as a royalty and that the right to participate in bonuses and rentals should be denied to avoid inconsistency. However, the court, ruling to give affect to all of the reservation, concluded that the interest reserved was simply a combination of diverse components of the mineral estate, resulting in ownership of a 1/32 royalty interest, coupled with a right to receive one-half of all bonuses and rentals and together with power to join in execution of leases in order to protect the grantor's interest in bonus and rents which might be paid thereunder. Therefore the owner was essentially left holding a non-possessory royalty interest, and development and exploratory rights remained part of the fee estate, be it mineral or an unsevered surface.

C. Importance of the Granting Clause:

The granting clause of an instrument has received a great deal of emphasis in Texas jurisprudence, and at one time was deemed paramount over later clauses of description. In a typical deed, there is a granting clause followed by a description of the land or interest therein which is transferred. Then, follow clauses of further description, reservations, encumbrances to which the conveyance is subject and, ultimately, a habendum clause, which notices itself with the words "to have and to hold". After the habendum clause, there is a warranty clause if the conveyance contains covenants of warranty.

The granting clause, then, is the operative clause for transferring the estate to the grantee and has been characterized as containing the parties' key expression of intent.[37] If the interest is being reserved in the grantor, then the initial clause of the reservation will take on the same significance. Beginning in the 1950's, certain of the courts struggling with difficult issues of construction looked to the granting clause as fully controlling over other provisions of the deed.[38] Cases involving the attachment of controlling effect to the granting clause spawned the corollary "repugnant to the grant" doctrine which was found particularly useful by the courts in dealing with multi-part or "two grant" conveyances, containing disparity between the granting clause, existing lease clause and future lease clauses.[39]

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[36]"SAVE AND EXCEPT an undivided 1/32 royalty interest in and to all of the oil, gas and other minerals in, to and under and that may be produced from the land herein conveyed to be paid or delivered unto said J.J. Elick, his heirs, or assigns, as his own property free of cost to him from oil, gas and/or other minerals forever, together with the right of ingress and egress at all times for the purpose of storing, treating, marketing and removing the same therefrom.

It is further expressly agreed and understood that the said J.J. Elick, his heirs or assigns shall participate in one-half of the bonus paid for any oil, gas or other mineral lease covering said land and shall participate in one-half of the money rentals which may be paid to extend the time within which a well may be begun under the terms of any lease covering said land and said J.J. Elick, his heirs or assigns shall join in the execution of any future oil, gas or mineral lease."

[37] *Alford v. Krum*, 671 S.W.2d 870, 872 (Tex. 1984), *citing Kokernot v. Caldwell*, 231 S.W.2d 528, 531-32 (Tex. Civ. App.—Dallas 1950, writ ref'd).

[38] *Lott v. Lott*, 370 S.W.2d 463 (Tex. 1963); *See also Waters v. Ellis*, 158 Tex. 342, 312 S.W.2d 231, (1958).

[39] *See generally* Laura H. Burney, *The Regrettable Rebirth of the Two-Grant Doctrine in Texas Deed Construction*, 34 S. TEX. L. REV. 73 (1995). Professor Burney attributes the popularity of two-grant conveyances to *Caruthers v. Leonard*, 254 S.W. 779 (Tex. 1923), which held that when a grantee was conveyed an interest in a mineral estate that was already subject to an oil and gas lease, only the reversionary interest passed. Thus, a conveyance made subject to an existing lease did not transfer the rentals or royalties to the grantee.

Glorification of the granting clause as the ultimate tool for judicial construction of mineral deeds reached its zenith in *Alford v. Krum*.[40] In *Alford*, the deed under consideration conveyed:

> [O]ne-half of the one-eighth interest in and to all the oil, gas and other minerals in and under and that may be produced from the following described lands ... together with the right of ingress and egress at all times for the purpose of mining, drilling and exploring of said lands for oil, gas and other minerals and removing the same therefrom.

The deed also conveyed and included "1/16 of all the oil royalty and gas rental or royalty due" under an existing lease. A future lease clause provided for grantor and grantee to each own one-half (1/2) interest in all minerals and rents under future leases, should the current lease expire. Deeming the granting clause the "controlling language" and dispositive of the interest created, the Texas Supreme Court in *Alford* determined that a 1/16 mineral interest had been created, disregarding and discarding the language suggesting an undivided 1/2 mineral interest which was contained in the future lease clause as being in "irreconcilable conflict" with the granting clause. For a period thereafter, conveyances with potential conflicts among the clauses and, in particular, multi-part grants or reservations received a rather uniform application of the *Alford* standard.[41] However, the express overruling of *Alford v. Krum* in *Luckel v. White*[42] diminishes the precedential value of these authorities, although the granting clause remains a very important factor in construction of an interest as having development rights or being purely an interest that participates in some quantum of production.

D. In and Under:

Irrespective of the viability of the "repugnant to the grant" doctrine, one of the most common and consistently applied analyses is to inquire whether the granting clause contains language typical of a mineral interest. An instrument that grants or reserves the oil, gas and other minerals "in, on and under" or "in and under" the described land, without further provisions relating to the minerals, creates a mineral interest.[43] In *Grissom v. Guetersloh*,[44] the reservation of "an undivided 1/16 interest in the minerals in and under the tract of land herein conveyed", followed by language striping the mineral interest of various components was held to nonetheless result in a reservation that was mineral in character. In distinguishing its holding from *Miller v. Speed*[45] and *Watkins v. Slaughter*[46] one of the factors

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Early scriveners of deeds presumed that only expressly assigned economic benefits would pass, hence the development of multi-part or "two-grant" deed forms which began by use of the "covers and includes" provision.

[40] 671 S.W.2d 870 (Tex. 1984).

[41] *Stag Sales Co. v. Flores*, 697 S.W.2d 493 (Tex. App.—San Antonio 1985, writ ref'd, n.r.e.); *Hawkins v. Texas Oil and Gas Corp.*, 724 S.W.2d 878 (Tex. App.—Waco 1987, writ ref. n.r.e.); *Smith v. Williams*, 779 S.W.2d 479 (Tex. App.—El Paso 1989), *rev'd per curiam*, 786 S.W.2d 665 (Tex. 1990); *Prairie Producing Co. v. Schlachter*, 786 S.W.2d 409 (Tex. App.—Texarkana 1990, writ denied).

[42] 819 S.W.2d 459 (Tex. 1991).

[43] *See Altman v. Blake*, 712 S.W.2d 117 (Tex. 1986); *Richardson v. Hart*, 143 Tex. 392, 185 S.W.2d 563 (1945); *Prairie Producing Co. v. Schlacter*, 786 S.W.2d 409 (Tex. App.—Texarkana 1990, writ denied); *Stag Sales Co. v. Flores*, 697 S.W.2d 493 (Tex. App.—San Antonio 1985, writ ref'd, n.r.e.); *Diamond Shamrock Corp. v. Cone*, 673 S.W.2d 310 (Tex. App.—Amarillo 1984, writ ref'd n.r.e.); 1 WILLIAMS & MEYERS, OIL AND GAS LAW § 304.4 (1993).

[44] 391 S.W.2d 167 (Tex. Civ. App.—Amarillo 1965, writ ref'd n.r.e.).

[45] 248 S.W.2d 250 (Tex. Civ. App.—Eastland 1952, no writ).

[46] 144 Tex. 179, 189 S.W.2d 699 (1945).

deemed important by the court was that the language of reservation referred to the minerals in place.[47] By contrast, in *Miller v. Speed*[48] the absence of the words "in and under said land" or words of similar import was deemed a significant factor by the court in construing the reservation at issue as a royalty. Nonetheless, there is very little consistency in the decisions of the courts with respect to these terms, as numerous cases, based upon other facts, have concluded that a royalty interest was conveyed or reserved by language which included "in and under" or similar terms[49] and, in fact, the inclusion of "in and under" is frequently contained within the language suggested by various form books and manuals for the reservation or grant of a royalty.[50]

E. Produced and Saved:

Use of the words "produced and saved," "that may be produced from", or "produced, saved and sold" has generally been considered characteristic of the language contained in the grant or reservation of a royalty interest.[51] Again, however, there is no consistency in the rulings of the courts which often have concluded that a mineral interest was created or reserved by language containing "produced and saved" or words of like import.[52] Consequently, it would seem that other factors are more important in the construction of a grant or reservation than the inclusion or exclusion of "in and under" or "that may be produced from." Logically, whether the estate in issue is mineral or royalty in nature, enjoyment of the royalty component of the interest is necessarily dependent upon the substance having been "produced."

In *Pinchback v. Gulf Oil Corp.*[53] the court was required to construe a conveyance of land in which the grantor reserved:

> One-eighth of all minerals that may hereafter be produced and saved...

from certain land conveyed to Gulf Oil Corporation, and which was being produced by Gulf Oil Corporation as the mineral fee owner. Without particular analysis of the wording of the reservation, the court concluded that the conveyance vested Gulf Oil Corporation with:

> ownership of the surface of the land and seven-eighths of the oil beneath the surface, with the obligation to

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[47] *Grissom*, 391 S.W.2d at 169.

[48] *Miller*, 248 S.W.2d at 252.

[49] *See generally Gavenda v. Strata Energy, Inc.*, 705 S.W.2d 690 (Tex. 1986); *Halbert v. Green*, 156 Tex. 223, 293 S.W.2d 848 (1956); *Neel v. Alpar Resources Inc.*, 797 S.W.2d 361 (Tex. App.—Amarillo 1990, no writ); *Hudgins v. Lincoln Nat'l Life Ins. Co.*, 144 F.Supp 192 (E. D. Tex. 1956).

[50] 7 ROBERT W. STAYTON, TEXAS FORMS § 4136 (1960) entitled *Royalty Reservations To Be Included in Conveyances of the Fee (Non-Participating and Perpetual)*, reads in pertinent part:

Save and Except and Reserved in favor of the undersigned..., an undivided one-half (1/2) royalty (being equal to not less than an undivided one-sixteenth (1/16)) of all the oil, gas and/or other minerals *in, to and under* and that may be produced from said... together with the right of ingress and egress at all times for the purpose of storing, treating, marketing and removing the same therefrom. (emphasis added).

Section 4135 entitled *Deed to Interest* in Royalty - Limited, Non-Participating, reads in part:

[A]n undivided ____ interest in and to all the oil, gas and other minerals *in and under* the following described tract of land situated in... together with the right of ingress and egress at all times for the purpose of taking said minerals. (emphasis added).

[51] *See generally Neel v. Alpar Resources, Inc.*, 797 S.W.2d 361 (Tex. App.—Amarillo 1990, no writ); *Miller v. Speed*, 248 S.W.2d 250 (Tex. Civ. App.—Eastland 1952, no writ).

[52] *Altman v. Blake*, 712 S.W.2d 117, 118 (Tex. 1986); *Prairie Producing Co. v. Schlachter*, 786 S.W.2d 409, 412 (Tex. App.—Texarkana 1990, writ denied); *Diamond Shamrock Corp. v. Cone*, 673 S.W.2d 310, 311 (Tex. App.—Amarillo 1984, writ ref'd n.r.e.).

[53] 242 S.W.2d 242 (Tex. Civ. App.—Beaumont 1951, writ ref'd n.r.e.).

> deliver to the grantor Mrs. Pinchback, her heirs or assigns one-eighth of the gross amount of any oil which might be produced therefrom... We conclude that was a reservation of the royalty interest and not a mere interest in the minerals.

Given the simplicity of the language of reservation, it is only logical to conclude that the terms "which might be produced therefrom" influenced the court to distinguish its ruling from other cases such as *Delta Drilling Co. v. Simmons.*[54]

F. Ingress and Egress:

The granting of rights of ingress and egress in connection with the conveyance or reservation of an interest has typically been associated with a mineral rather than royalty estate. A royalty interest is viewed as a non-possessory or incorporeal interest in land, the owner of which may not enter the premises for the purpose of exploration or development.[55] The rights of ingress and egress are implied within a grant or reservation of minerals, even if unstated,[56] and are considered a power attached to the right to develop and the executive right.[57] In *Neel v. Alpar Resources, Inc.*[58] the court distinguished the reservation of the right of ingress and egress "for the purposes of storing, treating, marketing and removing" hydrocarbons as a right consistent with a royalty interest. Nonetheless, the reservation of the right of ingress and egress for the purpose of "exploring, mining, developing and removing said mineral therefrom." was not a sufficient consideration to preclude the conclusion that an undivided 15/1987.4 interest reserved in *Halbert v. Green*[59] was a royalty under language denominating the reserved interest as a fraction of "royalty oil, royalty gas, and royalty on other minerals in, on and under..."

Although rights of ingress and egress and surface and subsurface easements are implied in favor of a mineral fee owner, listing them specifically in the deed may be helpful in several ways.[60] First, it makes clear the intent to create a mineral fee and not a royalty, consistent with the right to explore, drill and produce or, in the alternative, to lease with those rights moving to the lessee. Second, it reduces the possibility of disputes with the severed surface owner and the mineral owner as to what rights are commonly understood to go with the mineral estate. Finally, it may create specific rights not implied in the minerals owner's favor or which are broader than those implied rights.

G. Royalty Terminology:

The presence of the term "royalty" has been a significant factor to the courts in construing a grant or reservation. In *Halbert v. Green*[61] the court reviewed the grant of:

> an undivided 15/1987.4 interest in and to all of the royalty oil, royalty gas and royalty on other minerals in, on and under or that may be produced from the following described tracts of land... it is further understood that the grantees' interest in said minerals is only a royalty interest, as above

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[54]161 Tex. 122, 338 S.W.2d 143 (1960).

[55]*Bagby v. Bredthauer*, 627 S.W.2d 190 (Tex. App.—Austin 1981, no writ); *Pickens v. Hope*, 764 S.W.2d 256 (Tex. App.—San Antonio 1988, writ denied).

[56]*Sun Oil Co. v. Whitaker*, 483 S.W.2d 808 (Tex. 1972).

[57]*Prairie Producing Co. v. Schlachter*, 786 S.W.2d 409 (Tex. App.—Texarkana 1990, writ denied).

[58]797 S.W.2d 361, 365 (Tex. App.—Amarillo 1990 no writ).

[59]156 Tex. 223, 293 S.W.2d 848 (1956).

[60]*See generally* 1 E. SMITH AND J. WEAVER, TEXAS LAW OF OIL AND GAS § 3.5(A) (1998).

[61]156 Tex. 223, 293 S.W.3d 848 (1956).

> set out, and that they shall likewise have no interest in any bonus money that may be received by lessors in any future lease or leases on said land, and that it shall not be necessary for the grantees to join in any such lease or leases... [62]

The conveyance also contained a clause acknowledging that the lands were subject to an existing oil and gas lease, but included 15/1987.4 of the royalties provided for in said lease. Rejecting the grantees' contention that the termination of the existing lease rendered the interest a mineral fee, the court drew upon the royalty terminology contained within the grant to conclude that it was, as clearly stated, a royalty. In *Caraway v. Owens,*[63] the reservation of a "fee royalty of 1/32" was construed to entitle the grantor to a 1/32 royalty interest or, 1/32 of gross production.

In *Neel v. Alpar Resources, Inc.,*[64] the reservation of "an undivided one-sixteenth (1/16th) interest (same being one-half (1/2) of the usual one-eighth (1/8) royalty) in and to all oil, gas and other minerals..." followed by a statement that "said reserved interest is a non-participating royalty interest ...", was deemed conclusive of the nature of the interest, notwithstanding the grantor's contention that a mineral interest resulted due to absence of the phrase "from actual production". Accordingly, use of the word "royalty" in the granting clause seems to receive consistent treatment as the preferred method of creating a royalty interest.

In *Watkins v. Slaughter*[65] the Texas Supreme Court narrowly distinguished the effect of a deed conveying 80 acres:

> together with a 15/16 interest in and to all of the oil, gas and other minerals in and under and that may be produced from said land and the grantor retains title to a 1/16 interest in and to all of the oil, gas and other minerals in and under and that may be produced from said land; but it is distinctly agreed and understood that the grantor, his heirs and assigns shall not receive any part of the money rental paid on any future lease; and the grantee, his heirs or assigns, shall have authority to lease said land and receive the cash bonus and rental; and the grantor, his heirs or assigns, shall receive the royalty retained herein only from actual production of oil gas or other minerals on said land.

While the initial portion of the reservation was reflective of a mineral estate, stripped of components other than the right to receive royalty, the court based its decision upon the latter portion of the reservation designating the interest as a royalty, and the clause providing for its payment "from actual production".

In *Brady v. Security Home Inv. Co.*[66] the grantor of a deed owned several properties including a royalty interest in two tracts accompanied by the right to receive one-half of the bonuses and delay rentals. A blanket conveyance of various properties was executed including language conveying all of the grantor's undivided interest in and to the real properties described further in the deed. The royalty interests in issue were described as:

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[62]This deed language was quoted in *Halbert v. Green,* 285 S.W.2d 767 (Tex. Civ. App.—Eastland 1955), *rev'd,* 293 S.W.2d 848 (Tex. 1956).

[63] 254 S.W.2d 425 (Tex. Civ. App.—Texarkana 1953, writ ref'd).

[64]797 S.W.2d 361 (Tex. App.—Amarillo 1990, no writ).

[65]144 Tex. 179, 189 S.W.2d 699 (1945).

[66] 640 S.W.2d 731 (Tex. App.—Houston [14th Dist.] 1982, no writ).

> Royalty interest in all of the oil, gas and minerals that may be produced... as reserved in the deed from James A. Hawkins to Gaddis Wittjen dated March 12, 1949.

The court narrowly construed the use of the term "royalty" in this conveyance to exclude the associated right to receive bonuses and delay rentals which the grantor owned in the parcels in issue.

The absence of the term "royalty" also has significance in construction cases. In *Grissom v. Guetersloh*[67] the failure of the grantor to include the terms "royalty" and "out of actual production" in a reservation of a one-sixteenth of all oil, gas and other minerals enabled the court to distinguish the reservation from similar language involved in the holding in *Watkins v. Slaughter*.[68] Absent the terms "royalty" or other similar language, the grantor's interest was characterized as a mineral interest, stripped of its components other than the right to receive royalty. The net result was the grantor's entitlement to one-sixteenth of the royalty, rather than one-sixteenth of gross production. This interest in oil, gas and other minerals, stripped of its executive rights and the rights to receive bonus, was still an interest which was mineral in nature.

H. "Out of Actual Production":

Use of the words "out of actual production" has been a factor considered by the Texas Supreme Court in distinguishing between a mineral interest and a royalty interest. In *Watkins v. Slaughter*,[69] the deed in issue stated "the grantor retains title to a one-sixteenth (1/16) interest in and to all of the oil, gas and other minerals in and under and that may be produced from the land." Further language stripped away the right to receive "any part of the money rental paid on any future lease", and the grantee would have the authority to lease the land and receive bonus and delay rentals associated with the lease. The reservation concluded by stating that the grantor "shall receive the royalty retained herein *only from actual production...*" (emphasis added). The Texas Supreme Court ruled that the reservation read as a whole, including the words "royalty" and "from actual production" created a one-sixteenth (1/16) royalty interest.

By contrast, the reservation of "an undivided one-sixteenth (1/16) interest in and to all of the oil, gas and other minerals in and under and that may be produced from..." reviewed in *Altman v. Blake*,[70] was determined to be a mineral interest shorn of various components. In *Altman*, the court distinguished its earlier holding in *Watkins v. Slaughter* due to its "great emphasis on the parties' designation of Slaughter's retained interest as a royalty interest," stating "...there is no such direct language of royalty in the 1938 Blake Deed." However, the failure of the reservation to include the terms "from actual production" may have had more significance than indicated by the court's statement. The reservation in *Altman* did not use the words "from actual production". Consequently, it is apparent that the Texas Supreme Court does not equate the terms "that may be produced from" with "from actual production" although it would seem that the two phrases could be considered synonymous.

After the Texas Supreme Court's ruling in *Altman*, the Amarillo Court of Appeals reviewed a specific reservation[71]

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[67] 391 S.W.2d 167 (Tex. Civ. App.—Amarillo 1965, writ ref'd n.r.e.).

[68] 144 Tex. 179, 189 S.W.2d 699 (1945).

[69] 144 Tex. 179, 189 S.W.2d 699 (1955).

[70] 712 S.W.2d 117 (Tex. 1986).

[71] SAVE AND EXCEPT an undivided one-sixteenth (1/16th) interest (same being one-half (1/2) of the usual one-eighth (1/8) royalty) in and to all of the

in *Neel v. Alpar Resources, Inc.*[72] and succinctly stated that:

> The words "from actual production" stated in *Watkins* are not exclusive words of art which must be used when expressing a party's intent to reserve a royalty rather than mineral interest.

By use of the term "royalty" in the initial (*i.e.*, granting) clause of the reservation, the court correctly determined that a royalty interest was created. Nonetheless, the Texas Supreme Court may have disagreed with the statement that "from actual production" are not words of art in *French v. Chevron U.S.A., Inc.*[73]

I. *French v. Chevron U.S.A., Inc.*:

The mineral grant in issue in *French* reads:

> That I, George Calvert... do grant, bargain, sell, convey, set over, assign and deliver unto Capton M. Paul, an undivided fifty (50) acre interest, being an undivided 1/656.17th interest in and to all of the oil, gas and other minerals in, under and that may be produced from the following described land...[description of 32,808.5 acres]...
>
> It is understood and agreed that this conveyance is a royalty interest only, and that neither the Grantee, nor his heirs or assigns shall ever have any interest in the delay or other rentals or any revenues or monies received or derived from the leasing of said lands present or future or any part thereof. Neither the Grantee herein nor his heirs or assigns shall ever have any control over the leasing of said lands or any part thereof or the renewal or extending of any lease thereon or for the making of any lease contract to develop or prospect the same for oil, gas or other minerals, which is hereby specifically reserved in the Grantor.[74]

The grantee of the interest urged that the use of the phrase "royalty interest only" was clearly descriptive of the estate conveyed. The court began its analysis by observing that, without the language stating that the interest conveyed "is a royalty interest only" a mineral estate was clearly conveyed. By stripping away the right to develop, the right to lease, the right to receive bonus payments and the right to receive delay rentals, only the royalty component of the mineral estate remained. The court observed that the statement that the interest conveyed was a royalty interest only, was merely descriptive of what remained of a mineral estate, once its other components had been stripped away. In reaching its conclusion, the court regrettably resorts to a redundancy analysis:

> A grant of a royalty interest, without any further grant, does not convey an interest to the grantee in delay or other rentals or in bonus payments, nor would it convey executive rights. The meaning of

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oil, gas and other minerals in, to and under and that may be produced from the land herein conveyed to be paid or delivered unto said bank as its own property free of cost to it from royalty oil, gas and/or other minerals FOREVER, together with the right of ingress and egress, at all times for the purpose of storing, treating, marketing and removing the same therefrom. Said reserved [sic] is a non-participating royalty interest and shall not participate... . In the event oil, gas and/or other minerals are produced from said land, then said bank shall receive a full one-sixteenth (1/16th) portion thereof as its own property, to be paid or delivered to said bank free of cost to it.

[72] 797 S.W.2d 361 (Tex. App.—Amarillo 1990, no writ).

[73] 896 S.W.2d 795 (Tex. 1995).

[74] *Id.* at 796.

> this grant is to convey an interest in the nature of a royalty - a mineral interest stripped of appurtenant rights other than the right to receive royalties.[75]

With reference to the fact that the deed contained clauses reserving to the grantor the right to receive delay rentals, and revenues from leasing, the court concludes:

> This reservation would be redundant and would serve no purpose whatsoever if the interests in minerals being conveyed was a 1/656.17 royalty interest, that is, 1/656.17 of all production.[76]

Without expressly overruling *Watkins v. Slaughter*, the court in *French* goes on to conclude that:

> When a deed conveys a royalty interest by the mechanism of granting a fractional mineral estate followed by reservations, what is conveyed is a fraction of royalty, not a fixed fraction of total production.[77]

Citing to *Brown v. Havard*[78] for its authority in distinguishing between the conveyance of a fraction of production as royalty and a fraction of royalty, the court itself seems to disregard the clear distinction under Texas law between a "royalty interest" and an "interest in royalty."[79]

The decision in *French* has been dutifully followed by appellate courts in subsequent recent decisions *BankOne, Texas, Nat'l Ass'n v. Alexander*[80] and *Temple-Inland Forest Prod. v. Henderson*[81]

III. ROYALTY INTEREST OR A FRACTION OF THE ROYALTY?

A. A Piece of Pie:

Although there may be no dispute that a mineral interest is involved, the parties to a grant or reservation of royalty rights may nonetheless disagree as to the size of the interest conveyed or reserved. Typically, these disputes involve whether an interest in royalty or a royalty interest was created. Use of "in" or "of" before the term "royalty" creates a fraction of the royalty payable under existing or future leases.[82] The conveyance or reservation of a fraction, followed by the word "royalty" or "royalty interest", creates an interest in gross production which is payable to its owner free of cost.[83] The distinction has been explained as the difference between "a piece of pie" and "a piece of a piece of pie".[84]

Both types of interests were involved in *Luckel v. White*.[85] In reviewing a multi-grant conveyance, the court in *Luckel* concluded that a 1/32 royalty interest was granted under the existing lease, while a 1/4 interest in royalty was granted under future leases.

B. Fractions of the 1/8 Royalty:

Many of the reported decisions regarding early conveyances have involved the draftsman's misconception that only a 1/8 royalty would be reserved to the lessor in oil, gas and mineral leases. For instance, in *Helms v.*

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[75] *Id.* at 798.

[76] *Id.* at 798.

[77] *Id.* at 798.

[78] 593 S.W.2d 939 (Tex. 1980).

[79] *See* discussion *infra* Part III (A).

[80] 910 S.W.2d 530 (Tex. App.—Austin 1995, writ denied).

[81] 911 S.W.2d 531 (Tex. App.—Beaumont 1995, no writ).

[82] *See State Nat'l Bank of Corpus Christi v. Morgan*, 135 Tex. 509, 143 S.W.2d 757 (1940).

[83] *Masterson v. Gulf Oil Corp.*, 301 S.W.2d 486 (Tex. Civ. App.—Galveston 1957, writ ref'd n.r.e.).

[84] Richard T. Brady has an ample dictionary of "country" expressions, reportedly obtained from the walls of the Carrizo Springs bus station.

[85] 819 S.W.2d 459 (Tex. 1991).

Guthrie[86] a conveyance was made by the owner of 100% of the surface and mineral estate, and 75% of the royalty estate in certain lands. The deed recited that there had been a conveyance of "an undivided 1/4th of the 1/8th oil, gas and mineral royalty..." to another party, and contained the following reservation:

> Also, the grantors herein retain and reserve under said First Tract 1/2 of the 1/8th royalty (same being a 1/16th of the total production) of oil, gas and minerals, same being a non-participating royalty interest herein retained by grantors.

The grantee of the deed executed an oil and gas lease reserving a 1/8 royalty and a 1/16 of 7/8 overriding royalty. The plaintiff and grantor of the deed in issue claimed entitlement to 1/2 of the royalty reserved in the lease, including a share of the overriding royalty provided therein. Nonetheless, the court limited grantor's rights in accordance with the language of the deed to a 1/16 royalty interest in total production.

The inadvertent inclusion of the word "of", too many times in cases involving the usual 1/8 royalty has also been the source of litigation among disappointed owners. In *Harriss v. Ritter*[87] the grantors of land reserved:

> One-half of one-eighth of the oil, gas and other mineral royalty that may be produced from said land, and further reserve and except to themselves from this conveyance one-half of any bonuses or rentals that may be paid under the terms of any mineral lease... .

Against contentions by the grantors that a 1/16 royalty interest was reserved, the Texas Supreme Court concluded that the plain and unambiguous language of the reservation entitled the Plaintiffs to only 1/16 of the royalty. Under more extreme facts, the Plaintiff in *Richardson v. Hart*[88] who had been granted "1/16 of 1/8 of all of the oil royalty...", was held limited in ownership to 1/128 of the royalty or, 1/1024 of production under the existing 1/8 lease.

C. Size of the Interest is Immaterial:

The size of the interest reserved or conveyed is apparently immaterial to the courts in construing the nature of the interest. While the courts seek to determine the intention of the parties in cases of construction, it is the intention which has been expressed within the four corners of the instrument, and not necessarily the parties subjective intent. Obviously, the likelihood of the Browns' intent to retain 1/1024 of production in *Brown v. Havard* was not a significant factor. Likewise, the size of the reserved interest (and its effect on marketability of the land in general) was not a factor considered by the court in *Gavenda v. Strata Energy, Inc.*,[89] when the court concluded that the grantors of a deed had reserved 1/2 of all production as a free royalty. In *Gavenda* the court considered the reservation, for the term of 15 years, of:

> an undivided one-half (1/2) non-participating royalty of all of the oil and gas in, to and under that produced from the hereinabove described tract of land. Said interest hereby reserved is a non-participating royalty and shall not participate in the bonuses paid for any oil and/or gas lease covering said land, nor shall the Grantors participate in the rentals which may be paid under and pursuant to

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[86] 573 S.W.2d 855 (Tex. Civ. App.—Fort Worth 1978, writ ref'd n.r.e.).

[87] 154 Tex. 474, 279 S.W.2d 845 (1955).

[88] 143 Tex. 392, 185 S.W.2d 563 (1945).

[89] 705 S.W.2d 690 (Tex. 1986).

the terms of any lease with reference to said land.

Adhering strictly to the distinction between a royalty interest and an interest in royalty, the court held the operator of an oil and gas lease on the affected lands liable to the Gavendas for its failure to account to them for a full one-half of production as a free royalty, notwithstanding the execution of division orders authorizing payment for one-half of the royalty provided under the existing lease.

D. General Consistency:

By way of contrast to the cases involving the mineral/royalty distinction, there is a general consistency in the courts construction of cases involving questions of whether a royalty interest or a fraction of the royalty was reserved or conveyed. While the consequences have sometimes been unusual, the courts have strictly constrained parties to the precise language used in their royalty conveyances and reservations, adhering to the distinction between a royalty interest and a fraction of the royalty. It leads one to question, then, why the same court which applies the distinction between an interest in royalty and a royalty interest in *Luckel v. White*[90] does not consider the distinction a factor applicable in reviewing the language "this conveyance is a royalty interest only" (emphasis added) in *French v. Chevron U.S.A., Inc.*[91]

IV. MINERAL COTENANTS

Minerals, royalties and other interests in the mineral estate may, like all real property, be subject to a diversity of ownership. It is the tenancy in common or undivided fractional interest of oil, gas and other minerals that is of greatest concern to a surface owner or owners. Texas law relative to development and leasing rights between co-owners of oil and gas, no matter the number, generally facilitates the speedy exploration, development and ultimate production of mineral resources. In short, any cotenant of the minerals can drill for oil without the consent of the remaining mineral owners.[92] Necessarily, each separate participating oil and gas developer is authorized to make use of the surface overlying the mineral property.[93] Simply, any cotenant that owns an interest in a portion of the mineral estate that is possessory in nature, can explore, drill and produce oil, gas or other minerals from locations on and make full use of the surface, even if such activities are duplicative of other mineral owner's surface activities.[94] Likewise, any cotenant of an ownership interest in production, such as a royalty interest, if their interest is so denominated, can also enter into and make use of the surface in securing, treating, storing and caring for their royalty fraction if it is taken in kind or if they have granted the right to others to do so on their behalf, in lieu of securing a portion of the proceeds of actual production.[95] Texas law has developed these rules to encourage the rapid and successful development of natural resources and to prohibit the owner of a minority interest from blocking mining or drilling or use the surface. Each cotenant can fully exercise the rights of a dominant estate owner to utilize the surface, the titles and other incidents that are a necessary part of his undivided share in the minerals. This is the majority rule among producing oil and gas states: that

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[90] 819 S.W.2d 459 (Tex. 1991).

[91] 896 S.W.2d 795 (Tex. 1995).

[92] *Burnham v. Hardy Oil Co.*, 147 S.W.2d 330 (Tex. Civ. App.—San Antonio 1912), *aff'd* 108 Tex. 555, 195 S.W. 1139 (1917).

[93] *See generally* 1 E. SMITH AND J. WEAVER, TEXAS LAW OF OIL AND GAS § 2.3(A)(1) (1998).

[94] *TDC Engineering, Inc. v. Dunlap*, 686 S.W.2d 346 (Tex.Civ.App.—Eastland 1985, writ ref'd n.r.e.).

[95] *See e.g. Neel v. Alpar Resources, Inc.*, 797 S.W.2d 361 (Tex. App.—Amarillo 1990, n.w.h.).

a tenant in common, or the cotenant's lessee, has the absolute right to explore and produce their property without the permission of the other undivided owners.

Most oil and gas practitioners and exploration companies agree that cotenancy caused by the fractionalization of mineral interests is of an increasing concern in the industry because of its negative incentive to develop (based on the requirement to account for net proceeds to nonconsenting cotenants), and the quantitative increase in the possibility of surface burdens by diverse owners with different objectives, timelines and standards of reasonableness.[96] In determining rights and obligations between the surface holder and multiple mineral cotenants, the most onerous attribute of the mineral estate is the non-exclusive right to possession.[97]

V. SURFACE USE BY MINERAL OWNERS OR THEIR LESSEES

A. The Dominant Estate

Under Texas law, when a mineral severance has occurred, the right to minerals carries with it "the right to enter upon and extract them and all such incidents thereto as are necessary to be used for getting and enjoying them."[98] The rationale for the doctrine is because:

> "a grant or reservation of minerals would be wholly worthless if the grantee or reserver could not enter upon the land in order to explore for and extract the minerals granted and reserved."[99]

Hence, the mineral estate together with the right to use the surface for developing the minerals is the "dominant estate" meaning that the mineral owner's common law right to use the surface generally has superiority and priority over any purposes for which the surface owner desires to use the surface even when the surface owner is a public entity needing the property for public use.[100] As the dominant estate, the mineral owner may make as much use of the surface as is reasonably necessary in enjoying the minerals or in effectuating the goals of the oil and gas lease. However, even under the established common law rule, use of the mineral rights must be reasonably exercised with due regard to the rights of the surface interest owners — the mineral owner should use no more land than is reasonably necessary for development of the minerals and should exercise, at least, ordinary care.[101] The due regard doctrine generally has been applied from the perspective of the mineral owner and not from the vantage point of the burdened surface owner. If the lessee's activities are objectively reasonable within the industry, they will not expose the lessee to liability to the surface owner irrespective of their impact to the surface estate.[102] The due regard doctrine does recognize the concurrent rights of the two estates — the surface

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[96] *See generally* Dorothy J. Glancy, *Breaking Up Can be Hard to Do: Partitioning Jointly-Owned Oil, Gas and other Mineral Interests in Texas*, 33 TULSA L. J. 705 (1998).

[97] *See e.g. Laster v First Huntsville Properties Co.*, 826 S.W.2d 125 (Tex. 1991); *Willson v. Superior Oil Co.*, 274 S.W.2d 947 (Tex. Civ. App.—Texarkana 1954, writ ref'd n.r.e.).

[98] *Cowan v. Hardeman*, 26 Tex. 217, 222 (1862).

[99] *Harris v. Currie*, 142 Tex. 93, 176 S.W.2d 302, 305 (1944).

[100] *See Chambers Liberty County Navigation Dist. v. Banta*, 453 S.W.2d 134 (Tex. 1970).

[101] *General Crude Oil Co. v. Aiken*, 344 S.W.2d 668 (Tex. 1961); *see also, Brown v. Lundell*, 344 S.W.2d 863, 866 (Tex. 1961) (mineral owner owes duty not to negligently injure surface).

[102] *See generally* Burney, *Accommodating and Condemning Surface and Mineral Estates — The Implications of Tarrant County Water Control and Imp. Dist. No. 1 v. Haupt, Inc.*, 1994 Adv. Oil, Gas & Min. Law Inst. (Oct. 6-7, 1994).

owner's right to use and enjoy those parts of the surface not required for mineral activities and the mineral owner's right to use so much of the surface as is reasonably necessary for purposes of exploration and development of minerals.

1. Accommodation Doctrine

The "due regard" concept was expanded in *Getty Oil Co. v. Jones*,[103] which established the doctrine of accommodation. This doctrine recognizes that the use of the surface estate must be considered and accommodated by the mineral owners where it is necessary and possible to do so. The doctrine holds that

> "where there is an existing use by the surface owner which would otherwise be precluded or impaired and where under established practices in the industry there are alternatives available to the mineral lessee whereby minerals can be recovered, the rules of reasonable usage of the surface may require the adoption of an alternative use by the lessee."[104]

The accommodation doctrine is applied based upon the facts of each individual case depending upon the reasonable alternatives available to both the surface and mineral owners. If there is only one means of surface use that reasonably would allow production of the minerals, then the mineral owner has the right to pursue such use regardless of the surface damage. However, if the mineral owner has reasonable alternatives, the mineral owner must make a reasonable accommodation to permit the use of the surface for other productive purposes even if the mineral owner's production costs are increased. Application of the "accommodation doctrine" was further refined by the Texas supreme court in *Sun Oil Company v. Whitaker*[105] in which the court decided the reasonable alternative had to be one available on the property. Thus, if the alternative can only be exercised by use of land or materials off the lease (i.e., directional drilling from other lands or, as in *Whitaker*, importation of water for secondary recovery operations), the lessee is not required to employ that alternative. The mineral lessee must make use of alternative but industry accepted and not cost-prohibitive means of exploration.[106] Stated another way, the existing uses of the surface by the surface owner should not be impaired by the dominant estate's mineral activities when the contractor, using normal business practices, can accommodate such surface use and still enjoy the benefits of the mineral estate.

2. Restrictions on Dominant Use

The mineral lessee's right to make use of the surface is limited, therefore, by at least five (5) restrictive principles. The lessee's use must be:

i. a reasonable use;

ii. in accordance with the accommodation doctrine of existing surface uses;

iii. for the benefit of the minerals under the leased land;

iv. in accordance with the terms of the lease; and

v. in accordance with applicable statutes.

A mineral owner or his lessee's use must be reasonable and with due accommodation of the surface owner's existing uses at the time that the construction of roads and surface facilities are contemplated. Additionally, the surface use must be in compliance

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[103] 470 S.W.2d 618 (Tex. 1971).

[104] *Id.* at 622.

[105] 483 S.W.2d 808, 812 (Tex. 1972).

[106] *See Tarrant County Water Control & Imp. Dist. No. One v. Haupt, Inc.*, 854 S.W.2d 909 (Tex. 1993).

with applicable Railroad Commission rules or other Texas statutes, regulations or ordinances, such as those dealing with drilling or environmental matters. Lease terms and overuse of the surface are discussed further below. Governmental regulations which mitigate against unfettered use of the surface by the dominant possessory estate are discussed in Section IX below.

B. Access and Facility Easements

The first goal of any oil operator is to enter onto the land and commence exploring the depths below. Absent express language in an oil and gas lease providing for easements, there exists several statutory and common law remedies in order for the operator to use access easements, and erect pipeline rights-of-way and facility sites located on acreage covered by the oil and gas lease.

Oil and gas operators typically rely on either the express terms of their lease from the mineral owner, regardless of whether it is from the owner of a fully severed mineral interest or from a mineral lessor who owns some interest in the surface estate, or one of the several legally implied easements in order to exercise use of the surface. The mineral lessee relies on one of the four legal theories of easements: (i) an express easement tied to the specific language in the lease, (ii) an implied easement for extracting minerals, (iii) an implied easement by necessity, and (iv) an implied easement appurtenant. As a result of ownership of a leasehold interest, the lessee holds both express and implied easements over acreage existing immediately over the leasehold. The express easements include and Texas law implies in absence of such language, an easement for the reasonable use of the surface for exploring, drilling, producing, transporting and marketing the minerals covered by the Lease. Leases themselves and Texas law establish the mineral leasehold which is created by the lease as the dominant estate, making the lessee's right to use the surface superior to the surface owner's right in the event of any conflict.[107] Unreasonable use of the surface by the mineral lessee may constitute grounds for an action in damages by the surface owner.

1. Surface Use Must Benefit the Minerals Underneath

First, a clear limitation on the contractual and implied right of the mineral lessee to use the surface of the land is that such use must be exclusively to explore for and produce the oil and gas located under the specific tract of land under lease. This is merely an application of the general principle of property law that an easement may not be used for the benefit of any other property other than the dominant estate, that being the estate which the easement benefits. Use of the surface for the benefit of an adjoining leasehold generally constitutes an abuse and overuse of the scope of the easement. The exclusivity is further limited in that the authorized surface use cannot involve operations that benefit both on-lease and off-lease minerals. For example, a road, pipeline and storage facility constructed in connection with a well drilled on one lease may not also be used in conjunction with operations on an adjoining lease. Courts take a strict view of the scope of the easement. The lessee has no right to conjunctive uses. The only exception to this rule is in the case where the two tracts of land are pooled or unitized such that the mineral owner of the utilized tract shares in both the benefits and obligations of the surface use. This paper does not address surface use in connection with a pooled unit other than to note that any part of the surface of the pooled unit may be used to benefit the underlying unitized minerals.

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[107] *Ball v. Dillard*, 602 S.W.2d 521 (Tex. 1980).

One reported federal case may give authority for the proposition that an oil and gas lessee may make use of any of the adjoining surface lands owned by the same surface owner of any tract overlying the leasehold. Stated another way, the oil and gas lessee may have dominant use not only of the surface estate immediately over the leased mineral estate, but all other surface lands adjoining the leased acreage which are under common surface ownership. In the case of *Mountain Fuel Supply Co. v. Smith*, 471 F.2d 594 (10th Cir.), the United States Court of Appeals held that ownership of an area formerly in eleven separate tracts can be viewed as "...but one surface tract in common ownership..." by the surface owner, such that the lessee of a federal oil and gas lease covering a portion of the lands could make reasonable use of any of the surface. The Court of Appeals viewed all of the separate tracts acquired at different times by the surface owner as being a single tract. Under this Court's analysis, the consolidated ownership of the separate tracts into larger separately-owned parcels expands the scope of the easements originally created when the surface and minerals were severed. The court held that each of the eleven tracts now has the potential burden of development of the minerals under all of the tracts as opposed to the original burden of development of the minerals subjacent only to the surface.

2. Surface Use Must be in Accord With the Lease Terms

Second, the surface use must be in accordance with the lease agreement. A typical oil, gas and mineral lease contains specific provisions limiting the implied easement for surface use. For example, an older form lease may grant:

> "... exclusively onto Lessee for the purpose of investigating, exploring, prospecting, drilling and operating for and producing oil and gas, injecting gas, waters other fluids, and air into subsurface strata, laying pipe lines, storing oil, building tanks, roadways, telephone lines, and other structures and things thereon to produce, save, take care of, possess, store and transport said minerals, in the following separately described tracts of land in Bexar County, Texas, to wit:"

The lease form specifies which surface uses are authorized. Leases often include protections for the surface owner even if the mineral lessor has no interest in the surface. The surface protections found in a lease, such as burying pipelines and keeping drilling a specified distance from houses, are covenants running with the surface estate.[108]

Most leases allow the lessee to use surface roads, and build new roadways if needed. The operator should be able to use existing roads or build new roads on the surface of the acreage currently covered by the lease, unless such use would be unreasonable or in direct conflict with the surface owner's use. Mineral operators can construct roads and other transportation infrastructure without compensation to the surface owner for occupation of the land or its diminution in value.[109] In fact, a mineral owner or her lessee can even utilize the surface owner's own natural resources in constructing and maintaining surface facilities, such as lessee constructed or maintained roads, drill pads and tank batteries' foundations and dikes.[110]

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[108] *See e.g. Thomas v. Thomas*, 767 S.W.2d 507 (Tex. App.— Amarillo 1989, writ deined).

[109] *See e.g. Property Owners of Leisure Land, Inc. v. Wovel & Magee, Inc.*, 786 S.W.2d 757 (lessees construction of necessary emergency roads was reasonable even in light of explicit surface subdivision restrictions to the contrary).

[110] *Connell v. B.L. McFarland Drilling Contractor*, 162 Tex. 345, 347 S.W.2d 565 (1961)(authorizing

3. Easements To Gain Access to the Minerals

In the absence of written contract language in the lease authorizing surface easements, the lessee must rely on one of three types of implied easements. An implied easement is an easement right that the law or a court implies is written into the lease under certain specific fact situations. The two most common types of easements that may be implied in an oil and gas lease are easement by necessity, and easement appurtenant.

A mineral owner has a common law right, in the form of an implied easement of ingress and egress over the surface and through the subsurface for exploration and production.[111] Generally, Texas law holds that an oil and gas lease does not assign to the lessee the right to use the surface of other lands owned by the Lessor but not covered by the lease except to gain access to the leasehold. For instance, in the case of *Petty v. Winn Exploration Co., Inc.*, 816 S.W.2d 432 (Tex. App. – San Antonio 1991, no writ), an oil and gas lessee was allowed to continue to use an existing road for oil and gas operations, even though the road crossed lands that were not subject to the same lease. An oil and gas lessee obtains a fee simple determinable in the mineral estate, and like grantees of surface estates, the lessee can assert a right pursuant to Texas common law, to an easement by necessity or implied easement appurtenant across adjacent acreage retained or owned by the lessor. *Peacock v. Schroeder*, 846 S.W.2d 905 (Tex. App. – San Antonio 1983, no writ). In *Peacock*, a mineral lessor brought a claim that the lessee did not have an access roadway across lands owned by the lessor, but not covered by the lease, to reach the 160-acre lease. The appeals court found that the evidence supported the finding by the trial court of an implied easement by necessity and an implied easement appurtenant. The elements and application of these easements are discussed in more detail below. Moreover, the case is instructive in illustrating that most Teas easement cases involve road access easements to the leasehold, rather than pipeline rights-of-way and facility locations that benefit the leasehold but are located off lease.

4. Easement by Necessity and Appurtenant Easement

a) Easement by Necessity

The best legal theory for supporting use of roads and other access easements over surface acreage not currently covered by an oil and gas lease, lies in the common law doctrines of implied easement by necessity and implied appurtenant easement. The two theories are often pled together, or alternatively, in a lawsuit because they rest on nearly the same fact patterns. These two implied easements are not implied into the oil and gas lease, much like the reasonable use of the surface is implied into the lease grant. Rather, the easements are implied based on the nature of prior title to the lessor's contiguous land (not specifically to the leasehold) and the requirement that the leasehold have some access to the public thoroughfares. Generally, these two theories are not applicable to use of surface facilities other than roads because they concern access to the physical leasehold.

The two types of implied easements are nearly identical and rest on the principle that a subdivision of land into multiple tracts should not leave any one tract or the underlying minerals completely land locked with no means of access to public thoroughfares. The

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the opening of a pit caliche mine for construction of surface facilities).

[111] *Ball v. Dillard*, 602 S.W.2d 521 (Tex. 1980); *Parker v. Texas Co.*, 326 S.W.2d 579 (Tex. Civ. App.—El Paso 1959, writ ref'd n.r.e.).

elements of an implied easement by necessity are:

i. Unity of ownership of the dominant and servient estates prior to the severance;

ii. Access must be a necessity and not a mere convenience; and

iii. The necessity must exist at the time of the severance of the two estates.

Koonce v. Brite Estate, 663 S.W.2d 451, 452 (Tex. 1984). To establish an implied easement by necessity, sometimes known as a way of necessity, across the lands owned by another, the lessee must show that the lands were once commonly owned, and as a result of the division of the commonly owned lands, one tract (i.e., the tract upon which mineral operations are being conducted) was left with no public access. Under these circumstances, the lessee, as a way of necessity across the other tracts held by the lessor that was once part of the commonly owned acreage is entitled to obtain access to the land locked lease tract. The necessity must have been present at the time of the severance and that necessity must be strict, meaning that there must be a complete lack of public access and not a mere inconvenience. If any other legal means is available to gain access to the lease tract, then the necessity element fails.

b) Appurtenant Easement

The elements of an implied easement appurtenant are:

i. Unity of ownership of the dominant and servient estates prior to the severance;

ii. The use of the estate must have been apparent at the time of the grant;

iii. The use of the easement must have been continuous and the parties must have been intended that its pass by the grant; and

iv. The use of the easement must be reasonably necessary to the use and enjoyment of the dominant estate.

Drye v. Eagle Rock Ranch, Inc., 364 S.W.2d 196, 207-08 (Tex. 1962). The easement appurtenant arises much like the easement by necessity, but the easement must have been apparent at the time of the severance and continuous thereafter, so that the parties must have intended that its use pass with the conveyance of the land locked tract. The easement appurtenant seems, at best, tenuous under most title insurance scenarios because all road easements to production sites must have been apparent and in use at the time of the severance (either by deed or lease), and such use must have been continuous since such severance. The key distinction between a necessity easement and appurtenant easement is the *necessity* must have been apparent at the time of severance with the necessity easement, but its actual use must have been apparent with the appurtenant easement.

C. Drilling a Well

Lessees under oil, gas and mineral leases covering lands in Texas have been given broad and highly deferential latitude in selecting drilling locations of their choice. Suffice it to say that, absent express language in a lease to the contrary or clear unreasonableness in the choice, a driller has the exclusive say so in well location if the decision is based on any rational basis.[112] In lieu of discussing the varied factual basis upon which mineral estate holders' location selections have been upheld, the most often cited cases are listed as follows:

[112] *Ottis v. Haas*, 569 S.W.2d 508 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.).

i. *Gulf Oil Corp. v. Walton*, 317 S.W.2d 260 (Tex. Civ. App.—El Paso 1958, no writ).

ii. *Grimes v. Goodman Drilling Co.*, 216 S.W. 202 (Tex. Civ. App.—Fort Worth 1919, writ dism'd).

iii. *Parker v. Texas Co.*, 326 S.W.2d 579 (Tex. Civ. App.—El Paso 1959, writ ref'd n.r.e.).

iv. *Humble Oil & Ref. Co. v. Williams*, 420 S.W.2d 133 (Tex. 1967).

The lessee's trump card on location also extends to timing of commencement of drilling operations and the ability to enter upon the land without prior coordination with the surface owner.[113] And, compensation for reasonable use and consumption of or damage to the surface is not required.[114] But note, most lessees pay surface damages to maintain good relations with the people who live closest to the production facilities.

D. Production, Treatment, Storage and Transportation Facilities

Mineral lessees can lay and operate both gathering and transportation pipelines in order to accumulate and then subsequently move the severed hydrocarbons off lease.[115] Additionally, the operator can erect storage tank and necessary treatment equipment on the lease so long as such structures and machinery facilitate the lessee's fundamental production operations "to produce, save, care for and dispose" of the severed extractive substance.[116]

Lessees can also return after the leasehold estate expires to retrieve both personal property and fixtures attached to the surface. Generally, a lease may have an equipment removal clause which provides that:

> "Lessee shall have the right at any time during or after the expiration of this Lease to remove all property and fixtures placed by Lessee on said land, including the right to draw and remove all casing. When required by Lessor, Lessee shall bury all pipelines on cultivated lands below ordinary plow depths, and the well shall be drilled within 200' of any residence or barn now on said land without Lessor's consent."

However, when there is no time limit on the removal of equipment clause in a lease, the lessee is entitled to remove equipment used in connection with operations after full or partial termination under the law relating to trade fixtures which would permit the lessee to remove equipment within a reasonable time after termination of the lease.[117]

VI. WATER USE BY MINERAL OWNERS

As will be discussed below, water, both saltwater and fresh water, are owned by the surface owner. Most oil and gas activities use a large quantity of water in drilling operations. The mineral lessee's need for water is heightened by the fact that most activities are not conducted close to domestic supplies. Therefore, the mineral lessee will desire to either dig a water well or utilize existing landowner water wells for drilling or waterflood operations. The mineral estate has been held to have an

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[113] *Parker v. Texas Co.*, 326 S.W.2d 579 (Tex. Civ. App.—El Paso 1959, writ ref'd n.r.e.).

[114] *Vest v. Exxon Corp.*, 752 F.2d 959 (5th Cir.1985).

[115] *See Joyner v. R.H. Dearing & Sons*, 134 S.W.2d 757 (Tex. Civ. App.—El Paso 1939, error dism'd judg. cor.)(authorizing construction of dwelling to house lessee's production employees).

[116] *Id.* at 759.

[117] *See Sunray DX Oil Co. v. Texaco, Inc.*, 417 S.W.2d 424 (Tex. Civ. App.—El Paso 1967, writ ref'd n.r.e.).

implied right to take and use as much of the water as is reasonably necessary for the production of the underlying minerals.[118] This industrial use of water by the mineral owner was made clear by Texas courts even in absence of a definitive statutory or court pronouncement that fresh water was part of the surface estate as a matter of law.[119] In fact, until curbed by various provisions of the Texas Water Code[120], a mineral lessee was entitled to use the surface owner's waters not only for relatively short term drilling purposes, but for extended period secondary recovery operations by which water was continuously flooded into the oil-bearing formations.[121] Consumption of water by the mineral owner, even when it causes substantial damage to the surface owner by diminishing the remaining available supply, constitutes reasonable use.[122] The existence of other alternate means of off-premises supplies does not temper the mineral lessee's right of dominant use.[123] Of course, only groundwater can be unilaterally utilized by the mineral lessees, because it is only that type of water which is owned by the surface owner. Surface water, as opposed to groundwater, is owned by the State of Texas.

A. Groundwater

Indeed, a mineral owner or his lessee may use groundwater produced from beneath a particular tract of land for development, exploration and production activities on any other part of the surface overlying the minerals, even in light of a subsequent and pervasive subdivision of the surface.[124] Problematic for the surface owner of a small ranchette or suburban lot is that the water well may actually benefit drilling and production in another part of the subdivision, which is, from the surface owner's perspective, highly counterintuitive.

A mineral owner's use of water is, however, generally limited to groundwater. It is important, therefore, to understand the two broad categories of water: surface water and groundwater. Surface water is water that can be seen and exists on the surface, and is confined in water courses, rivers, lakes, streams and other impoundments. It also includes water that may flow beneath the ground under such courses. The Texas Water Code in Chapter 11.021, reserves all surface waters to the State of Texas. The appropriation, impoundment, use, sale and lease of surface water is highly regulated and governed by specific case law, statutes and other rules that are not under review here. A rather complicated permit system for surface water exists under the Texas Water Code, which is administered by the Texas Natural Resources Conservation Commission.[125]

Groundwater is statutorily defined as the water percolating beneath the surface of the earth. TEX. WAT. CODE §§ 35.002(5) and 36.001(5). It is this type of groundwater – percolating groundwater – that comprises the greatest source of water for private use and which is generally appropriated by the mineral owner or his lessee for oil, gas and mineral activities.

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[118] *Guffey v. Stroud*, 16 S.W.2d 527 (Tex. Comm'n. App. 1929).

[119] *Stradley v. Magnolia Petroleum Co.*, 155 S.W.2d 649 (Tex. Civ. App.—Amarillo 1941, error ref'd.).

[120] TEX. WATER CODE § 27.0511(c) (Vernon 1999).

[121] *Sun Oil v. Whitaker*, 483 S.W.2d 808 (Texas 1972).

[122] *Id.*

[123] *Id.*

[124] *See e.g. Pfluger v. Clack*, 897 S.W.2d 956 (Tex. App.—Eastland 1995 writ denied)(holding that explicit reservation of water use for any mineral activities was broader than general implicit right to use water to benefit only underlying mineral estate).

[125] *See generally* Tex. Water Code Ann. § 11.001 *et seq.*

1. Absolute Rule of Capture

Texas courts have generally allowed the surface owner to claim ownership of all of the groundwater that he captured from beneath his land pursuant to the English common law or the absolute ownership rule adopted in the case of *Houston & T.C. Ry. Co. v. East*, 98 Tex. 146, 81 S.W. 279 (1904). Texas has held fast to the rule that allows the landowner to utilize all water that is captured from beneath his surface. Groundwater is, then, subject to the absolute rule of capture. The rule of capture is a rule of non-liability concerning the drainage of water from beneath another's land and is not a property right. The only private limitation on the landowner's or mineral operator's right to withdraw water is the slight risk of liability for the subsidence of an adjoining owner's land caused by the negligent, willful, wasteful or malicious withdrawal of water.[126] The only requirement for using groundwater is that it be put to some beneficial use. Any use is beneficial so long as the water is not intentionally wasted or used solely to injure a neighbor. Oil and gas drilling operations obviously constitute a beneficial use. Stated another way, the absolute rule of capture allows a landowner to appropriate for his use, or his assigns, all water, as long as this is done without malice or pure waste. Generally, a landowner who has water wells located on his property is free to take as much water as he would like, without liability to any adjoining owner for drainage, taking more than his "fair share", and without liability for hindering the recharge of the reservoir.

2. Groundwater Conservation Districts

The only true governmental regulation concerning groundwater use by a landowner or by a mineral owner in the conduct of exploiting the mineral estate comes from a groundwater conservation district or other similarly situated governmental conservation district that may limit the number of wells by permit, institute spacing and proration formulae and regulate withdrawal rates—i.e., regulate production.[127] No landowner, assignee or lessee may drill a well, alter the size of a well or operate the well without first obtaining a permit from the groundwater conservation district, if one exists for the area in question.[128] There are numerous exemptions from the drilling and operating permit requirement of Chapter 36. The following list are statutory exemptions, but each groundwater conservation district may promulgate its own exceptions:

i. Wells that produce less than 25,000 gallons of water a day;[129]

ii. Wells that supply domestic water for ten or fewer family households;[130]

iii. Wells used to provide water for feeding livestock, poultry or used in connection with farming or ranching operations;[131]

iv. Wells used to supply water for oil and gas activities;[132] and

v. Jet wells for normal, domestic needs.[133]

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[126] *Friendswood Development Co. v. Smith-Southwest Indus.*, 576 S.W.2d 21, 30 (Tex. 1978).

[127] For instance, the following governmental districts are currently regulating groundwater production: (a) Edwards Aquifer Authority; (b) Barton Springs-Edwards Aquifer Conservation District; (c) Hickory Underground Water Conservation District No. 1; (d) Panhandle Groundwater Conservation District No. 3; and (e) Harris-Galveston Coastal Subsidence District.

[128] Tex. Water Code Ann. § 36.115 (Vernon Supp. 1999).

[129] Tex. Water Code Ann. § 36.117(a)(1) (Vernon Supp. 1999).

[130] Tex. Water Code Ann. § 36.117(a)(2) (Vernon Supp. 1999).

[131] Tex. Water Code Ann. § 36.117(a)(3) (Vernon Supp. 1999).

[132] Tex. Water Code Ann. § 36.117(a)(4) (Vernon Supp. 1999).

Clearly, the statutory exemption for wells used to supply water for oil and gas activities contemplates that any agreement or governmental regulation concerning groundwater always remains subject to the mineral owner's reasonable use. The exemption, in a sense, deregulates the mineral estates dominant use of water resources owned by the regulated surface owner – the regulation hinders only the surface owner as the subservient estate.

B. Saltwater

1. Use

Saltwater existing beneath the surface of the earth, even if existing in the mineral stratum or co-mingled with oil, gas or "other minerals," has been expressly held by the Texas Supreme Court to be owned by and part of the surface estate.[134] Nevertheless, in *Robinson,* the Supreme Court, based on prior case law allowing reasonable use of the surface and the rights therein for the benefit of the mineral estate, granted the oil and gas operator a right to use saltwater in secondary recovery operations.[135]

2. Disposal

As recently publicized in a series of exposés by the San Antonio Express-News, the production of saltwater is a necessary but environmentally hazardous by-product of oil pumpage. In the early days of the industry, saltwater was spilled upon the surface of the earth or contained in evaporation ponds as a method of disposal. This highly destructive method of dealing with saltwater has basically been regulated into nonexistence, although at common law the practice was considered a reasonable use of the surface.[136] Today, the disposal of saltwater is conducted via reinjection wells into depleted formations beneath the known water tables. Reinjection of saltwater generated by production activities back into the same tract of land from which it was produced is authorized as a reasonable use of the surface of the tract of land.[137] Simply stated, a mineral owner can produce saltwater and reinject saltwater, regardless of the surface ownership of the tract from where it was produced or disposed (even if there are different tracts and surface owners, so long as the saltwater production and disposal benefits the same underlying mineral estate).

VII. SEISMIC AND OTHER GEOPHYSICAL SURVEYS

Probably the first introduction a severed surface owner will have with the rights of a mineral estate is when seismic testing is proposed to be conducted utilizing the surface of the land. All forms of geophysical surveys, such as magnetic, gravity and chemical analysis, constitute exploration activities, just like drilling a test well or taking core samples. Recently, with the introduction of powerful new computer systems, three-dimensional seismic imaging has become a favored tool of selecting drill sites and potentially productive formations. Unfortunately, 3-D seismic tactics, techniques and procedures utilize large areas of surface property, in order to gain the most accurate information about the deeper horizons. These seismic activities in the 3-D shoot area are surface intensive by way of receiver phones and lines and sources of kinetic energy, such as thumper trucks or shot holes.

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[133]Tex. Water Code Ann. § 36.117(a)(5) (Vernon Supp. 1999).

[134]*Robinson v. Robbins Petroleum Corp., Inc.*, 501 S.W.2d 865 (Tex. 1973).

[135]*Id.*

[136]*Brown v. Lundell*, 162 Tex. 84, 344 S.W.2d 863 (1961).

[137]*TDC Engineering, Inc. v. Dunlap*, 686 S.W.2d 346 (Tex. Civ. App.—Eastland 1985, writ ref'd n.r.e.).

The topic of geophysical operations has been of growing importance to oil and gas practitioners and there are timely and excellent articles on the subject.[138] From whom the rights to conduct surface operations on the surface in exploring minerals beneath the surface of the earth should be secured, is somewhat complicated by the fact that the surface of one tract may be used to gain valuable information about adjoining tracts, or the aggregate information from a variety of the surface locations may be used to gain information about the underlying or adjoining tracts. At the threshold, it is important to note that the owner of the mineral estate, not of the severed surface estate which has no ownership interest in the minerals, has the exclusive right to explore, develop and produce the minerals, including the exclusive subset of exploration, that being conducting or authorizing another to conduct 3-D seismic activities on or through the mineral estate.[139] *Phillips Petroleum Co. v. Cowden* is the seminal case requiring permission from at least one of the mineral owners and not from the overlying surface owner in order to use the surface of the land for gathering seismic information. *Phillips* validates the valuable exploration interest as part of the mineral estate. Texas courts have authorized the owner of a mineral estate to recover damages in a trespass action if her mineral estate was "occupied" by seismic operations.[140] The seismic operator may make reasonable use, if so authorized by the mineral owner, of the surface of the land subject to the mineral estate.[141]

When seismic operations are conducted on the surface to benefit minerals underneath the tract of land, the seismic operators or permitees of the mineral estate owner must reasonably accommodate the then-existing surface uses.[142] In summary, Texas courts have held geophysical exploration operations are a valuable right of the mineral estate and the mineral owner may reasonably conduct such activities on the surface of the earth as the dominant estate.[143]

VIII. OTHER MINERALS AND THOSE MINERALS OWNED BY THE SURFACE ESTATE

Land professionals frequently encounter deeds and leases which reserve or convey, in addition to oil and gas, the "other minerals" or "the mineral estate", or perhaps even "coal and other minerals."[144] Traditional distinctions in

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[138]Owen L. Anderson & Dr. John D. Pogott, *3-D Seismic Technology: Its Uses, Limits & Legal Ramifications*, 42 ROCKY MTN. MIN. L. INST., 16-1 (1996); Harry L. Blomquist, III, *Geophysical Trespass? The Guessing Game Created by the Awkward Combination of Outmoded Laws and Soaring Technology*, 48 BAYLOR L. REV. 21 (1996); Clayton J. Hoover, *Recurring Practical Issues in 3-D Seismic Surveys*, ADV. OIL, GAS & MIN. L. COURSE (Paper O)(State Bar of Texas 1998).

[139]*Phillips Petroleum Co. v. Cowden*, 241 F.2d 586 (5th Cir. 1957); *Yates v. Gulf Oil Corp.*, 182 F.2d 286 (5th Cir. 1950).

[140]*Humble Oil & Ref. Co. v. Kishi*, 276 S.W. 190 (Tex. Comm'n App.—1925 judgm't adopted).

[141]1 E. SMITH AND J. WEAVER, TEXAS LAW OF OIL AND GAS § 7.2(C)(1998).

[142]*Getty Oil Co. v. Jones*, 470 S.W.2d 618 (Tex. 1971).

[143]*Wilson v. Texas Co.*, 237 S.W.2d 649 (Tex. Civ. App.—Fort Worth 1951, writ ref'd n.r.e.); *Yates v. Gulf Oil Corp.*, 182 F.2d 286 (5th Cir. 1950).

[144]"The origin of general references to 'other minerals' following specific references to 'oil and gas' is historically obscure. One possibility is that it grew out of the concern that casinghead gas or distillate produced with oil and gas would not be covered by a deed or lease references to 'oil and gas.' There is Oklahoma precedent to that effect. *Mullendore v. Minnehoma Oil Co.*, 114 Okl. 261, 246 P. 837 (1926). Alternatively, the reference may have begun as a hedge against the discovery of unrelated valuable substances, for when one valuable substance is found, there are likely to be other different but valuable substances as well; oil and gas and coal, for example, are frequently found in sedimentary strata in the same geographic area.

the processes for mining liquid and gaseous minerals and mining hard minerals result in conveyances of "oil, gas and other minerals" creating two separate, different and distinct estates in land which cannot be fully delineated by a specific horizontal depth. Each estate – the mineral estate and the surface estate – comes with certain mineral substances, and each estate enjoys rights dominate to the other in the exploration of these retained substances. All of these issues result in title conflicts between the surface holder and the mineral holder over ownership and physical access. For most of our professional work, it is understood that such conveyance includes oil, gas, hydrocarbons and such constituents as may be produced with oil and gas.[145] In fact, until the early 1970's, the only really valuable mined minerals in Texas were oil and gas.[146] The relatively few early Texas cases to discuss the ownership of minerals held that minerals meant "all substances legally cognizable as minerals".[147] The only exception to this plain language analysis was the ownership of substances that had traditionally been utilized by the surface owner and their tenants on the land – items such as sand, gravel and building stone [cut stone, limestone, rock, stones, etc.].[148] In Texas today, however, there exists many valuable substances that are actively mined, produced and sold. Some of these natural resources have undergone a resurgence in both their price and demand. Technical improvements like solution mining of uranium, along with the economic improvement of the world's uranium market, have driven the price of yellow-cake uranium slightly upwards.[149] Additionally, the use of coal and lignite in South and Central Texas is increasing as an energy source for the generation of electricity by utilities.[150]

A. Manner of Enjoyment

It might be interesting to note that one scholar of oil, gas and mineral law has offered a different approach to the issue of ownership and enjoyment of the broad definition of minerals. Professor Eugene Kuntz states:

> "The courts are seeking to give effect to an intention to include or exclude a specific substance, when, as a matter of fact, the parties had nothing specific in mind on the matter at all... The intention sought should be the general intent, rather than any supposed, but unexpressed, specific intent and, further, that general intent should be arrived at, not by defining and

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Finally, there may well have been a purely speculative motive behind use of the term. It would not be surprising if the general reference to 'other minerals' is frequently used simply in the hope that the extra language will give the grantee (who usually prepares the deed) rights that he would not otherwise have." E. KUNTZ, J. LOWE, O. ANDERSON AND E. SMITH, CASES AND MATERIALS ON OIL AND GAS LAW, Ch. 4 § E (2d Ed. 1993).

[145]*Rio Bravo Oil Co. v. McEntire*, 128 Tex. 124, 95 S.W.2d 381, 96 S.W.2d 1110; *see also Oklahoma Ex. Rel. Commissioners of Land Office v. Butler*, 793 P.2d 1334 (Okl. 1987) (holding that in Oklahoma the term "oil, gas and other minerals" does not describe the entire mineral estate, but only includes oil, gas and those minerals produced as constituents and components thereof.)

[146]*See* C. Davis and E. McCarthy, *Hard Minerals Update: A Consideration of Conflicts Between Hard Mineral Companies and Oil Companies Over Rights of Surface Use, Ownership of Hard Minerals and Damages Under Moser; and Selected Environmental and Reclamation Developments*, ADVANCED OIL, GAS AND MIN. L. COURSE (PAPER J) (State Bar of Texas, 1986).

[147]*Anderson & Kerr Drilling Co. v. Bruhlmeyer*, 134 Tex. 574, 136 S.W.2d 800 (1940).

[148]*Heinatz v. Allen*, 147 Tex. 512, 217 S.W.2d 994 (1949); *Psencik v. Wessels*, 205 S.W.2d 658 (Tex. Civ. App.—Austin 1947, writ ref'd).

[149]Recently quoted at $15 per pound (eU308).

[150]*Outcrops*, TEXAS MINING AND RECLAMATION ASSN., TEXAS MINING, Feb., 1999, at 4, 5.

redefining the terms used, but by considering the purposes of the grant or reservation in terms of the manner of enjoyment intended in the ensuing interest.

> When a general grant or reservation is made of all minerals without qualifying language, it should be reasonably assumed that the parties intended to sever the entire mineral estate from the surface estate, leaving the owner of each with definite incidents of ownership in enjoyable and distinctly different manners. The manner of enjoyment of the mineral estate is through extraction of valuable substances, and the enjoyment of the surface is through retention of such substances as are necessary for the use of the surface....
>
> Applying this intention, the severance could be construed to sever from the surface all substances presently valuable in themselves, apart from the soil, whether their presence is known or not, and all severances which become valuable through the development of the arts and sciences."

Kuntz, THE LAW RELATING TO OIL AND GAS IN WYOMING, 3 Wyo. L. J. 107, 112-13 (1947). Professor Kuntz's statement is sometimes referred to as "the manner of enjoyment theory", and has been cited by numerous courts but never applied in its pure form to solve the interpretative problems of mineral conveyances.

B. Oil & Gas Are Minerals

In Texas, oil and gas are minerals as a matter of law and no question exists as to whether they are included in a grant or reservation of "minerals." Unfortunately, Texas courts, landmen and attorneys have had a much harder time deciding whether substances that are pit or strip mined, such as lignite, uranium, and iron ore are included in the term "minerals."[151] The courts' focus in reviewing any conveyance is the scope and intent of the parties found in the granting clause. What arises in a controversy between the surface owner and a mineral owner is the valuable question of who controls the executive right and, therefore, ownership of the hard minerals. If the grantor conveys "the minerals" on Blackacre to the grantee reserving the surface, can the grantee or his lessee destroy Blackacre's surface by strip mining lignite or uranium? Texas courts have accepted and rejected several tests in defining the legal rights and duties attaching to this ever-changing mineral estate. Fortunately, as we will see, there exists some straightforward rules that land professionals may apply when dealing with other minerals.

C. Application of Texas Rules of Construction

1. Surface Destruction Test

Although the status of the law for minerals other than oil and gas at times

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[151] *See generally* 1 E. SMITH AND J. WEAVER, TEXAS LAW OF OIL AND GAS § 3.6 (1996); Harrell, *Recent Developments in Nonregulatory Oil and Gas Law*, 31 OIL AND GAS INST. 327, 358 - 61 (1980); Hoffman, *Title to Near Surface Minerals*, ADVANCED OIL, GAS AND MIN. L. COURSE (Paper B) (State Bar of Texas, 1985); Kramer, *Conflicts Between the Exploitation of Lignite and Oil and Gas: The Case for Reciprocal Accommodation*, 21 HOUS. L. REV. 49, 87 (1984); Lowe, *What Substances are Minerals?*, 30 ROCKY MTN. MIN. L. INST. 2-1, 2-38 (1984); Davis, *Hard Minerals Update*, ADVANCED OIL, GAS AND MIN. L. COURSE (Paper J) (State Bar of Texas, 1986); Norvell, *Developing Lands Characterized by Separate Ownership of Oil and Gas and Surface Mineable Coal and Uranium, The Other Side of Acker v. Guinn and its Progeny*, 33 OIL AND GAS INST. 193, 199 (1982); Note, *Abandonment of the Surface Destruction Test in Determining Ownership of Unnamed Minerals*, 15 TEX. TECH L. REV. 699, 715 (1984)

seems complicated, there actually exists a compact body of information that is easily remembered. In Texas we have two tests that must be applied by the practicing land professional, along with a list of specific substances. The year 1983 is an important year to remember. For instruments executed prior to 1983, the surface destruction test is used in construing conveyances of other minerals.

Why a surface destruction test? In almost all early cases, the courts were concerned that the dominant mineral estate could possibly consume or destroy the surface during the production of minerals. Therefore, in 1971, the Texas Supreme Court decided that, under the facts presented, iron ore belonged to the surface owner, not the mineral estate owner, even though iron ore is and was then generally considered to be a mineral. *See Acker v. Guinn*, 464 S.W.2d 348 (Tex. 1971). The court's rationale was that the mining of iron ore would completely destroy the surface (unlike production of oil and gas from wells or other substances that are shaft mined). The construction of the word "mineral" was based on the presumption that, in granting "oil, gas and other minerals", the surface owner would not have intended that the mineral owner could destroy the surface estate during the mining of iron ore. However, unsettling questions remained for the mineral owner. What if the substance could be pit mined or mined by a non-destructive method? What if the substances was not known to exist at the time of the grant or reservation being construed? Was the mining technique assessed as destructive at the time of the litigation or at the time of the conveyance? This particular case spawned enormous litigation as to other substances as each became a valuable energy source over the next ten years.[152]

The 1971 rationale was followed in 1977 and again in 1980 in the case of strip-mined lignite. *See Reed v. Wylie*, 554 S.W.2d 169 (Tex. 1977); *Reed v. Wylie*, 597 S.W.2d 743 (Tex. 1980). Reed II was the final case for developing the surface destruction test as a rule of construction for identifying ownership of hard minerals.

The surface destruction test, as it is now known, can be summarized in outline form as follows:

i. If a substance is at or near the surface so that any reasonable method of extraction would, as of the time of removal, consume, destroy or deplete the surface, then the substance is part of the surface estate as a matter of law. "At the surface" usually means substances that are at, on, or outcropping from the surface of the lands or are within a few feet of the topographic surface;

ii. Deposits of lignite within 200 feet of the surface are "near surface" as a matter of law; "Near surface" usually means substances within 200 feet beneath the topographic surface;

iii. For particular substances deemed to be part of the surface estate under the above two steps, additional deposits of the same substance found at other deeper intervals are also part of the surface estate. That is to say, if deep coal is found underlying surface deposits of coal, then the deep coal also belongs to the surface owner; and

iv. In determining whether a method of mining would necessarily consume or deplete the surface estate, the

[152]*Friedman v. Texaco, Inc.*, 691 S.W.2d 586 (Tex. 1985); *Moser v. United States Steel Corp.*, 676 S.W.2d 99 (Tex. 1984); *Reed v. Wylie*, 597 S.W.2d 743 (Tex. 1980); *Reed v. Wylie*, 554 S.W.2d 169 (Tex. 1977).

availability of restoration techniques or reclamation devices is immaterial.

In evaluating if surface destruction methods are applicable, one only need find that they were in use or available at any time from the effective date of the instrument until a present date. As it is easy to see, the surface destruction test is quite unworkable in that it ignores the ever-expanding use of technology to gain access to substances without irreparably harming the surface, and the increasing sophistication of restoration and reclamation techniques in re-establishing the surface after open pit mining or other types of surface-destructive activities.

Consequently, in 1983, the Texas Supreme Court in *Moser v. United States Steel Corp.*, 676 S.W.2d 99 (Tex. 1984), abandoned the surface destruction test for prospective mineral conveyances because the earlier test offered no title certainty. Under the surface destruction test, professional landmen and title examiners could not determine the ownership of minerals from the specific language of the instrument because such ownership most likely depended on the depth of the mineral deposit and an engineering assessment of the technology used to produce the minerals from their exact subsurface location. Such assessment was a fact issue which could not be conclusively established unless and until a jury rendered a verdict. In the early 1980's, the exploitation of coal, lignite and uranium was beginning to rapidly increase, thus, making such economic issues worthy of litigation.

2. Ordinary and Natural Meaning Test

The Supreme Court in *Moser*, held that the term "minerals" in a conveyance or reservation includes, as a matter of law, all substances within the "ordinary and natural meaning of the words", so that the uranium in the case at hand belonged to the mineral owner and not the surface owner. In other words, the phrase "other minerals" includes all substances that are ordinarily and naturally thought by reasonable people to be minerals. As we will see, the ordinary and natural meaning test has not given title examiners much comfort either. It leaves unanswered, for example, who may own natural gas that exists within the coal or lignite seams in those instances where separate coal and oil and gas leases or conveyances burden the land.

More astonishing to surface owners was that the *Moser* Court held that the mineral owner has the right to make use of the surface as is reasonably necessary to remove the minerals, even if such use destroys the surface. However, the court imposed on the mineral owner the obligation to compensate the surface owner for surface-destructive activities unless the substance removed is specifically named in the grant or reservation.[153] The latter exception to the rule is based on the assumption that the parties intended no compensation if they understood that such minerals would need to be removed in the future.

There is one important thing to remember about the ordinary and natural meaning test. Although urged to totally abandon the surface destruction test, the court decided that its decision would be applied only to conveyances of other minerals executed after June 8, 1983, the

[153]Although the court in *Moser* grants the surface owner a right of compensation for the destruction of his land during the production of the unnamed minerals, no damage calculation or formula was offered. Realistically, compensation would be in the form of tort damages, such that the surface owner would be placed, after the completion of mining activities, in the same position he was before the activities. In other words, the surface owner acquires no contractual benefits of the mineral extraction, but is not harmed by it either.

date of the court's decision.[154] The court fashioned, therefore, a prospective rule of construction. Instruments executed prior to June 8, 1983, continue to be construed under the surface destruction test. *See Friedman v. Texaco, Inc.*, 691 S.W.2d 586 (Tex. 1985) (reaffirming the prospective-only nature of the ordinary and natural meaning test by applying the surface destruction test to a 1959 deed).

3. The List

Both the surface destruction test and the ordinary and natural meaning test are used for determining ownership of substances that have not previously been held by Texas courts to belong to one estate or the other, or that were not specifically listed in the instrument. Specifically, the following ten (10) substances belong to the surface estate as a matter of law and no inquiry into the construction of a reservation or grant of "other minerals" is necessary:

i. Building stone;[155]

ii. Limestone;[156]

iii. Caliche;[157]

iv. Surface shale;[158]

v. Sand;[159]

vi. Gravel;[160]

vii. Near surface lignite and coal;[161]

viii. Iron ore (probably only near surface iron ore);[162] and

ix. Water[163] (both fresh water and salt water that is pumped from the ground).

Moser v. United States Steel Corp., 676 S.W.2d 99, 102 (Tex. 1984).

For all severances after June 8, 1983, uranium is part of the mineral estate. *Id.* at 103; *Friedman v. Texaco, Inc.*, 691 S.W.2d 586, 589 (Tex. 1985). For pre-June 8, 1983 mineral severances, the surface destruction test is applicable to determine if uranium is held by the surface owner. *Id.* Additionally, both the surface destruction test and the ordinary natural meaning tests are rules of construction. Therefore, if the parties to a land title instrument indicate that the title holder of "other minerals" was given a specific named or determinable substance, then such specific intent is to be honored. In the case of a specific named substance, the owner may mine, extract and produce it, even though such activities may and will destroy the surface. The critical issue with a specific named or easily determined substance will be whether there was the intent to grant the substance. But such naming of the substance, or words inferring a strong intent to grant, may still not be enough to prevent the use of traditional constructional rules. For instance, the words "oil, gas and other minerals of every kind and character" were not sufficient to convey near surface uranium that was anticipated to be produced by

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[154]The application of the ordinary natural meaning test to instruments executed after June 8, 1983, substantially discounts the ability of the *Moser* opinion to add title certainty, since a majority of existing mineral severances were executed prior to the 1980's, and all of these deeds are waiting of record for interpretation under the factually-based surface destruction test.

[155]*Heinatz v. Allen*, 147 Tex. 512, 217 S.W.2d 994 (1949).

[156]*Heinatz v. Allen*, 147 Tex. 512, 217 S.W.2d 994 (1949); *Atwood v. Rodman*, 355 S.W.2d 206 (Tex. Civ. App.—El Paso 1962, writ ref'd n.r.e.).

[157]*Atwood v. Rodman*, 355 S.W.2d 206 (Tex. Civ. App.—El Paso 1962, writ ref'd n.r.e.).

[158]*Atwood v. Rodman*, 355 S.W.2d 206 (Tex. Civ. App.—El Paso 1962, writ ref'd n.r.e.).

[159]*Psencik v. Wessels*, 205 S.W.2d 658 (Tex. Civ. App.—Austin 1947, writ ref'd.).

[160]*Psencik v. Wessels*, 205 S.W.2d 658 (Tex. Civ. App.—Austin 1947, writ ref'd.).

[161]*Reed v. Wylie*, 597 S.W.2d 743 (Tex. 1980).

[162]*Reed v. Wylie*, 597 S.W.2d 743 (Tex. 1980).

[163]*Fleming Foundation v. Texaco*, 337 S.W.2d 846 (Tex. Civ. App.—Amarillo 1960, writ ref'd n.r.e.); *Sun Oil Co. v. Whitaker*, 483 S.W.2d 808.

strip mining. *See Atlantic Richfield Co. v. Lindholm*, 714 S.W.2d 390 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.). Title to the uranium did not pass even in light of the other language implying that the mineral owner acquired the right to consume the surface in the mining of the minerals. But, in the case of *Wagstaff v. Matthew*, 730 S.W.2d 839 (Tex. App.—Tyler 1987, no writ), the distinction was clearly drawn between named and unnamed substances. In *Wagstaff*, a grantor reserved an undivided one-half of oil, gas and other minerals. In the conveyance instrument, the grant was made subject to a then-existing coal lease. The grantee under the original instrument, claimed ownership of all coal and lignite deposits located within 200 feet of the surface, unburdened by the reserved one-half mineral interest. The court placed substantial emphasis on the subject to clause which specifically mentioned the coal and lignite lease, in holding that an undivided 1/2 interest in all lignite, regardless of its depth, was reserved. No use of rules of construction was needed because the lignite was not unnamed.

4. Non-Participating Interests

In 1995, the Texas Supreme Court finally reconciled several conflicting appellate courts and applied the *Moser* analysis to non-participating royalty interests. *Plainsman Trading Co. v. Crews*, 898 S.W.2d 786 (Tex. 1995). Thus, under a royalty reservation made in 1949, the owner of a 1/16 non-participating royalty on all oil, gas or other minerals is not due royalties on any strip-mined lignite or other substances that the surface owner may own. "A non-participating royalty is an interest in the mineral fee, however large or small that fee is and regardless of how its limits are determined." *Id.* at 790. Simply stated, the non-participating royalty interest could not attach to a particular substance, mineral or not, which is not part of the mineral fee estate because the non-participating royalty is carved from the mineral fee. For non-participating interests, the analysis is straightforward. First, one must determine which estate owns a particular substance. If the substance is part of the surface estate, then the non-participating owner receives nothing, because the non-participating interest is carved from and burdens the mineral estate only.

5. Surface Destruction As Surface Use

The issue, as always with other minerals, comes down to the destruction and use of the surface by the mineral owner. As we have seen with other areas of oil and gas law, courts are moving toward theories of reasonable accommodation of the surface, either through the manner of extraction, the technologies employed, reclamation or reasonable compensation.

Reasonable use and accommodation of the surface is also driven by increasingly sophisticated state laws and regulations. Of particular importance to the development and production of other minerals, is the Texas Uranium Surface Mining Reclamation Act, the Texas Surface Coal Mining and Reclamation Act, and the Texas Quarry Safety Act. TEX. NAT. RES. CODE CHAPTER 131 (Uranium Surface Mining Reclamation Act); TEX. NAT. RES. CODE CHAPTER 133 (Quarry Safety Act); TEX. NAT. RES. CODE CHAPTER 134 (Texas Surface Coal Mining & Reclamation Act). All of these statutes, along with the applicable rules and regulations promulgated by the specific divisions of the Texas Railroad Commission, continue a movement requiring de facto compensation to the surface owner, along with prescribed methods of reclamation of the surface. The paramount issue, therefor, is a proper mineral or mining lease from the surface or mineral owner who owns the target substances and a separate easement or other interest in land from

the other owner authorizing the contemplated extraction activity.

IX. GOVERNMENTAL REGULATION OF MINERAL INTERESTS[164]

Exploring and drilling for oil and gas in populated areas requires facing critical issues which determine whether and how operations can occur. Oil and gas operations may be messy or noisy and, thus, may conflict with activities planned for certain areas of the city. However oil and gas are where you find them and operations are necessarily site specific. The inherent conflict between surface use for oil and gas activities and use of property for municipal, residential or other business purposes has caused many cities to impose severe restrictions on oil and gas operations. That is to say, cities, as the ultimate surface land use planners, have used their governmental power to diminish the mineral owner's dominant use of the surface. In many cases, the law has been extended to increase the authority to regulate activities both within and outside their corporate limits. As a consequence, the decision of whether and how to undertake exploration and production activities in urban areas requires a different analysis than exploration in rural areas. Municipal regulation of oil and gas activities invariably makes mineral exploration and development more difficult and expensive. Additionally, public use or conforming private use of the surface may practically limit or even preclude mineral development. Moreover, the State of Texas has authorized surface owners, as subdividing developers, to trump the mineral owners dominant use of the surface, if the Railroad Commission gives its blessing.

A. Cities' Authority to Regulate

1. The Type of City Defines the Scope of its Power

In general, cities have broad powers and should be considered the primary regulatory authority for areas within their jurisdiction. There are several types of cities defined by constitutional and statutory law. The type of city, which in some regards is related to its size, has an impact over the extent of the city's ability to regulate activities both within its city limits and in adjacent areas. However, the general legislative grant which empowers all cities is remarkably similar among all types of cities. All municipalities, including the three classes of general law municipalities described below, are given the power "to adopt ordinances for good government, peace or order which are necessary or proper for carrying out a power granted by law."[165] The primary differentiation relates to geographic scope and the extent of regulatory authority. For example, unincorporated communities have literally no governmental powers and very limited jurisdictional areas. By contrast, home rule cities have legislative authority functionally equivalent to that of the Texas state legislature, and some have jurisdictional areas covering entire counties.

There are two types of incorporated cities - general law cities and home rule cities. When a community exceeds the population of 200, it may incorporate pursuant to a statutory procedure set out in local government code Section 7.01. The territorial requirements for incorporation of all general law cities is

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[164]A majority of this section is drawn, with permission, from Mr. Kevin M. Beiter's presentation entitled, *Municipal Regulations of Oil and Gas Activities and Constitutional Takings – How Far is "Too Far,"* 20 STATE BAR SECTION REPORT – OIL, GAS AND MINERAL LAW 4 (State Bar of Texas, June 1996).

[165]Tex. Loc. Gov't. Code Ann. § 51.001 (Vernon 1988). Citations to this code throughout the text are abbreviated as "Local Government Code."

dictated by statute.[166] General law cities do not have the power to adopt a charter or create a body of laws distinct to that city. They may pass ordinances but their powers are limited to the general laws of the state and they only can exercise those powers expressly granted by the legislature or those powers necessarily implied by the legislature's express grant of powers.[167] Despite these apparent limitations, general law cities have broad powers within their jurisdictional limits both under the statutory laws of the state and under the police power.

The other type of city is a home rule city. Most larger cities in the state are home rule cities. A city may become a home rule city when it reaches a population of 5,000. Home rule cities may adopt or amend charters and may comprehensively regulate activities within their jurisdiction; however, Article XI, Section 5 of the Texas Constitution prohibits home rule cities from acting in a manner inconsistent with the Constitution. The home rule city has plenary authority equivalent to a state legislature's authority except when its enactments conflict with state law.[168]

2. Regulation of Mineral Activities by Ordinance

An ordinance is a permanent rule or prohibition and is the municipal law equivalent of a statute. Ordinances have effect only within the corporate limits of the city unless the legislature expressly has extended their application to extraterritorial areas. Nearly all cities of all types have restrictive drilling ordinances which prohibit drilling or mining operations within the city limits or at least within certain areas of the city. In some urban areas which have experienced extensive mineral development, ordinances have been developed which designate drilling blocks or lots within the city and provide city council or designated authority the ability to grant or deny drilling permits. Some ordinances have the effect of pooling interests where wells are drilled within the corporate limits of the city.[169] While there is little express statutory authority for regulation of oil and gas drilling, municipalities' authority to regulate oil and gas activities within their corporate limits does not appear to be subject to serious question.[170] The validity of an ordinance is dependent upon many circumstances. But generally, an ordinance properly promulgated by a city is presumed to be reasonable and valid, and one attempting to attack an ordinance has an extremely heavy burden.[171]

Given the presumption of validity afforded ordinances, it seems probable that an ordinance limiting or even substantially restricting oil and gas exploration or development within a city's corporate limits, if properly enacted, would be held valid. For instance, in

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[166]Tex. Loc. Gov't. Code Ann. § 5.901(1)-(3) (Vernon 1988). Territorial requirements range from no more than two square miles of surface area for communities of fewer than 2,000 inhabitants to no more than nine square miles of surface area for communities having 5,000 to 10,000 inhabitants.

[167]1 J. Dillon, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATION §237 (5th Ed. 1911).

[168]*City of Corpus Christi v. Continental Bus Systems, Inc.*, 445 S.W.2d 12 (Tex. Civ. App.—Corpus Christi 1969, writ ref'd. n.r.e.).

[169]*See Mills v. Brown*, 159 Tex. 110, 316 S.W.2d 720 (Tex. 1958). This drilling block type of ordinance will be discussed further in the section of this paper relating to zoning.

[170]*See Unger v. State*, 629 S.W.2d 211 (Tex. App.—Fort Worth 1982, writ ref'd.). In the case of home rule cities, specific statutory authorization is not necessary and assuming the drilling regulation is not inconsistent with statutory aims for municipal regulation, the ordinance will be presumed valid. *See City of College Station v. Turtle Rock Corp.*, 630 S.W.2d 802, 807 (Tex. 1984).

[171]*See id.; Hunt v. City of San Antonio*, 462 S.W.2d 536, 539 (Tex. 1971).

Helton v. City of Burkburnett,[172] the city had established an ordinance which authorized it both to regulate drilling and to completely deny drilling permits. Helton chose to drill a well in an undeveloped portion of the city within the corporate limits, but refused to even seek a permit to do so. The city responded by obtaining a permanent injunction against the drilling of the well. The court held the ordinance to be valid, noting that an ordinance is presumed constitutional unless it clearly appears on its face to be unreasonable and arbitrary. The court also held that if the city's police powers are properly invoked, it can deprive individuals of rights including the right to drill a well.

Similarly, in *Klepak v. Humble Oil & Refg. Co.*,[173] a lessee had obtained oil and gas leases on certain city lots in the City of Tomball and had obtained from the Texas Railroad Commission a Rule 37 exception to drill a well. However, the city denied him a drilling permit because he did not have a surface location on a tract designated as a "drilling block" by the city. *Klepak* argued that the Railroad Commission was the sole source of drilling authority and that the ordinance was an unconstitutional taking of his property. The Court of Appeals held that the legislature's grant of authority to the Railroad Commission did not invalidate existing law giving the cities the power to regulate drilling when acting in the public interest. Absent a showing of arbitrariness, the ordinance did not constitute a taking and, because the city's exercise of its police power was a purely governmental function, the city could not be held liable for damages.

While neither of the above cases involved an ordinance completely prohibiting mineral exploration within the city's boundaries, they both suggest the likely conclusion that an ordinance that did so would not be void as long as it was enacted in the public interest.

3. Regulation of Land Use by Zoning

Cities also have the authority to regulate oil and gas activities within their corporate limits by exercise of their zoning authority. Zoning laws have long been held to be a valid exercise of the sovereign's police power.[174] Zoning usually is accomplished by ordinance and, like ordinances in general a zoning ordinance must be enacted for the purpose of promoting the health, safety, morals and general welfare of the public in order to be valid.[175] Many home rule cities have both zoning and oil and gas ordinances. For instance, some cities have ordinances which limit the height of structures which could obscure visibility, including drilling structures, near airports. An ordinance of this type was involved in *City of Abilene v. Burk Royalty Co.*[176] Many cities have comprehensive zoning ordinances which may allow oil and gas activities only in certain zones within a city or if a "conditional use" permit is provided. In many cases, obtaining a permit for a conditional use may require a hearing before a planning and zoning authority and a relatively strict permitting process. In such cases, an operator seeking to drill within the corporate limits of a city may have to navigate a rather complex process to obtain a permit.

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[172]619 S.W.2d. 23 (Tex. Civ. App.—Ft. Worth 1981 (writ ref'd. n.r.e.).

[173]177 S.W.2d 215 (Tex. Civ. App.—Galveston 1944, writ ref'd. w.o.m.).

[174]*See Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). The United States Supreme Court upheld the power of governments to enact and implement zoning laws largely by analogizing zoning to the historic control of nuisances at common law.

[175]*See City of Bellaire v. Lamkin*, 317 S.W.2d 43 (Tex. 1958).

[176]470 S.W.2d 643 (Tex. 1971).

4. Regulation of Nuisances

Cities have both inherent and statutory power to regulate nuisances. Home rule cities may regulate nuisances within their corporate limits and within 5,000 feet beyond city limits.[177] General law cities likewise are authorized to regulate nuisances, but are restricted to doing so within their city limits.[178] While there are no cases directly in point, it seems likely that oil and gas drilling activities (or at least some activities associated with drilling) could qualify as a nuisance. The general rule is that the activity must, in fact, be a nuisance before it can be controlled by a city. A city cannot declare something to be a nuisance unless it would constitute a nuisance at common law or is a nuisance per se.[179]

B. Regulation Under the Statutory Mineral Subdivision Act

Regulation of mineral activities in urban areas may also be effected indirectly, by creation of a statutory mineral subdivision under Chapter 92 of the Texas Natural Resources Code entitled "Mineral Use of Subdivided Land." The Texas legislature in 1983, recognizing the inherent conflict between land developers and cities seeking to develop urban property in increasingly densely populated areas and of operators pursuing valid mineral activities, enacted the statute to provide a mechanism to allow orderly development of land and minerals in tandem. The statute is not limited in its application to private property owners and, in fact, it may provide a further vehicle for coordination of concurrent surface and mineral rights in cases in which the surface is owned or condemned by a municipality. This chapter provides a statutory procedure for adopting a plat binding on all mineral owners within qualified subdivisions.

The statute applies only to counties having populations in excess of 400,000 or in a county having a population in excess of 140,000 that borders on a county having a population in excess of 400,000 persons or that is located on a barrier island.[180] The only counties in Texas which clearly meet these qualifications include Bexar, Dallas, El Paso, Harris, Tarrant, Travis, Brazoria, Denton, Fort Bend, Montgomery, Collin and Galveston Counties. Under the act, the surface owners of a parcel of land not to exceed 640 acres may create a "qualified subdivision" on the land by securing Railroad Commission approval of a plat of the subdivision and filing this plat with the clerk of the county in which the subdivision is located. If the surface owner complies with Chapter 92, the owner of the possessory mineral interest no longer has an unbridled dominant use of all of the surface overlying his mineral estate, but may explore, develop and produce minerals only from designated operations sites as platted in the qualified subdivision.[181] It is on these designated sites only that the mineral operator can make reasonable use of the surface as defined in Texas case law. A mineral subdivision plat which delineates where operation sites are to be located does, of necessity, impose limitations on the mineral owner's operations and may, in some cases, effectively define the alternative means that must be employed by a mineral owner under the accommodation doctrine. Although the surface owners' surface use rights are

[177]Tex. Loc. Gov't. Code Ann. § 217.042 (Vernon 1988).

[178]Tex. Loc. Gov't. Code Ann. § 217.002 (Vernon 1988) (type A municipality); *Id.* at § 217.022 (type B municipality).

[179]*City of Lucas v. North Texas Mun. Water Dist.*, 724 S.W.2d 811, 824 (Tex. App.—Dallas 1986, writ ref'd. n.r.e.).

[180]Tex. Nat. Res. Code Ann. § 92.002(3) (Vernon 1988).

[181]Tex. Nat. Res. Code Ann. §§ 92.001 - 92.007 (Vernon 1988).

generally subject to the dominant rights of the mineral owner, once a plat is in place, the plat defines what activities and uses are permitted in different areas of the subdivided tract.

To comply with Chapter 92, the surface owner must create a plat consistent with both the act and the platting authority of the county in which the plat is proposed. The plat must designate separate operation sites of not less than two acres each for each 80 acres of land within the subdivision from which the possessory mineral interest owner may conduct the mineral exploration activities.[182] After notice to the surface owner and all possessory mineral interest owners, the plat must be approved by the Texas Railroad Commission before becoming effective.[183] Upon approval of the plat, the surface owner must commence actual construction of roads and utilities within the subdivision and sell a lot to a third party by the third anniversary date of the order of the Railroad Commission for the subdivision to maintain its status under Chapter 92.[184]

Chapter 92, however, does not expressly affect the authority of cities to require approval of subdivision plats or the authority of a home rule city to regulate development activities within its boundaries[185] and in fact, despite the existence of a certified plat a city can, by ordinance or zoning authority, substantially restrict or eliminate drilling rights within the mineral subdivision. Thus, the existence of an operation site logically would not create any property rights in the owner of a possessory mineral interest. That owner would still face the normal difficulties in obtaining consent to drill under any existing city ordinance.[186] However, the mineral subdivision act does provide a viable means of attempting to satisfy both the statutory and regulatory goals of accomplishing reasonable exploitation of mineral resources while allowing city platting authority and mineral owners latitude to explore.

C. Conclusion

Cites have broad powers to regulate activities within their jurisdictions, and those jurisdictional limits may extend substantially beyond the corporate limits of the city. Cities also acquire property for municipal uses which may be altogether incompatible with mineral exploration and development. A consequence of these actions is that mineral development in areas surrounding cities may be substantially more difficult and expensive than those same activities in rural areas. In some cases, mineral development is simply precluded.

Oil and gas exploration in urban areas requires a greater degree of planning and involves compliance with more levels of regulatory authority than is normally the case. Consequently, purchasers of land with outstanding mineral interests may take some comfort in the substantial regulation of surface intensive mineral operations. Landowners that fully familiarize themselves with the regulation of exploration in urban areas may determine that mineral estate's dominant use is realistically not an encumbrance upon the surface.

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[182]Tex. Nat. Res. Code Ann. § 92.002(1),(3) (Vernon 1988).

[183]Tex. Nat. Res. Code Ann. § 92.004 (Vernon 1988).

[184]Tex. Nat. Res. Code Ann. § 92.005(c) (Vernon 1988).

[185]Tex. Nat. Res. Code Ann. § 92.007 (Vernon 1988).

[186]*Phillips Petroleum Co. v. Mecom*, 395 S.W.2d 828 (Tex. Civ. App.—Houston 1965, writ ref'd. n.r.e.).

X. CONVEYANCE OF A SURFACE ESTATE CONTAINING UNDIVIDED OWNERSHIP OF MINERALS SUBJECT TO AN EXISTING LEASE

Texas law holds that a conveyance of land that is currently under an oil and gas lease, either during its primary term, or during the secondary term when held by production, entitles the grantee under the conveyance to all of the unaccrued and future royalties as well as any other outstanding benefits payable under the lease, in absence of explicit language in the conveyance documents otherwise.[187] The receipt of benefits also helps bind the purchaser, as a successor-in-interest to the then-existing oil and gas lease terms. Typical form warranty deeds make the grant subject to the existing lease and specifically include language that "covers and includes" the specified royalty and delay rental payable under the existing lease.[188] Practitioners are cautioned to avoid using the "covers and includes" language unless specifically dictated by the terms of the real estate transaction. "If the interest described in the granting clause and in the 'covers and includes' proviso of the subject-to clause are inconsistent, the rights of the grantee [under the subsisting oil, gas and mineral lease] will be uncertain, and litigation to resolve that uncertainty is likely to result."[189]

XI. NONAPPORTIONMENT RULE – THE PROBLEMS WITH SUBDIVISIONS

Japhet v. McRae[190] is the leading case in Texas annunciating the nonapportionment rule. This simple extension of the rule of capture provides that the owner of the tract of land where the producing well is bottomed is entitled to all royalties payable under the lease agreement regardless of the later subdivision of the land. Consequently, when an owner of property, which is subject to an existing oil and gas lease, sells a discreet divided portion of the surface and underlying mineral estates, the new owner of the particular tract participates in wells physically located and bottomed thereon. An entirety clause may be inserted to trump the common law and provide that royalties will be apportioned on a pooled basis based on the number of surface acres that each new grantee owns in relation to all land covered by the existing lease. Nevertheless, purchasers of subdivided tracts of land that include all or some minerals in the conveyance should be careful to review subsisting oil and gas leases and understand the effect of nonapportionment. Most oil and gas leases contain explicit nonapportionment or "negative entireties" clauses.[191] When a nonapportionment scenario is present, the purchaser should understand that their surface may be used in the conduct of exploration activities for the benefit of a lease covering a greater parcel from which their lands were carved, but that royalties will only be paid to the specific tract owner that is physically penetrated by the producing wellbore.

The other major problem resulting from a subdivision of the surface, be it into smaller rural parcels or suburban

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[187] *Harris v. Currie*, 142 Tex. 93, 176 S.W.2d 302 (1943).

[188] The use of the word "covers and includes" is a historical artifact based on now defunct and explicitly overruled Texas case law holding that future lease benefits were retained by the grantor in absence of specific language.

[189] 1 E. SMITH AND J. WEAVER, TEXAS LAW OF OIL AND GAS § 3.8(A) (1998).

[190] 276 S.W. 669 (Tex. Comm'n App. 1925).

[191] *See* John S. Lowe, OIL & GAS LAW, p. 158 3d ED. (West 1995).

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