Ownership of Mineral Rights under Texas Law

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I. CHARACTERIZATION OF MINERAL RIGHTS UNDER TEXAS LAW

In order to understand title to oil, gas and other minerals, it is important to know what is considered a mineral under Texas law and what materials and elements which from a Webster's dictionary definition would be considered as minerals actually are considered part of the surface estate.

A. Oil, Gas and Constituent Elements

There are a number of statutory and regulatory definitions of oil and gas which are similar but not identical. Texas Natural Resources Code Sections 85.001, 86.002, 91.001 define the terms "oil" and "gas" as well as some of the constituent elements produced in conjunction with oil and gas.

Oil and gas also have other statutory definitions than those listed below, but the other definitions are generally broader because they are used in the context of pollution, health and safety, and environmental matters, underground storage of gas, taxation, and compression and liquification of natural gas. For example, in the context of pollution statutes, it matters little whether the oil is crude or refined so the definition for oil is broadened.

1. Oil

"Oil" means crude oil and crude petroleum oil (Sec. 91.001);
"Oil" means crude petroleum oil (Sec. 86.002);
"Oil" means crude petroleum oil, crude petroleum, and crude oil (Sec. 85.001)

The word "petroleum" comes from a Greek word that literally means "rock oil" or "oil from the earth." and the usual dictionary definition of the word "crude" as it applies to oil or other natural substances is "existing in a natural state and not altered by cooking or processing." This definition is embodied in 34 TAC Sec. 3.692 as follows:

> (2) Crude oil — Any naturally occurring liquid hydrocarbons at atmospheric temperature and pressure coming from the earth, including condensate.
>
> (A) Crude oil includes, but is not limited to, crude oil: (i) as it exists at atmospheric pressure and temperature when it is produced; (ii) as it exists after initial gas separation and/or stabilization; or (iii) as it exists after treating and/or conditioning for the removal of water and/or other impurities, and is sold, shipped, or purchased as crude oil.
>
> (B) Crude oil does not include any product which has been physically separated from crude oil.

2. Gas

"Gas" means natural gas (Sections 85.001, 86.002, 91.001)

3. Oil Wells and Gas Wells

Most wells produce some combination of oil and gas. Therefore, the statutory definitions of oil wells and gas wells become extremely important in determining whether the production from a particular well is to be treated as one producing oil or gas. Those definitions as stated in Texas Natural Resources Code Sec. 86.002 are as follows:

“Oil well” means “any well that produces one barrel or more of oil to each 100,000 cubic feet of gas

"Gas well" means a well that: (A) produces gas not associated or blended with oil at the time of production; (B) produces more than 100,000 cubic feet of gas to each barrel of oil from the same producing horizon; or (C) produces gas from a formation or producing horizon productive of gas only encountered in a well bore through which oil also is produced through the inside of another string of casing.

16 TAC § 3.79, a Railroad Commission rule and regulation, embellishes the definition of a gas well slightly from the statutory definition:

(11) Gas well — Any well: (A) which produces natural gas not associated or blended with crude petroleum oil at the time of production; (B) which produces more than 100,000 cubic feet of natural gas to each barrel of crude petroleum oil from the same producing horizon; or (C) which produces natural gas from a formation or producing horizon productive of gas only encountered in a wellbore through which crude petroleum oil also is produced through the inside of another string of casing or tubing. A well which produces hydrocarbon liquids, a part of which is formed by a condensation from a gas phase and a part of which is crude petroleum oil, shall be classified as a gas well unless there is produced one barrel or more of crude petroleum oil per 100,000 cubic feet of natural gas; and that the term "crude petroleum oil" shall not be construed to mean any liquid hydrocarbon mixture or portion thereof which is not in the liquid phase in the reservoir, removed from the reservoir in such liquid phase, and obtained at the surface as such.

4. Casinghead Gas, Natural Gasoline, and Condensate

Several of the products customarily produced with oil and gas are casinghead gas, natural gasoline, and condensate.

Casinghead gas and natural gasoline are defined in Texas Natural Resources Code Sec. 86.002 as:

"Casinghead gas" means any gas or vapor indigenous to an oil stratum and produced from the stratum with oil.

"Natural gasoline" means gasoline manufactured from casinghead gas or from any gas.

Condensate is defined in Texas Tax Code Sec. 201.001 as:

"Condensate" means liquid hydrocarbon that is or can be recovered from gas by a separator, but does not include liquid hydrocarbon recovered from gas by refrigeration or absorption and separated by a fractionating process

34 TAC § 3.692 has a similar definition for condensate:

Condensate — Any liquid hydrocarbon condensed from a natural gas stream and existing at atmospheric pressure and temperature.

(A) Condensate includes, but is not limited to, liquid hydrocarbons: (i) recovered by non-mechanical processes such as conventional gravity separators; (ii) recovered by a treating facility such as a gas compression or dehydration facility; or (iii) recovered at pipeline drip stations.

(B) Condensate does not include liquid hydrocarbons which may be recovered only by mechanical separation processes such as refrigeration, absorption or distillation.

B. Importance of Definitions

The "white oil" cases of *Hufo Oils v. Railroad Commission*, 717 S.W.2d 405 (Tex.App. — Austin 1986, writ denied) and *Amarillo Oil Co. v. Energy-Agri Products Inc.*, 794 S.W.2d 20 (Tex. 1990) illustrate the importance of the definitions.

1. *Hufo Oils v. Railroad Commission*, 717 S.W.2d 405 (Tex.App. — Austin 1986, writ denied)

Hufo was principally concerned with whether "white oil" should be treated the same as "oil" under the statutory definitions. "White oil" was defined in *Hufo* as "casinghead gas reduced to a liquid state (natural gasoline) by a LTX unit (low temperature extraction unit) located at the well site."

The classification of casinghead gas production reduced to a liquid state was important because many of the wells where "white oil" was being produced would no longer meet the statutory definition of an oil well due to declining crude production, *i.e.*, in the absence of liquification of the casinghead gas, the gas oil ratio had changed enough that the wells would

need to be reclassified as gas wells. The producers of those "white oil" wells were counting the liquified casinghead gas as crude production to keep the gas oil ratio from changing the well classification from gas to oil. The Railroad Commission disallowed the practice and *Hufo* was the appeal of the Railroad Commission's decision.

The Court of Appeals upheld the Railroad Commission's decision that "white oil" was not oil as defined in the statutes and stated the import of such decision:

> The classification of a well as an oil well or a gas well has profound economic consequences for several reasons: 1) Spacing requirements are different for oil wells and gas wells. In the Panhandle, the spacing rule for gas wells is one well for each 640 acres, whereas oil wells may be spaced as close as one well for each ten acres. Accordingly, up to sixty-four oil wells may be drilled on the acreage required for one gas well. 2) Casinghead gas (the main product of many white oil wells) is given priority by gas pipeline companies, which means that it is purchased at off-peak times while gas from gas wells remains unsold. 3) In the Panhandle, ownership of oil and ownership of gas are often severed so that the owner of the oil rights does not own the gas rights and vice versa. 4) The gas-to-oil ratio of a well may increase with continued production, forcing an oil well to be reclassified as a gas well. These factors make it advantageous to have, and maintain, an "oil well" classification for a well in the Panhandle field.

2. *Amarillo Oil Co. v. Energy-Agri Products Inc.*, 794 S.W.2d 20 (Tex. 1990)

In *Amarillo Oil*, Energy-Agri Products was the producer of several wells which had been classified by the Railroad Commission as oil wells due to the initial interval in which the wells had been perforated and were producing. Because of declining production from that interval, Energy-Agri Products elected to come up the wellbore and perforate an additional interval which essentially only produced gas. It did so with the approval of the Railroad Commission The additional gas production did not change the classification of the well and Energy-Agri took the position that the additional gas production was casinghead gas because it was gas produced from an oil well. In ruling that such production was not casinghead gas, the Supreme Court focused on the statutory definition of casinghead gas:

> "Casinghead gas" means any gas or vapor indigenous to an oil stratum and produced from the stratum with oil

Since the production of the bulk of the gas was from a different stratum and the gas was not indigenous to or being produced from the stratum from which oil was being produced, the gas production from the newly perforated zones did not qualify as casinghead gas and therefore was the production of gas.

Because ownership of gas rights was different than ownership of oil rights, *Amarillo Oil* vested ownership of the produced gas in the owner of the gas rights rather than in the operator of the wells which only owned the oil rights. Had the gas been held by the court to have been casinghead gas, then the owner of oil rights would have maintained title to casinghead gas produced from an oil well.

C. Coal and Lignite

The determination whether coal and lignite are part of the surface estate or part of the mineral estate is based upon the tests announced in *Acker v. Guinn*, 464 S.W.2d 348 (Tex. 1971), which was modified by *Reed v. Wylie,* 554 S.W.2d 169 (Tex. 1977) (*Reed I*), which was then modified by *Reed v. Wylie*, 597 S.W.2d 743 (Tex. 1980) (*Reed II*). However, when the State is involved and claiming title to reserved/severed mineral interests, a different rule is applied. *See Schwarz v. State,* 703 S.W.2d 187 (Tex. 1986).

1. *Acker v. Guinn*, 464 S.W.2d 348 (Tex. 1971)

Acker did not deal with coal and lignite as did Reed I and Reed II, but instead dealt with iron ore. However, the mining techniques for near surface iron ore and near surface coal and lignite are essentially the same. In *Acker* the issue was stated as follows:

> The question to be decided is whether an interest in the iron ore passed to the grantee under a deed executed in 1941 and purporting to convey 'an undivided 1/2 interest in and to all of the oil, gas and other minerals in and under, and that may be produced from' a tract of 86 1/2 acres in Cherokee County

Acker announced the surface destruction test as to whether a mineral, such as iron ore (or for that matter, coal and lignite) was part of the mineral or surface estates:

> In our opinion the basic approach there suggested is entirely sound. A grant or reservation of minerals by the fee owner effects a horizontal severance and the creation of two separate and distinct estates: an estate in the surface and an estate in the minerals. *See Texas Co. v. Daugherty*, 107 Tex. 226, 176 S.W. 717; Walker, Fee Simple Ownership of Oil and Gas in Texas, 6 Tex.L.Rev. 125. The parties to a mineral lease or deed usually think of the mineral estate as including valuable substances that are removed from the ground by means of wells or mine shafts. This estate is dominant, of course, and its owner is entitled to make reasonable use of the surface for the production of his minerals. It is not ordinarily contemplated, however, that the utility of the surface for agricultural or grazing purposes will be destroyed or substantially impaired. Unless the contrary intention is affirmatively and fairly expressed, therefore, a grant or reservation of 'minerals' or 'mineral

> rights' should not be construed to include a substance that must be removed by methods that will, in effect, consume or deplete the surface estate. *See* Clark, Uranium Problems, 18 Tex.B.J. 505.
>
> That is the rule to be applied in determining whether an interest in the iron ore was conveyed by the deed in this case. In terms of its location with respect to the surface, methods by which it must be mined, and the effect of production upon the surface, the ore is quite similar to gravel and limestone. Aside from the general reference to 'other minerals,' moreover, there is nothing in the deed even remotely suggesting an intention to vest in the grantee the right to destroy the surface. It is our opinion that in these circumstances the ore, like gravel and limestone, should be considered as belonging to the surface estate and not as part of the minerals. We accordingly hold that as a matter of law no interest in the ore passed by the deed.

2. *Reed v. Wylie,* 554 S.W.2d 169 (Tex. 1977) (*Reed I*)

Reed I involved the construction of a 1950 deed and determination as to whom owned the coal and lignite under a specific tract of land. The minerals had been severed from the surface and the reservation in the deed read as follows:

> In addition to the above and foregoing exception there is hereby excepted and reserved to the Grantors herein a one-fourth (1/4) undivided interest in and to all oil, gas and other minerals on and under the land and premises herein described and conveyed; and it is hereby expressly agreed and understood that Grantors herein, their heirs and assigns shall have, and they hereby have the right of ingress and egress for the sole and only purpose of mining and operating for oil, gas and all other minerals, on and under said land, and to produce, mine, save and take care of said products, and to take all usual, necessary and convenient means for working, preparing and removing said minerals from under and away from said land and premises.

The Texas Supreme Court reaffirmed the holding of *Acker* and also incorporated the following additional holdings:

(a) *Acker* controls all substances which would otherwise be considered minerals, and includes coal and lignite:

> "*Acker v. Guinn* stands for the rule that a substance is not a "mineral" if substantial quantities of that substance lie so near the surface that the production will entail the stripping away and substantial destruction of the surface.

(b) Ownership of the mineral at whatever depth it is found is controlled by whether the mineral is owned by the surface owner due to the surface destruction test announced in *Acker*:

> "That being the circumstance, and there being no contrary affirmative expression in the instrument, it controls the construction of the instrument as to the same substance at all depths."

This holding clarified that ownership of a mineral such as coal and lignite would not be split between the surface estate and mineral estate based solely upon its proximity to the surface and mining technique despite the urgings of the dissent that the Court should adopt a rule where the surface owner would be the owner only of that amount of coal and lignite which had to be strip mined and the mineral owner would be the owner of the minerals which would be extracted by mining which would not destroy the surface.

(c) The Court clarified that the burden to prove that a mineral such as coal or lignite is part of the surface estate falls on the surface owner and established that the surface owner's burden of proof required a showing that extraction of the mineral at the date of the instrument creating the severance had to be of a surface depleting or destructive nature:

> "Instead, the surface estate owner must prove that, as of the date of the instrument being construed, if the substance near the surface had been extracted, that extraction would necessarily have consumed or depleted the land surface."

The court also noted that disputes of this type rarely involve substances about which the parties had *any* specific intent whatsoever; rather, they are inclined to concern unnamed minerals which later become very valuable, the subsequent controversy determining only who will be enriched by the extraction of the substance.

3. *Reed v. Wylie*, 597 S.W.2d 743 (Tex. 1980) (*Reed II*)

Reed II overruled *Reed I* to a limited extent:

(a) That portion of *Reed* which would require that the near surface substance "must" be removed by surface destructive methods was overruled.

(b) That part of the *Reed* opinion which required a fact finding that the surface must have been destroyed as of the date of the instrument was overruled.

Reed II also substituted/clarified the following tests:

(a) In substitution of the two portions of Reed I specifically overruled, the following test was instead substituted:

> "The test now is whether any reasonable method, including such a method as of the date of this opinion, of removal of the lignite, coal or iron will consume, deplete or destroy the surface." In other words, if at any point from the date of the severance to the present, a reasonable method for mining would be surface depleting or destructive, then the surface owner owns the near surface minerals

(b) The opinion clarified that "at the surface" as stated in *Reed I* also means and includes near the surface and that, as a matter of law, "[a] deposit which is within 200 feet of the surface is "near surface"".

(c) The Court then restated the rule regarding ownership of a mineral substance found at or near the surface:

> "to restate the rule for clarity, it is this: if the surface owner satisfies the tests set out above, and establishes ownership of the substance at or near the surface, he or she owns the lignite, iron, or coal beneath such land at whatever depth it may be found."

4. *Schwarz v. State,* 703 S.W.2d 187 (Tex. 1986)

Schwartz stands for the proposition that *Acker, Reed I,* and *Reed II* do not apply, however, when the State is the owner of the "minerals". In a dispute between the state and a private citizen over the ownership of coal and lignite, the Texas Supreme Court ruled that any ambiguities concerning what minerals the state conveyed to a private citizen should be resolved in favor of the State. *See Schwarz v. State,* 703 S.W.2d 187 (Tex. 1986). As a result, the ubiquitous mineral reservation contained by the State meant that the State retained all of a tract's coal and lignite and that the surface owner did not own the coal and lignite, despite the fact that it lay within 200 feet of the surface. As summarized by the Court:

> Thus, after tracing the history of mineral reservations in public land grants, it is clear that the sovereign in Texas has always claimed all of the substances commonly classified as "minerals" and only gives away those substances by an express release or conveyance. Even disregarding the historical basis, however, there remains a very valid reason for the distinction between conveyances by private parties and conveyances by the State. The State holds the public lands in trust for the benefit of all of her people. The State subsidized and encouraged settlement in frontier areas by offering the land to settlers on extremely favorable terms. The Alexanders did not purchase this land in the open market place and they did not pay the full market price

> for it. Furthermore, the legislature has provided by statute that money paid for certain minerals reserved by the State, the extraction of which is usually destructive to the surface, such as coal, lignite, and uranium, will be divided with the surface owner. TEX.NAT.RES. CODE ANN. § 53.065 (Vernon 1978) provides that the surface owner will receive 40% of all bonuses, rentals and royalties. Section 53.066 provides that these payments are in place of all damage to the soil. Section 53.061 allows the surface owner to negotiate the lease. Chapter 131 of the Code mandates reclamation of the surface by a strip mine operator. These statutory protections were not purchased in the open market place but rather are part of the same broad public policy which reserved to the State the lignite under the Schwarz' property.

D. Uranium

In *Moser v. United States Steel Corp.,* 676 S.W.2d 99 (Tex. 1984), the Supreme Court abandoned the tests of *Acker*, *Reed I*, and *Reed II* with regard to uranium and held that uranium is a mineral, but also ruled that the change in the law would apply prospectively only to those severances of the surface and mineral estates occurring after June 8, 1983. Therefore, for severances occurring prior to June 8, 1983, the tests of *Acker*, *Reed I*, and *Reed II* would still be applied.

As regards liability for surface damages, the court ruled:

> We hold the limitation of the dominant mineral owner's liability to negligently inflicted damages does not control in a case such as this, in a general conveyance of "other minerals." When dealing with the rights of a mineral owner who has taken title by a grant or reservation of an unnamed substance such as this, liability of the mineral owner must include compensation to the surface owner for surface destruction. [fn4]
>
> This holding does not affect the right of the mineral owner to enter the surface estate and use so much of the surface as is reasonably necessary to remove the minerals. *Ball v. Dillard*, 602 S.W.2d 521, 523 (Tex. 1980); *Harris v. Currie*, 142 Tex. 93, 176 S.W.2d 302, 305 (Tex. 1943). As in the case of the mineral owner who takes under a specific grant, the mineral owner under a grant of "other minerals" is restricted in his use of the surface estate by the dictates of the "due regard" or "accommodation doctrine." This rule is applied when the surface owner and mineral owner are attempting to use the surface estate for two conflicting and incompatible uses. We held, in *Getty Oil Co. v. Jones*, 470 S.W.2d 618 (Tex. 1971), that even though the mineral owner held the dominant estate, he must exercise his rights of surface use with due regard for the rights of the surface owner.
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> [fn4] This holding does not affect the statutory duty of the mineral owner, or his lessee, to reclaim the surface after surface mining. See Texas Uranium Surface

> Mining and Reclamation Act, NAT. RES. CODE ANN. §§ 131.001 to -.270. *See also* Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1201 *et seq.* (1977). The Texas Act requires an operator who is surface mining uranium to submit and effect a reclamation plan or lose his performance bond and face civil and criminal penalties. TEX. NAT. RES. CODE. ANN. § 131.101 to -.270. The Code provides the surface owner with an opportunity to have the land classified as unsuitable for surface mining if he believes the land cannot be reclaimed to the Code's strict standards. *Id.* §§ 131.038, -.039, -.047. The Code also demands all reclamation efforts to proceed as contemporaneously as practicable with the surface mining operation. *Id.* § 131.102(b)(14).

The Gefferts, who were the prevailing parties in this case retained the uranium based upon a 1949 severance, but would have prevailed on an *Acker* and *Reed I* basis due to the jury verdict which found that the uranium could have been mined without any substantial destruction of the surface. *Reed II* was decided while this case was on appeal.

In *Friedman v. Texaco, Inc*., 691 S.W.2d 586 (Tex. 1985), the Supreme Court confirmed its holding in *Moser v. United States Steel Corp.,* 676 S.W.2d 99 (Tex. 1984) that uranium is a mineral and that the *Moser* decision applies prospectively "only to those severances of the surface and mineral estates occurring after June 8, 1983." The Supreme Court's involvement in this case became necessary because *Moser* was decided after the decision of the court of appeals in this case (which was based upon *Acker*. *Reed I* and *Reed II*) and while the application for review was pending with the Supreme Court.

E. Coalbed Methane

I was unable to find any statutes or caselaw which addresses who would own coalbed methane. However, unless, pursuant to *Reed II*, the coal and lignite would be within 200 feet of the surface, coalbed methane should be treated as a mineral and owned by the mineral owner rather than the surface owner. However, in those situations where there are coal and lignite deposits within 200 feet of the surface and much deeper coal seams where coalbed methane is also located, *Reed II* would hold that the surface owner owns the coal and lignite. Since coalbed methane is a byproduct of coal and lignite, the question to be answered by the courts in those limited circumstances will be whether the methane is also owned by the surface owner or whether the mineral owner would have the rights to the methane.

I am also currently unaware of any significant attempts to produce coalbed methane in Texas. However, the US Department of Energy Energy Information Administration shows some production from the Eagle Pass area and shows some reserves in north central Texas.

As traditional supplies of oil and natural gas are depleted in Texas, coalbed methane may become more financially attractive and Texas courts may be faced with having to decide ownership issues in those circumstances where coal and lignite is found at both near surface and deeper depths.

F. Granite, Limestone, Gravel, Sand, Water, Etc.

There are various statutory definitions of "minerals". In Texas Property Code Section 75.001, the definition is:

> "Mineral" means oil, gas, uranium, sulphur, lignite, coal, and any other substance that is ordinarily and naturally considered a mineral in this state, regardless of the depth at which the oil, gas, uranium, sulphur, lignite, coal, or other substance is found.

This chapter of the Property Code pertains to the unclaimed property fund and thus the legislative intent on making a broader definition was to provide the Comptroller with a single definition for purposes of dealing with and providing forms/applications which could be used by owners of proceeds on mineral production to reclaim any proceeds which may have been paid into the unclaimed property fund. In this context, it makes little difference as to whether the proceeds are on uranium, coal or oil or gas.

In Texas Natural Resources Code Section 131.004, the definition is:

> "Minerals" means uranium and uranium ore.

This chapter deals with surface uranium mining and reclamation so it was not important to include other substances in the definition which might commonly be known as minerals.

Therefore, it is important not to consider the statutory definition under one code chapter as being generally applicable. Texas courts have not done so, but have instead decided on a substance by substance basis, what is, in the absence of express language, meant and included within the scope of the term "other minerals."

1. Limestone

In *Heinatz v. Allen*, 217 S.W.2d 994 (Tex. 1949), the Supreme Court was faced with a severance of the surface and mineral estates pursuant to a will, where "the surface rights exclusive of the mineral rights" were devised to one beneficiary and "the mineral rights" were devised to another beneficiary. The heir who obtained the mineral rights entered the property and began to quarry limestone. The surface owner objected and filed suit, claiming that limestone could not be considered a mineral for the purpose of the devise and, therefore, it belonged to the surface estate. In addressing ownership issues, the Court stated:

> In our opinion substances such as sand, gravel and limestone are not minerals within the ordinary and natural meaning of the word unless they are rare and exceptional in character or possess a peculiar property giving them special value, as for example sand that is valuable for making glass and limestone of such quality that it may profitably be manufactured into cement. Such

> substances, when they are useful only for building and road-making purposes, are not regarded as minerals in the ordinary and generally accepted meaning of the word.

In *Heinatz*, the court found that the limestone was not exceptional and did not possess any peculiar property and that the cost of quarrying most of the limestone would exceed its value and as a result, the limestone would not be considered a mineral.

In *Atwood v. Rodman*, 355 S.W.2d 206 (Tex.Civ.App. — El Paso 1962, writ ref'd n.r.e.) the court held that limestone, caliche, and surface shale would not be considered part of the mineral estate.

Moser specifically stated that *Heinatz* had characterized limestone as belonging to the surface estate as a matter of law, apparently abandoning the rare and exceptional character/peculiar property test espoused in *Heinatz*. In *Gifford-Hill & Co. v. Wise County Appraisal Dist.*, 827 S.W.2d 811 (Tex. 1991), the Supreme Court confirmed that its ruling in *Moser* had held that, as a matter of law, limestone is not a mineral but was instead part of the surface estate.

2. Water

In *Sun Oil Co. v. Whitaker*, 483 S.W.2d 808 (Tex. 1972) the Court upheld a prior court of appeal holding that fresh water was not included in the mineral estate pursuant to a reservation of "oil, gas, and other minerals".

3. Solid Sulphur Deposits

Union Sulphur Co. v. Texas Gulf Sulphur Co., 42 S.W.2d 182 (Tex.Civ.App. — Austin 1931, writ ref'd) was mentioned in *Moser* as standing for the proposition that solid sulphur deposits are part of the mineral estate. However, the issue of sulphur when produced by itself, as opposed to sulphur produced in conjunction with oil and/or gas, would now probably be controlled by the *Acker*, *Reed* and *Reed II* tests.

4. Gravel and Sand

Praeletorian Diamond Oil Ass'n v. Garvey, 15 S.W.2d 698 (Tex.Civ.App.-Beaumont 1929, writ ref'd) held that gravel and sand are not included in or covered by a lease of the oil, gas and "other minerals".

5. Granite

In *Wilderness Cove, Ltd. v. Cold Spring Granite Co.*, 62 S.W.3d 844 (Tex.App.-Austin 2001, no pet.), the Austin appellate court was faced with construing an 1890 deed to the Texas Capitol Granite Company where the grantors had conveyed "all of our interest in and to the

Granite on the . . . land together with the necessary right of way to the extent of our interest in the same for constructing a Rail Road and for quarrying and handling the said Granite."

The *Wilderness Cove* Court held that the grantee of the granite rights had ownership paramount to that of the surface owner and that the granite rights owner had the right to destroy the surface to retrieve the granite.

Wilderness Cove does not stand, however, for the proposition that granite is a mineral as a matter of law, despite its finding that the granite met the *Heinatz* rare/exceptional qualities test:

> . . . the granite located on the Property does possess rare and exceptional characteristics that give it special value. The extraordinary prices paid for the granite interest in the 1890s demonstrate its value because only Burnet County, Texas, red granite was used in building the capitol building in Austin.

Instead, it stands for the proposition that if a substance or substances are specifically included in a reservation or conveyance, then the courts will characterize ownership of the substance based upon the terms of the reservation or conveyance.

Plainsman Trading Co. v. Crews, 898 S.W.2d 786, 789-790 (Tex. 1995) also recognizes that surface estate "minerals" can be provided different treatment as long as express language is used:

> This is not to say that surface owners such as the Crewses could not, by the use of express language, create a non-participating royalty interest in some valuable substance belonging to the surface owners which under other definitional constructs would be called a mineral.

II. RULE OF CAPTURE

The Rule of Capture forms the basis for ownership rights in oil and gas as it is produced. The Rule has its roots going back to at least Roman law. It also was originally devised with regard not to oil, gas and minerals, but with regard to another natural resource, *i.e.*, wildlife.

A. *Pierson v. Post*, 3 Cai. R. 175, 2 Am. Dec. 264 (N.Y. 1805)

This famous case is generally thought to be that which established the American version of the rule of capture. In *Pierson*, the New York Supreme Court was concerned with the ownership of a deceased fox. According to the case and subsequent reports, Post was hunting foxes with hounds. His hounds spooked a fox and with the hounds in hot pursuit, the fox ran and hid in an unused well. Pierson, who was on his way home and visible to Post, spotted the fox, grabbed a broken rail and

killed the fox before Post and his hounds could get to the fox. Pierson then slung the carcass over his shoulder and was going to continue home when he was approached by Post who demanded the fox, to which Pierson reportedly replied:

> It may be you was going to kill him, but you did not kill him. I was going to kill him and did kill him.

Post then sued Pierson for the value of the fox, claiming that the fox was his because he was in active pursuit of the fox when Pierson killed it and laid claim to it. In holding that Pierson was entitled to ownership of the dead fox, the Court stated:

> If we have recourse to the ancient writers upon general principles of law, the judgment below is obviously erroneous. Justinian's Institutes, and Fleta, adopt the principle, that pursuit alone vests no property or right in the huntsman; and that even pursuit, accompanied with wounding, is equally ineffectual for that purpose, unless the animal be actually taken. The same principle is recognized by Bracton.
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> Puffendorf defines occupancy of beasts feroe naturoe, to be the actual corporeal possession of them, and Bynkershock is cited as coinciding in this definition. It is indeed with hesitation that Puffendorf affirms that a wild beast mortally wounded or greatly maimed, cannot be fairly intercepted by another, whilst the pursuit of the person inflicting the wound continues. The foregoing authorities are decisive to show that mere pursuit gave Post no legal right to the fox, but that he became the property of Pierson, who intercepted and killed him.
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> . . .
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> If the first seeing, starting, or pursuing such animals, without having so wounded, circumvented or ensnared the animal, so as to deprive them of their natural liberty, and subject them to the control of their pursuer, should afford the basis of actions against others for intercepting and killing them, it would prove a fertile course of quarrels and litigation.

B. *Coastal Oil & Gas Corp. v. Garza Energy Trust*, 05-0466 (Tex. 8-29-2008)

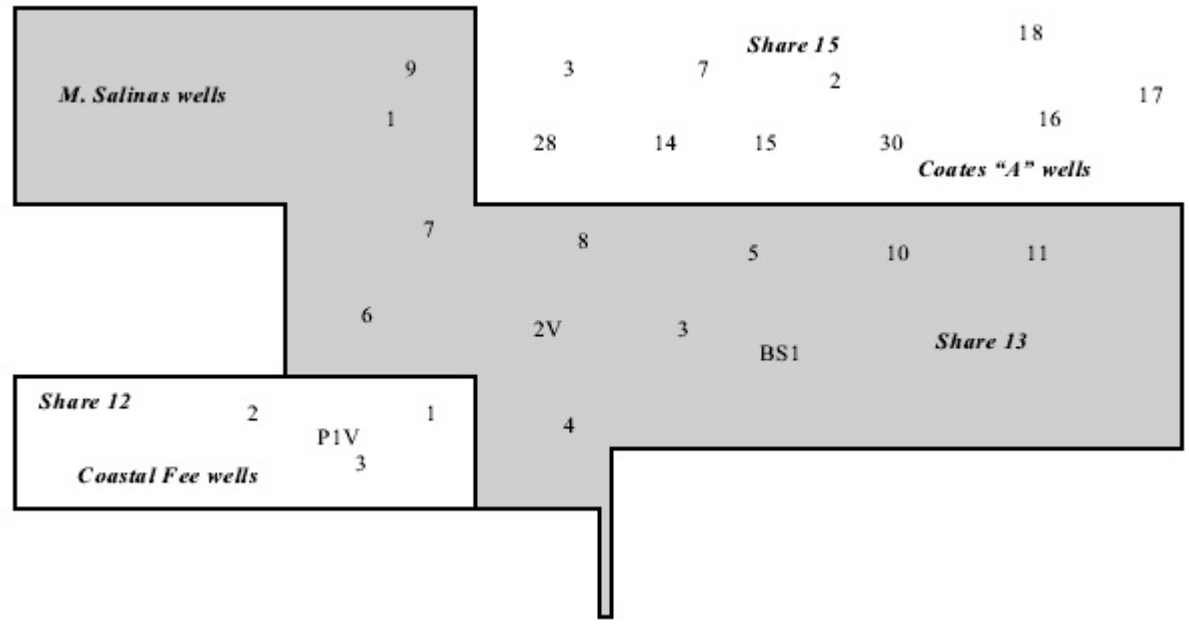
This case contains the most recent Texas Supreme Court pronouncement on the Rule of Capture as it applies to oil and gas:

> That rule gives a mineral rights owner title to the oil and gas produced from a lawful well bottomed on the property, even if the oil and gas flowed to the well from beneath another owner's tract. The rule of capture is a cornerstone of the oil and gas industry and is fundamental both to property rights and to state regulation. Salinas

does not claim that the Coastal Fee No. 1 violates any statute or regulation. Thus, the gas he claims to have lost simply does not belong to him.

This case is the most recent in a long history of litigation involving these parties. There was an interpleader suit filed by Coastal in 1978 due to mineral/royalty ownership problems with regard to some of the land involved in the *Coastal v. Garza* suit, which was settled by an agreed judgment in 1982. Then in 1988, the suit of *Juan Lino Garza, et al. v. Elizabeth H. Coates Maddux, et al.*, Cause No. C-035-88-G in the 370th Dist. Ct., Hidalgo County, Tex., was filed[1]. *Garza v. Maddux* was resolved 11 years later by the appellate decision in *Garza v. Maddux*, 988 S.W.2d 280 (Tex.App.-Corpus Christi 1999, pet. denied). Another suit, *Amelia Garza de Salinas, et al. v. Elizabeth H. Coates Maddux, et al.*, was filed in late 1995 and docketed under Cause No. C-6239-95-B in the 93rd District Court of Hidalgo County, Texas.

In *Coastal* the paramount issue concerned the fracture stimulation of several of Coastal's wells on an adjoining tract of land and the claims by the Garza family that such fracture stimulation constituted a subsurface trespass. As part of the Supreme Court's opinion, the following schematic was depicted:



All wells in both Shares 12 and 13 were fracture stimulated but the Garzas complained and their expert testified that the fracing of the Coastal Fee No. 1 and 2 wells were massive and that a substantial portion of the gas produced from such wells was attributable to the Garza's lands under Share 13. The Court ruled that no actionable trespass occurred because the rule of capture applied and the gas that was produced by Coastal was not the Garzas' gas in the first place. The Court also

[1] This case commenced my involvement in this litigation on behalf of Enterprise Products which was one of the defendants.

recognized the benefits of fracture stimulation and that a holding of subsurface trespass based upon fracture stimulation would wreak havoc in the industry:

> Third, determining the value of oil and gas drained by hydraulic fracturing is the kind of issue the litigation process is least equipped to handle. One difficulty is that the material facts are hidden below miles of rock, making it difficult to ascertain what might have happened. Such difficulty in proof is one of the justifications for the rule of capture. But there is an even greater difficulty with litigating recovery for drainage resulting from fracing, and it is that trial judges and juries cannot take into account social policies, industry operations, and the greater good which are all tremendously important in deciding whether fracing should or should not be against the law. While this Court may consider such matters in fashioning the common law, we should not alter the rule of capture on which an industry and its regulation have relied for decades to create new and uncertain possibilities for liability with no more evidence of necessity and appropriateness than this case presents. Indeed, the evidence in this case counsels strongly against such a course. The experts in this case agree on two important things. One is that hydraulic fracturing is not optional; it is essential to the recovery of oil and gas in many areas, including the Vicksburg T formation in this case. (This fact has recently been brought to the public's attention because of development in the Barnett Shale in north Texas, which is entirely dependent on hydraulic fracturing.) The other is that hydraulic fracturing cannot be performed both to maximize reasonable commercial effectiveness and to avoid all drainage. Some drainage is virtually unavoidable. In this context, common law liability for a long-used practice essential to an industry is ill-advised and should not be extended absent a compelling need that the Legislature and Commission have ignored. No such need exists.
>
> Fourth, the law of capture should not be changed to apply differently to hydraulic fracturing because no one in the industry appears to want or need the change. The Court has received amicus curiae briefs in this case from the Railroad Commission, the General Land Office, the American Royalty Council, the Texas Oil & Gas Association, the Texas Independent Producers & Royalty Owners Association, the Texas Alliance of Energy Producers, Harding Co., BJ Services Co., Halliburton Energy Services, Inc., Schlumberger Technology Corp., Chesapeake Energy Corp., Devon Energy Corp., Dominion Exploration & Production, Inc., EOG Resources, Inc., Oxy Usa Inc., Questar Exploration and Production Co., XTO Energy, Inc., and Chief Oil & Gas LLC. These briefs from every corner of the industry — regulators, landowners, royalty owners, operators, and hydraulic fracturing service providers — all oppose liability for hydraulic fracturing, almost always warning of adverse consequences in the direst language. Though hydraulic fracturing has been commonplace in the oil and gas industry for over sixty years, neither the Legislature nor the Commission has ever seen fit to regulate it, though every other aspect of

> production has been thoroughly regulated. Into so settled a regime the common law need not thrust itself.

Justice Willett, in a concurring opinion, pointed out the difference between "no actionable trespass" and "no trespass":

> First, it nixes trespass-by-frac suits for drainage (the only damages sought here) by invoking the rule of capture. I agree such suits would subvert this time-honored rule, but I would foreclose them a half-step sooner under the same "balancing of interests" approach we applied to subsurface fluid injection nearly a half-century ago in *Railroad Commission of Texas v. Manziel*. Such encroachment isn't just "no actionable trespass"; it's no trespass at all. As a practical matter, the distinction between "no actionable trespass" and "no trespass" may seem more rhetorical than real: recovery is denied either way. But orthodox trespass principles that govern surface invasions seem to me to have dwindling subterranean relevance, particularly as exploration techniques grow ever sophisticated. Given the pace of innovation, fueled by spiraling demand in a supply-constrained world, I would confront Lord Coke's maxim directly and decide whether land ownership indeed "extends to the sky above and the earth's center below," or alternatively, whether that ancient doctrine "`has no place in the modern world.'" The Court says there is no actionable trespass because there is no injury, and there is no injury because the rule of capture says so: "the gas he claims to have lost simply does not belong to him." True, you cannot recover actual damages for trespass absent injury, but I would approach this case not as the Court does today but as the Court did in *Manziel*, focusing not on the injury caused by the alleged trespass but on whether the underlying act was wrongful to start with. Injury is the *result* of trespass, not part of its definition, and this case should turn not on the absence of injury but on the absence of wrongfulness. Balancing the respective interests as we did in *Manziel*, this type of subsurface encroachment, like the waterflood in *Manziel*, simply isn't wrongful and thus isn't a trespass at all, not just a nonactionable trespass.
>
> Second, the Court implicitly leaves trespass as a potentially viable theory in suits seeking "nondrainage" damages, for example, when a reservoir or nearby drilling equipment is damaged. But plaintiffs alleging nondrainage injuries already have a ready theory: negligence. In such cases, where the rule of capture is inapposite, I would end definitively any lingering flirtation of Texas law with equating hydraulic fracturing with trespass. I would say categorically that a claim for "trespass-by-frac" is nonexistent in either drainage or nondrainage cases.

III. CREATION OF MINERAL RIGHTS SEPARATE FROM SURFACE RIGHTS

Oil, gas and mineral severances are accomplished by either a grantor reserving minerals or by a conveyance of just minerals. In *Benge v. Scharbauer*, 259 S.W.2d 166 (Tex. 1953), the Court stated:

> It is well settled that the owners of land may reserve to themselves minerals or mineral rights, including the oil or any right or ownership therein. *Humphreys-Mexia Co. v. Gammon*, 113 Tex. 247, 254 S.W. 296; 29 A.L.R. 607; *Hoffman v. Magnolia Petroleum Co.*, Tex.Com.App., 273 S.W. 828(4); Watkins v. Slaughter, supra; Curry v. Texas Company, Tex.Civ.App., 18 S.W.2d 256, writ dismissed; 31-A T.J. 64, Sec. 32, and authorities therein cited.

An exception, as contrasted with a reservation, does not create a new estate and does not operate as a reservation. *See Coyne v. Butler*, 396 S. W .2d 474 (Tex.Civ .App.--Corpus Christi 1965, no writ).

The definitions of reservations and exceptions were stated in *Bagby v. Bredthauer*, 627 S.W.2d 190 (Tex.App.-- Austin 1981, no writ) as follows:

> Technically, a reservation is the creation, by and in behalf of the grantor, of a new right issuing out of the thing granted-something which did not exist as an independent right before the grant, a taking back of a part of the thing already granted. *See Coyne v. Butler*, 396 S. W .2d 474 (Tex.Civ .App.--Corpus Christi 1965, no writ). An exception operates to exclude from the grant some part of the thing granted which would otherwise pass to the grantee, with the whole of the thing granted. An exception does not itself pass title but rather prevents the particular excepted interest from passing with the grant. Title to the interest excepted remains in the grantor by virtue of his original title. In *Coyne v. Butler*, *supra*, the grantor "excepted" the interest in question from his grant. The court held that no new interest was created since no words of reservation were used in the instrument.

See also Patrick v. Barrett, 734 S.W.2d 646 (Tex. 1987) where the Texas Supreme Court stated:

> The keystone of this opinion is a clear understanding of the distinctions between an exception and a reservation. It is manifest that an exception does not pass title itself; instead it operates to prevent the excepted interest from passing at all. *Pich v. Lankford,* 157 Tex. 335, 339-40, 302 S.W.2d 645, 648 (1957). On the other hand, a reservation is made in favor of the grantor, wherein he reserves unto himself royalty interest, mineral rights and other rights. *Benge v. Scharbauer,* 152 Tex. 447, 451-52, 259 S.W.2d 166, 167-68 (1953).

Since an exception cannot create a new estate, it is imperative that a grantor who desires to retain all or a portion of the oil, gas and minerals use either reservation language in the deed or specific words in the granting clause or description of the property clause specifically limiting the estate granted. (An example of the latter would be a granting clause which reads as follows: "Grantor hereby grants, sells and conveys to Grantee the surface estate only in and to the following described

lands" or a property description which begins with "the surface estate only of" whatever lands are being conveyed. The failure of a grantor to use either reservation language, as opposed to exception language, or to specifically limit either the grant or the property description to a certain estate will result in a failure of the grantor to reserve and retain the mineral or other interest excepted, although it may have been the grantor's intent to reserve and retain such interest. For example, if a grantor who owned 100% of the surface and mineral estates executed a general warranty deed which had a granting clause which conveyed all interests in the lands meant to be conveyed and had an exception clause which excepted the oil, gas and other minerals, then the exception might be ineffective and title to the oil, gas and other minerals might pass to the grantee. As stated in *Coyne v. Butler*, 396 S. W .2d 474 (Tex.Civ .App.--Corpus Christi 1965, no writ), which cites to the seminal case of *Duhig v. Peavy-Moore Lumber Co.*, 135 Tex. 503, 144 S.W.2d 878 (Tex. 1940):

> If the subject deed was not plain and clear and if both the grant and exception could not be given effect, the exception must fail. The risk of title loss is on the grantor.

IV. SLICING AND DICING MINERAL/ROYALTY RIGHTS

Mineral rights can be split into a number of components as recognized by *Benge v. Scharbauer*, 259 S.W.2d 166, 167-168 (Tex. 1953) which stated:

> A grantor may reserve unto himself mineral rights, and he may also reserve royalties, bonuses and rentals-either one, more or all. *Schlittler v. Smith*, 128 Tex. 628, 101 S.W.2d 543; *King v. First Nat. Bank of Wichita Falls*, 144 Tex. 583, 192 S.W.2d 260, 163 A.L.R. 1128; *State Nat. Bank of Corpus Christi v. Morgan*, 135 Tex. 509, 143 S.W.2d 757; *Collier v. Caraway*, Tex.Civ.App., 140 S.W.2d 910, writ refused; *Curry v. Texas Co.*, *supra*; *Kokernot v. Caldwell*, Tex.Civ.App., 231 S.W.2d 528, writ refused.
>
> An instrument may convey two separate estates in the minerals, one of which may be a full mineral interest and the other a royalty, or other interest in the minerals. *Richardson v. Hart*, 143 Tex. 392, 185 S.W.2d 563, 565; *Countiss v. Baldwin*, Tex.Civ.App., 151 S.W.2d 235, writ dismissed, correct judgment; *MacDonald v. Sanders*, Tex.Civ.App., 207 S.W.2d 155, refused, n.r.e.; *Acklin v. Fuqua*, Tex.Civ.App., 193 S.W.2d 297, n.r.e.

A. Components of Mineral Ownership

The primary components of mineral ownership are:

> (i) The right to utilize the mineral estate and as much of the surface as is reasonably necessary, and as previously noted with regard to uranium mining, that may include the ability to destroy the surface, subject to remediation and damages to the surface owner with regard to post-June 8, 1983 mineral severances.

(ii). The right to "lease" the mineral rights. A "lease" is really the conveyance of a fee simple determinable estate. "Leasing" rights are also know as Executive Rights

(iii) The right to receive compensation for leasing the mineral rights, commonly known as "bonus".

(iv) The right to receive delay rentals payable under a lease.

(v) The right to receive royalties on production of minerals. The right may be established as part of the lease or as the result of a conveyance or reservation of a royalty interest in a separate instrument.

(vi) The right to receive shut-in royalties and other payments and benefits, not otherwise specifically enumerated above, which are payable and/or due under a lease.

1. Non-Participating Royalty Interests

A royalty interest which does not include ownership of executive rights, the right to receive bonus, and/or the right to receive delay rentals, is generally described as a non-participating royalty interest. *Plainsman Trading Co. v. Crews*, 898 S.W.2d 786, 789-790 (Tex. 1995) defined such interest as follows:

> A non-participating royalty interest . . . may be defined as an interest in the gross production of oil, gas, and other minerals *carved out of the mineral fee estate* as a free royalty, which does not carry with it the right to participate in the execution of, the bonus payable for, or the delay rentals to accrue under, oil, gas, and mineral leases executed by the owner of the mineral fee estate.

2. Term of Royalty Interests

A royalty interest can be for a term, such as for a specified period, or for a specified period and as long thereafter as production is obtained from the land burdened by the royalty interest. Although it is more common to find term non-participating royalty interests, there is no prohibition on making a royalty, or even a mineral interest, into a term interest.

3. Duties of Executive Rights Owner to Holders of Non-Participating Royalty Interests/Non-Executive Rights

a. The holder of the executive rights owes a non-participating royalty interest owner a duty of utmost fair dealing. In *Pickens v. Hope*, 764 S.W.2d 256, 267 (Tex.App.-San Antonio 1988, writ denied), the court stated:

> Because, however, the non-participating royalty owner must depend upon the mineral fee owner for the enjoyment of his interest, the courts have implied a covenant of the utmost fair dealing in the exercise of the executive rights to lease or develop the minerals. *Schlittler v. Smith,* 128 Tex. 628, 101 S.W.2d 543, 545 (Tex.Comm'n App. 1937, opinion adopted); *Morriss v. First National Bank of Mission,* 249 S.W.2d 269, 276 (Tex.Civ.App. — San Antonio 1952, writ ref'd n.r.e.).

Utmost fair dealing and good faith was defined in *Marrs & Smith P'ship v. D.K. Boyd Oil & Gas Co., Inc.*, 223 S.W.3d 1 (Tex.App.-El Paso 2005, pet. denied) as:

> The duty of utmost good faith requires the executive rights holder to execute the same type of oil and gas lease on the same terms as he would have done in the absence of an outstanding, nonparticipating interest in a third party. *Hlavinka v. Hancock*, 116 S.W.3d 412, 417 (Tex.App.-Corpus Christi 2003, pet. denied). This is a more stringent standard than simple good faith but is generally considered a lesser standard than a true fiduciary obligation. *Dearing*, 824 S.W.2d at 732.

b. *Manges v. Guerra,* 673 S.W.2d 180 (Tex. 1984). The Supreme Court of Texas held the executive to a standard of good faith and utmost fair dealing, but characterized the standard as a fiduciary duty arising out of the relationship between the executive and the non-executive, and not out of the contract or deed.

In *Manges v. Guerra,* Clinton Manges had purchased the surface and slightly more than a one-half undivided interest in the mineral estate of a large tract of land from various members of the Guerra family, as well as the executive right to lease the Guerra mineral interest. It is not uncommon for a purchaser of the surface to want to somehow control the location of wells on the surface, and Manges' acquisition of the executive rights then afforded him the ability to control surface use for mineral development. Subsequently, Manges leased part of the Guerras' mineral interest to himself for five dollars and, thereafter, obtained production. He also executed a farm-out agreement to a third party operator, retaining a fifty percent working interest free of drilling costs. In addition, he executed a top lease to a third party operator. The Guerras sued, claiming that Manges had breached his duty as an executive by encumbering their interest, leasing to himself, and securing benefits for himself alone. The trial court found for the Guerras, ordering that: 1) Manges be removed as executive; 2) the Manges-to-Manges leases be cancelled as of the date of execution; 3) the Guerras receive an accounting from Manges for proceeds from production consistent with the Guerras' status as co-tenants; 4) the Guerras be awarded $382,000 actual damages as compensation for what they would have received if Manges had timely leased to a third person; 5) the Guerras be awarded $500,000 in exemplary damages; and 6) the various instruments executed by Manges did not affect the Guerras' interest. The Supreme Court

affirmed the judgments of the lower courts except for those parts of the judgments which had removed Manges as holder of the executive rights.

c. Limitations on *Manges*. The holding in *Manges* has been limited, however, to just those situations where the ownership relationship is one of cotenancy. An owner of a non-participating royalty interest is not a cotenant with the owner of the mineral interest from which the non-participating royalty interest was carved. As stated in *Marrs & Smith P'ship v. D.K. Boyd Oil & Gas Co., Inc.*, 223 S.W.3d 1 (Tex.App.-El Paso 2005, pet. denied):

> Cases interpreting *Manges* have concluded that when the executive and non-executive are cotenants in the mineral estate and there is a relationship of trust and confidence between the parties, a fiduciary relationship exists between the executive and non-executive mineral interest owner. *Hlavinka*, 116 S.W.3d at 417 n. 3, *citing Marathon Oil Co. v. Moye*, 893 S.W.2d 585, 591 (Tex.App.-Dallas 1994, orig. proceeding) and *Pickens v. Hope*, 764 S.W.2d 256, 267 (Tex.App.-San Antonio 1988, writ denied). *Manges* did not apply the customary standard that the fiduciary must subordinate its own interest to those of the non-participating interest owner, but instead charged the fiduciary with acquiring for the non-executive every benefit that he exacts for himself. *See Manges*, 673 S.W.2d at 183. Under *Manges*, Boyd owed the Partnership a duty to acquire for the Partnership every benefit exacted for itself with respect to the mineral interest, but this fiduciary duty only existed with respect to Boyd's exercise of the executive rights.

See also *Pickens v. Hope*, 764 S.W.2d 256, 267 (Tex.App.-San Antonio 1988, writ denied) which stated:

> That did not happen in the present case. Undoubtedly, the conveyance by the Guerras of the executive rights in the mineral estate created a privilege and a duty on the part of Manges to manage the mineral property belonging to the Guerras. This duty to manage is certainly fiduciary in nature. No duty to manage the non-participating royalty was ever conferred on Pickens. Manges committed specific acts of self-dealing (e.g., leasing to himself and providing for a "back-in" 50% working interest, free of cost, to himself in the farm-out) which deprived his co-tenants of bonus, delay rentals and royalties. In *Manges*, the executive did not extract the same benefit for the non-executive as he did for himself. There is no self-dealing in the instant case. The Supreme Court held that Manges breached a fiduciary duty on the facts presented. It described this breach as follows: In our opinion Manges' conduct amounted to a breach of his fiduciary duty as found by the jury in making the lease to himself, in agreeing upon a $5 nominal bonus for 25,911.62 acres of land, and in dealing with the entire mineral interest so that he received benefits that the non-executive [his co-mineral owners] did not receive. His taking one hundred percent of seven-eighths of the three producing wells, his

> taking one-half of the working interest, free and clear of costs, by his farm-out to Schero, was also the receipt of special benefits that the non-executive did not receive . . . (Emphasis supplied.) 673 S.W.2d at 184.

3. Production Payments

Another type of interest in mineral ownership and production is a "production payment", which is a finite interest in production, expressed as a monetary amount payable out of a certain percentage of production. Production payments can be carved out of either the mineral/royalty interest or working interest. An example of a production payment would be the grant or reservation of the sum of $100,000.00 payable from 1/4 of the net proceeds obtained from the sale of oil and/or gas from the land described. *See JVA Operating Co. v. Kaiser-Francis Oil Co.*, 11 S.W.3d 504 (Tex.App.-Eastland 2000, pet. denied).

4. Leases

Since Daniel Ellwood is presenting a comprehensive review of oil and gas leases and the rights under such leases, I will not go into leases in any great detail. However, I will briefly explain the rights associated with oil, gas and mineral leases and the interests created by such leases.

Although oil, gas and mineral leases are denominated as "leases", they actually are not leases as that term has been traditionally used with regard to the letting of estates in the real property's surface. Instead and generally speaking, an oil, gas and mineral lease is a conveyance of a fee simple determinable estate. As noted in *BP Amoco Prod. v. Marshall*, 04-06-00478-CV (Tex.App. [4th Dist.] 12-10-2008):

> The lessee acquires ownership of all the minerals in place that the lessor owned and purported to lease, subject to the possibility of reverter in the lessor. *Id.* The lessee's interest is "determinable" because it may terminate and revert to the lessor upon occurrence of certain events specified in the lease that terminate the lease. *Id.* Typically, a lease is kept alive after its primary term only by production in paying quantities or a savings clause such as a shut-in royalty clause, a continuous operations clause, or a drilling operations clause. *Krabbe v. Anadarko Petroleum Corp.*, 46 S.W.3d 308, 315 (Tex.App.-Amarillo 2001, pet. denied). If the lease's primary term expires when there is non-production and the lessee fails to comply with any savings clause in the lease, the lease and the lessee's determinable fee interest "automatically terminates." *Id.* The lease terminates and the fee interest reverts to the lessor without the lessor taking any legal action. *W.T. Waggoner Estate v. Sigler Oil Co.*, 118 Tex. 509, 19 S.W.2d 27, 30 (1929); *Kincaid v. Gulf Oil Corp.*, 675 S.W.2d 250, 255 (Tex.App.-San Antonio 1984, writ ref'd n.r.e.). Once a lease terminates by its own terms, it cannot be ratified or revived by subsequent actions of the lessor. *Ladd Petroleum*, 695

S.W.2d at 109; *Woodson Oil Co. v. Pruett*, 281 S.W.2d 159, 165 (Tex.Civ.App.-San Antonio 1955, writ ref'd n.r.e.).

5. Interests in Leases

a. Working interests, which are the ownership interests owned by a lessee under an oil, gas and mineral lease

b. Overriding royalty interests, which are non-possessory interests carved out of the working interest. *See H.G. Sledge, Inc. v. Prospective Inv. & Trading Co., Ltd.*, 36 S.W.3d 597 (Tex.App.-Austin 2000, pet. denied) which defined such interests as follows:

> It is an interest, which is carved out of, and constitutes a part of, the working interest created by an oil and gas lease." *In re GHR Energy Corp.*, 972 F.2d 96, 99 (5th Cir. 1992) (quoting *Gruss v. Cummins*, 329 S.W.2d 496, 501 (Tex.Civ.App.-El Paso 1959, writ ref. n.r.e.)). This type of royalty is a fractional interest in the "gross production of oil and gas under a lease, in addition to the usual royalty paid to the lessor, free of any expense for exploration, drilling, development, operating, marketing, and other costs incident to the production and sale of oil and gas produced from the lease." 8 Williams & Meyers, supra note 1, 748. Although carved out of the working interest, an overriding royalty interest confers no right to drill, develop, or produce the oil and gas under the leased tract and thus is viewed as nonpossessory.

c. Carried working interests, which are forms of working interests where the owner is entitled to a cost-free or partially cost-free working interest. Usually the working interest is cost-free until payout of the well or wells burdened by the carried working interest and following payout, the working interest is no longer carried. Carried working interest usually cover their share of royalty both before and after payout.

d. Promotes, which are whatever the market will bear. They can consist of overriding royalties, carried working interests, cash payments, and just about any other interest of enriching the owner of a working interest who is willing to sell part of his working interest. Usually, with a promote, the seller will make money even if the drilling program results in dry holes or wells which never payout.

V. UNDERSTANDING RIGHTS RELATING TO THE MINERAL/DOMINANT ESTATE AND SURFACE/SUBSERVIENT ESTATE

As discussed previously with regard to the cases regarding coal, lignite, uranium and other minerals, in Texas, the mineral estate is the dominant estate and the mineral owner has the right to use as much of the surface estate as maybe reasonably necessary to enjoy the mineral estate.

In *Plainsman Trading Co. v. Crews*, 898 S.W.2d 786, 789 (Tex. 1995), the rationale for the dominance of the mineral estate was stated as follows:

> It has historically been held that the mineral estate is dominant, meaning, the mineral owner has the right to use so much of the surface as may be reasonably necessary to enjoy his mineral estate. *See Acker v. Guinn*, 464 S.W.2d 348, 352 (Tex. 1971); *Harris v. Currie*, 142 Tex. 93, 176 S.W.2d 302, 305 (1944); *Cowan v. Hardeman*, 26 Tex. 217, 222 (1862) (noting that these rights existed both in Spanish civil and English common law). Practically speaking, the mineral estate would be wholly worthless if the owner of the minerals could not enter upon the land in order to explore for and extract them. *Harris*, 176 S.W.2d at 305.

However, the Court in *Plainsman* also recognized the inherent conflict between the owner of a severed mineral estate and the owner of a surface estate:

> Just as the mineral estate would be worthless absent a right to make use of the surface, the surface estate would be worthless if the reasonable use granted to the mineral owner encompassed the right to consume or deplete the surface. Thus, in *Acker v. Guinn*, 464 S.W.2d 348 (Tex. 1971), this court created the presumption that a surface owner conveying "minerals" did not intend to convey the right to destroy his interest. Likewise, we presumed the grantee of a surface estate from which "minerals" are reserved did not intend to accept an estate with little or no value. We followed the rule that where a deed conveyed or reserved minerals generally, it did not convey or reserve any substance the extraction of which, by any reasonable means, would consume or deplete the surface. *See Reed v. Wylie*, 597 S.W.2d 743 (1980)

A. Accommodation Doctrine/Due Regard for the Rights of Surface Estate

In *Getty Oil Co. v. Jones*, 470 S.W.2d 618, 621 (Tex. 1971), the Court articulated the concept that the mineral lessee must exercise its rights with due regard for the rights of the surface owner. As explained in the opinion in *Getty*, Jones had erected a self propelled above ground irrigation system, commonly known as a center-pivot irrigation system or circle irrigation system. For those who have been to West Texas or other fairly dry parts of the country, you may have seen this example of an irrigation system. It has a central hub which is the pivot point and the irrigation sprinklers are suspended from a tube about 7-10 feet above ground with wheeled assemblies spaced along the length of the tube/sprinkler assembly and the tube and sprinklers rotate around the central hub so that you get a circular irrigation pattern. The oil and gas lease was in existence at the times that Jones acquired the surface. Prior to installation of the system, Getty had drilled one well, which did not interfere with the irrigation system following its installation. By the time Getty drilled two additional wells, Jones had installed his irrigation system and the additional wells which Getty had drilled required pumping units taller than the sprinkler system could accommodate unless the pumping units were submerged below the surface. Getty's placement of the wells and planned

installation of pumping units would have effectively made it impossible for Jones to continue to use his irrigation system to water his crops. Adobe also owned part of the lease on other lands owned by Jones and had built cellars to install its pumping units and oriented the cellars so that its wells and pumping units would not interfere with Jones' irrigation system.

Although the *Getty* Court sent the case back to the trial court for further proceedings, the Court provided the following guidance to the trial court in how to proceed in determining the respective rights of Getty and Jones:

> But under the circumstances indicated here; i.e., where there is an existing use by the surface owner which would otherwise be precluded or impaired, and where under the established practices in the industry there are alternatives available to the lessee whereby the minerals can be recovered, the rules of reasonable usage of the surface may require the adoption of an alternative by the lessee.
>
> There must be a determination that under all the circumstances the use of the surface by Getty in the manner under attack is not reasonably necessary. The burden of this proof is upon Jones, the surface owner. *Cf. Humble Oil & Refining Co. v. Williams*, 420 S.W.2d 133 (Tex.Sup. 1967). Jones sought to discharge this burden by showing that the use which Getty is making of the surface is not reasonably necessary because of non-interfering and reasonable ways and means of producing the minerals that are available to Getty, the use of which will obviate the abandonment by Jones of his existing use of the surface, and that the alternatives available to Jones would be impractical and unreasonable under all the conditions. These are the elements to be considered by the trier of facts and the jury should be so instructed in resolving the issue of the reasonable necessity of the surface use by Getty, the mineral lessee.

Texas Genco, LP v. Valence Operating Co., 187 S.W.3d 118, 125 (Tex.App.-Waco 2006, pet. denied) also addressed the issue of due regard and held:

> The dominant mineral estate has the right to reasonable use of the surface estate to produce minerals, but this right is to be exercised with due regard for the rights of the surface estate's owner. *Getty Oil Co. v. Jones*, 470 S.W.2d 618, 621 (Tex. 1971). This concept of "due regard," known as the accommodation doctrine, was first articulated in *Getty Oil* and balances the rights of the surface owner and the mineral owner in the use of the surface. *Tarrant County Water Control & Improvement Dist. No. 1 v. Haupt, Inc.*, 854 S.W.2d 909, 911 (Tex. 1993) (*Haupt I*). Upon remand of *Haupt I*, we reiterated the elements of the accommodation doctrine that have been established by the supreme court: [W]here there is an existing use by the surface owner which would otherwise be precluded or impaired, and where under the established practices in the industry there are alternatives available to the [mineral owner] whereby the minerals can be recovered, the rules of reasonable usage of the surface may require the adoption of an alternative by the [mineral owner]. *Haupt, Inc. v. Tarrant County*

> *Water Control & Improvement Dist. No. 1*, 870 S.W.2d 350, 353 (Tex.App.-Waco 1994, no writ) (*Haupt II*) (quoting *Getty Oil*, 470 S.W.2d at 622). And while we noted that the accommodation doctrine preserves the mineral owner's absolute right to use the surface if there is only one way to produce the minerals, we repeated the core of the accommodation doctrine: *Getty recognizes that if there is but one means of surface use by which to produce the minerals, then the mineral owner has the right to pursue that use, regardless of surface damage.* [citation omitted]. On the other hand, if the mineral owner has reasonable alternative uses of the surface, one of which permits the surface owner to continue to use the surface in the manner intended (especially when there is only one reasonable manner in which the surface may be used) and one of which would preclude that use by the surface owner, the mineral owner *must* use the alternative that allows continued use of the surface by the surface owner. *Id.* (quoting *Haupt I*, 854 S.W.2d at 911-12) (emphasis in original); *see also id.* at 912-13 ("if reasonable alternative drilling methods exist that protect [the surface owner's existing use], then an accommodation by the mineral owners would be *required*") (emphasis added). We then delineated the surface owner's burden of proof: [T]he surface owner must show that the particular manner of surface use being challenged is not reasonably necessary to the mineral owner under all circumstances. *Haupt*, 854 S.W.2d at 911; *Getty Oil*, 470 S.W.2d at 623. This may be done by proving that the mineral owner has available other reasonable means of production, in addition to the method under attack, that will not interfere with the surface owner's existing use. *Id.* Moreover, the surface owner must also show that any alternative uses of the surface, other than the existing use, are impracticable and unreasonable under all the circumstances. *Getty Oil*, 470 S.W.2d at 623. All of these elements of the surface owner's burden are fact-sensitive and must be established either conclusively or by appropriate findings in determining the reasonable necessity of the mineral owner's surface use. *Haupt*, 854 S.W.2d at 911; *Getty Oil*, 470 S.W.2d at 623.

As indicated by both *Getty* and *Texas Genco*, the use of the surface for which protection is to be extended under the due regard/accommodation doctrine is only existing surface use and facilities. A surface owner's unrealized plans to make some future use of its property will not bring into play such doctrine.

Valence Operating Co. v. Texas Genco, LP, 255 S.W.3d 210 (Tex.App.–Waco 2008) reinforces the accommodation doctrine and makes clear that directional drilling is an acceptable alternative to accommodate an existing surface use. Valence attempted to raise on appeal the issue of whether it could be compelled to directionally drill from a surface location outside of its unit or lease, but the Court would not address this issue as there was evidence that the surface location for a directionally drilled well could be located on the unit and lease so as not to interfere with the ash-disposal landfill operated by Texas Genco incident to its lignite coal plant operations.

B. Right to Use of Water

Although *Sun Oil Co. v. Whitaker*, 483 S.W.2d 808 (Tex. 1972) affirmed that underground fresh water was a part of the surface estate, it also held that unless prohibited by the lease, the mineral lessee has the right to use so much of the underground fresh water as necessary for the utilization of the mineral estate. In *Sun Oil*, the lease prevented the lessee from using lessor's water wells, but was silent on the issue of whether Sun Oil could drill its own wells and use the water from them for a waterflood operation approved by the Railroad Commission. The silence on this point in the lease was resolved against the lessor and Sun was allowed to drill for and produce water for use in its operations on the lease.

C. Competing Mineral Estates

What happens when the owner of a uranium lease in a situation where Texas law would hold that the uranium is a mineral has a conflict with the owner of an oil and gas lease regarding reasonable use of the surface? Keep in mind that under *Reed II* and *Moser*, near surface minerals such as coal, lignite, iron ore, and pre-June 8, 1983 severances where uranium is involved are considered part of the surface estate while post-June 8, 1983 severances of uranium are considered part of the mineral estate, even if the uranium is to be mined by surface mining.

I don't know the answer to this question and have not found any cases which definitively address this issue. Factors/issues to consider in determining a possible answer to this question would be:

(i) Since both owners own interests in the mineral estate which under Texas law is the dominant estate, there would be no priority based upon dominant/servient estates.

(ii) Would dominance be based upon whose lease was recorded first; i.e., if a uranium lease has been executed and recorded at the time the oil and gas lease was granted, does the oil and gas lessee take subject to the rights of the uranium lessee? Typically, record notice of the rights of another party means that the subsequent purchaser takes and exercises its rights subject to the rights of the owner whose instrument was already of record,

(iii) Would a more fair and equitable manner of handling this issue be to adopt the due regard/accommodation doctrine espoused in *Getty* and its progeny? If an oil and gas lessee decided to drill one or more wells and was successful and a few years later, a uranium lessee, whose lease was prior in time and notice, decided to start strip mining and notified the oil and gas lessee it would need to plug its wells below the depth of the mine and cease producing them during the time of the uranium mining, should the uranium lessee have the right to do so and to require the oil and gas lessee to bear all of the loss of income from the wells, risk of loss of the wells and damage to the formation due to an extended shut-in, the costs of temporarily plugging the wells, removing all equipment, reinstalling the equipment and reconnecting the wells,

the risk of loss of the lease due to failure to produce and/or conduct operations during the period of the strip mining?

If I were counseling a client faced with this potential situation, I would highly recommend that the parties attempt to come to an agreement prior to conducting operations on the land in question to avoid the possibility of future problems

VI. REVIEW OF SPECIFIC RULES/DOCTRINES

A. Co-ownership/Ouster

As previously mentioned, estates in land including the mineral estate and all of its subparts can be co-owned with owners owning undivided interests. Such co-ownership of the same type of possessory estates creates a cotenancy.

The general rule is that any cotenant who has the right to develop the mineral estate can do so even in the absence of consent from the other co-owners. In *Willson v. Superior Oil Co.*, 274 S.W.2d 947 (Tex.Civ.App.-Texarkana 1954, writ refd n.r.e.), the court stated:

> Each co-tenant may enter upon the premises for the purpose of exploring for oil and gas and may drill and develop the premises. In the absence of a joint agreement, upon discovery of oil and gas, the producing co-tenant must account to the non-consenting or non-producing co-tenant for his pro rata share of the net profits, that is, the market value of the oil or gas produced, less necessary and reasonable expenses incurred in producing and marketing same; and if a co-tenant drills a dry hole, he does so at his own risk and without right to reimbursement from his co-tenant (in the absence of an agreement therefor) for the drilling costs. 31 Tex.Jur., Sec. 11, pp. 36-37; *Burnham v. Hardy Oil Co.*, *supra*; *Prairie Oil & Gas Co. v. Allen*, *supra*; *Earp v. Mid-Continent Petroleum Corp.*, *supra*.

Therefore, if a cotenant or his lessee drills a dry hole and the other cotenants have not joined in the drilling of the well, the risk of loss is all on the party drilling the dry hole. If the well is a producer, the non-participating cotenants are entitled to share in the production based upon their interest in the mineral estate after the drilling cotenant or his lessee recoups the reasonable costs associated with drilling and producing. The drilling cotenant/lessee is not allowed to inflate costs or charge a premium for drilling and producing.

B. Life Estate Interests/Open Mines Doctrine

Frequently, life estate interests are created in real estate, including the mineral estate. Life estates are often created by operation of law, such as when a person who owns separate real property dies

intestate with a surviving spouse and children (in which event the surviving spouse is entitled to a 1/3 life estate in the property) or the separate property constitutes the homestead (in which event the surviving spouse's homestead interest is equivalent to a ½ life estate). At other times, a person may create a life estate by either conveying or reserving a life estate or including the granting of a life estate in his or her will.

When a life estate interest has been created as to the mineral or royalty estate, then the following rules apply per *Moore v. Vines*, 474 S.W.2d 437 (Tex. 1971):

> Ordinarily a life tenant who dissipates the corpus of an estate is liable to the remaindermen for waste. Waste is defined as 'permanent harm to real property, committed by tenants for life or for years, not justified as a reasonable exercise of ownership and enjoyment by the possessory tenant and resulting in a reduction in value of the interest of the reversioner or remainderman.' American Law of Property, Vol. I, 2.16e. Mineral royalties and bonuses are part of the corpus and the life tenant is entitled only to the interest thereon. The open mine doctrine forms an exception to the general rule. *Clyde v. Hamilton*, 414 S.W.2d 434 (Tex.Sup. 1967). Blackstone expressed the original doctrine in this manner: 'To open the land to search for mines of metal, coal, sc., is waste; for that is a detriment to the inheritance: but if the pits or mines were open before, it is no waste for the tenant to continue digging them for his own use; for it is now become the mere annual profit of the land.' 2 W. Blackstone, Commentaries. *See also* Woodward, The Open Mine Doctrine in Oil and Gas Cases, 35 Texas L.Rev. 538 (1957). We have held that the doctrine is invoked where wells were producing under a lease executed by the testator at the time the life estate came into being, and where producing wells were drilled after the vesting of the life estate but under an oil and gas lease in force and effect at the time. *Youngman v. Shular*, 155 Tex. 437, 288 S.W.2d 495 (1956); *Thompson v. Thompson*, 149 Tex. 632, 236 S.W.2d 779 (1951); and *Swayne v. Lone Acre Oil Co.*, 98 Tex. 597, 86 S.W. 740, 69 L.R.A. 986 (1905). It is said that the fiction will be indulged that the wells were opened by the testator or settlor where they were drilled under authority of an oil and gas lease executed by them; or, as it has been otherwise expressed, the drilling of wells under authority of an existing lease is the equivalent of an open mine. See 1 Kuntz, Oil and Gas, § 8.2 (1962). It is further stated in this treatise that there is uncertainty as to the result if the lease in existence at the time the life estate began thereafter terminates. The comment is made that solution of the problem turns on whether emphasis is given to the factor that wells are drilled under authority of an existing lease which is the equivalent of an open mine, it being apparent that such authority for opening mines or drilling wells no longer exists after termination of the outstanding lease; or if emphasis is given to the intention of the grantor that the land be dealt with as he had dealt with it, from which it would follow that the life tenant would be entitled to enjoy the proceeds of a subsequent lease.

McGill v. Johnson, 799 S.W.2d 673 (Tex. 1990) summarized the open mine doctine as follows:

> The effect of the open mine doctrine is that all royalties, bonuses, and income derived from these royalties and bonuses is not treated as corpus of the life estate, but rather, belongs to the life tenant. *Clyde v. Hamilton,* 414 S.W.2d 434 (Tex. 1967).

An owner is always free to specify in an instrument which creates a life estate that the life tenant is to receive royalties or the right to dissipate the corpus of the estate, and if that occurs, then the life tenant is entitled to the interest specified in the instrument. A corollary to this rule is stated in *Steger v. Muenster Drilling Co., Inc.*, 134 S.W.3d 359 (Tex.App.-Fort Worth 2003, pet. denied):

> Although a life tenant ordinarily cannot convey an estate that is greater than one tied to her life, the instrument conveying the life estate can confer greater powers upon the life tenant. Thus, a testator or grantor can give the life tenant power to execute oil and gas leases that extend beyond the life tenant's own lifetime.

When oil companies and other companies are faced with life estate interests as to producing properties, that can present a problem as to how to pay the royalties, particularly when the open mine doctrine is inapplicable. As noted from the foregoing, the life tenant is entitled to interest on the royalties which are to be invested. However, most production companies are not in the business of investing royalty owner's funds for the benefit of a life tenant, so often the life tenant and remaindermen are contacted and asked to come to and provide the company with an agreement on how to distribute the proceeds. Alternatively, the production company can cut one check naming all remaindermen and life estate owners and let them figure out what to do with the check, although that approach does present a life estate owner or remainderman with the possibility of forging endorsements on the check, with claims possibly being made against the company by the remaindermen if the life tenant receives the check and forges the endorsements for the remaindermen.

C. Adverse Possession

It is possible to adversely possess the mineral rights in a tract of land, just as it is possible to gain title to the surface through adverse possession. The applicable statutes are found in Texas Civil Practice and Remedies Code Sections 16.021 *et seq*. with the following forming the primary and most often used bases for adverse possession:

> **§ 16.024. Adverse Possession: Three-Year Limitations Period.**
> A person must bring suit to recover real property held by another in peaceable and adverse possession under title or color of title not later than three years after the day the cause of action accrues.

> **§ 16.025. Adverse Possession: Five-Year Limitations Period.**
> (a) A person must bring suit not later than five years after the day the cause of action accrues to recover real property held in peaceable and adverse possession by another who: (1)

cultivates, uses, or enjoys the property; (2) pays applicable taxes on the property; and (3) claims the property under a duly registered deed.
(b) This section does not apply to a claim based on a forged deed or a deed executed under a forged power of attorney.

§ 16.026. Adverse Possession: 10-Year Limitations Period.
(a) A person must bring suit not later than 10 years after the day the cause of action accrues to recover real property held in peaceable and adverse possession by another who cultivates, uses, or enjoys the property.
(b) Without a title instrument, peaceable and adverse possession is limited in this section to 160 acres, including improvements, unless the number of acres actually enclosed exceeds 160. If the number of enclosed acres exceeds 160 acres, peaceable and adverse possession extends to the real property actually enclosed.
(c) Peaceable possession of real property held under a duly registered deed or other memorandum of title that fixes the boundaries of the possessor's claim extends to the boundaries specified in the instrument.

§ 16.028. Adverse Possession With Recorded Instrument: 25-Year Limitations Period.
(a) a person, regardless of whether the person is or has been under a legal disability, may not maintain an action for the recovery of real property held for 25 years before the commencement of the action in peaceable and adverse possession by another who holds the property in good faith and under a deed or other instrument purporting to convey the property that is recorded in the deed records of the county where any part of the real property is located.
(b) Adverse possession of any part of the real property held under a recorded deed or other recorded instrument that purports to convey the property extends to and includes all of the property described in the instrument, even though the instrument is void on its face or in fact.
(c) A person who holds real property and claims title under this section has a good and marketable title to the property regardless of a disability arising at any time in the adverse claimant or a person claiming under the adverse claimant.

If the entry which constitutes the start of the running of the adverse possession period occurs prior to a severance then adverse possession which ripens into title to the surface also includes the mineral estate. As stated in *Chapman v. Parks*, 347 S.W.2d 805 (Tex.Civ.App.-Amarillo 1961, writ ref'd n.r.e.):

> The rule is well established in Texas that an adverse entry upon the surface of land extends downward and includes title to the underlying minerals where at the time of entry there had been no severance of the mineral estate. *Broughton v. Humble Oil & Refining Company*, Tex.Civ.App., 105 S.W.2d 480, writ refused. The rule is equally as well established in Texas that after the severance of the surface of the land and the mineral estate, the mere possession of the one will not ripen into a limitation to the other and that after severance of the oil and gas and mere adverse possession and use

> of the surface does not constitute adverse possession of the minerals under the surface. *Grissom v. Anderson*, 125 Tex. 26, 79 S.W.2d 619. *Henderson v. Chesley*, Tex.Civ.App., 229 S.W. 573, writ refused.

The requirements for adverse possession were extensively covered in *Garza v. Maddux*, 988 S.W.2d 280 (Tex.App.-Corpus Christi 1999, pet. denied), which also held that the granting of an oil, gas and mineral lease effects a severance of the minerals:

> The Garzas claim title to the mineral rights in the disputed tract through the alleged adverse possession of their predecessors-in-interest. They specifically contend their adverse possession began in 1924 when Eleuterio Salinas built a fence separating the disputed tract from the remainder of Share 15 and began to cultivate or use the land for grazing purposes exclusive to the rights of all others. They assert title under the three, five, ten, and twenty-five year limitations periods.
>
> Adverse possession as defined in section 16.021 of the civil practice and remedies code is "an actual and visible appropriation of real property, commenced and continued under a claim of right that is inconsistent with and is hostile to the claim of another person." TEX. CIV. PRAC. & REM. CODE ANN. § 16.021 (1) (Vernon 1986); *Rhodes v. Cahill,* 802 S.W.2d 643, 645 (Tex. 1990); *Clements v. Corbin,* 891 S.W.2d 276, 278 (Tex.App. — Corpus Christi 1994, writ denied). To establish title through adverse possession, "the possession must be of such character as to indicate unmistakably an assertion of a claim of exclusive ownership in the occupant." *Clements,* 891 S.W.2d at 278 (quoting *Rick v. Grubbs,* 147 Tex. 267, 214 S.W.2d 925, 927 (1948)).
>
> . . .
>
> The record reflects that the Salinas family built the fences along the boundary between Shares 13 and 15, including a partial fence between Share 15 and the disputed tract. The family leased Share 15 for grazing from 1920 to 1928 and from 1930 to 1937. Their cattle moved freely between their property and the leased property through the opening in the fence.
>
> In 1937, Share 15 was conveyed to Vessels who almost immediately severed the minerals from the surface by the oil and gas lease to Sun Oil Co. The disputed tract was not excluded from the conveyance. By deeds in 1938 and corrected in 1942, certain members of the Salinas family conveyed a portion of Share 13 to the Garzas' immediate predecessor-in-interest, Guadalupe Garza. In 1939, the Salinas family quitclaimed to Vessels their interests in all of Share 15, as delineated on the recorded map of August 1920. As these deeds can be given a definite or certain legal meaning, they are not ambiguous.

Unless the Salinas family transferred their adverse claims, if any, in Share 15 prior to the 1939 quitclaim deed, all their interests in the disputed tract passed to Vessels. *See Rogers v. Ricane Enter., Inc.,* 884 S.W.2d 763, 769 (Tex. 1994) (quitclaim deed passes the interest of the grantor in the property). Because the lease to Sun Oil Co. included a warranty of title, any mineral interest subsequently acquired to that land passed *eo instante* to Sun Oil Co., with a reverter in Vessels should the lease fail. *See Houston First Am. Sav. v. Musick,* 650 S.W.2d 764, 770 (Tex. 1983); *Caswell v. Llano Oil Co.,* 120 Tex. 139, 36 S.W.2d 208, 211 (1931); *Shield v. Donald,* 253 S.W.2d 710, 712 (Tex.Civ.App. — Fort Worth 1952, writ ref'd n.r.e.) (regarding mineral interest).

The 1942 deed, which corrected the 1938 deeds, provides that Guadalupe Garza was conveyed land described as:

> 271 acres out of the Northeast part of Share No. Thirteen (13) out of Schunior[']s Subdivision of Porciones 73, 74, and 75 in Hidalgo County, Texas, according to the plat of said subdivision of record in the office of the County Clerk of Hidalgo County, Texas[.]

In four places, the deed states that the acreage is out of Share 13. One of those statements is an unconditional warrant of 271 acres in Share 13, and another provides that if the acreage is unavailable at the location described, Garza will have 271 acres out of Share 13. As discussed above, the metes and bounds description does not refer to the fence which existed at the time of the conveyance and makes no mention of Share 15.

The record does not reflect that the Salinas family transferred their interests in the disputed tract to the Garzas prior to the 1939 quitclaim deed to Vessels. Therefore, no material issue of fact exists regarding title by adverse possession prior to 1939 under the three, five, ten, or twenty-five year statutes. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.024, 16.025, 16.026 16.028. Because of the 1937 severance, to raise a fact issue regarding adverse possession of the minerals under the disputed tract after 1939, there must be some evidence of drilling. *See Sun Operating Ltd. Partnership v. Oatman,* 911 S.W.2d 749, 757 (Tex.App. — San Antonio 1995, writ denied); *Webb v. British Am. Oil Prod. Co.,* 281 S.W.2d 726, 734 (Tex.Civ.App. — Eastland 1955, writ ref'd n.r.e.). As stated previously no drilling has commenced.

As the above make clear, once minerals are severed from the surface estate, actual production of the mineral estate for the requisite period of time by the adverse possessor is required to establish an adverse possession title to the minerals.

D. *Duhig v. Peavy-Moore Lumber Co., Inc.*, 144 S.W.2d 878 (Tex. 1940).

In *Duhig*, Duhig acquired from the Gilmer Estate the Josiah Jordan survey in Orange County, subject however, to a reservation of an undivided one-half interest in the minerals by the Gilmer Estate. Duhig subsequently conveyed the acreage to Miller-Link Lumber Company, but such deed only reserved an undivided one-half interest in the mineral rights in and under the acreage conveyed and was neither made subject to nor made any reference to the prior mineral reservation. Peavy-Moore Lumber Company then acquired all of Miller-Link Lumber Company's rights and interests in and to the Josiah Jordan Survey.

In determining that Duhig did not reserve an additional one-half of the minerals in addition to the one-half previously reserved, the Texas Supreme Court stated:

> . . . the language of the deed as a whole does not clearly and plainly disclose the intention of the parties that there be reserved to the grantor Duhig an undivided one-half interest in the minerals in addition to that previously reserved to Gilmer's estate, and that when resort is had to established rules of construction and facts taken into consideration which may properly be considered, it becomes apparent that the intention of the parties to the deed was to invest the grantee with title to the surface and a one-half interest in the minerals, excepting or withholding from the operation of the conveyance only the one-half interest theretofore reserved in the deed from Gilmer's estate to Duhig.
>
> . . .
>
> The granting clause of the deed, as has been said, purports to convey to the grantee the land described, that is, the surface estate and all of the mineral estate. The covenant warrants the title to 'the said premises'. The last paragraph of the deed retains an undivided one-half interest in the minerals. Thus the deed is so written that the general warranty extends to the full fee simple title to the land except an undivided one-half interest in the minerals.
>
> The language used in the last paragraph of the deed is that 'grantor retains an undivided one-half interest in * * * the minerals'. The word 'retain' ordinarily means to hold o880r keep what one already owns. 54 C.J. p. 738; 37 Words & Phrases, Perm.Ed., p. 510; Websters New International Dictionary. If controlling effect is given to the use of the word 'retains', it follows that the deed reserved to Duhig an undivided one-half interest in the minerals and that the grantee, Miller-Link Lumber Company, acquired by and through the deed only the surface estate. We assume that the deed should be given this meaning. When the deed is so interpreted the warranty is breached at the very time of the execution and delivery of the deed, for the deed warrants the title to the surface estate and also to an undivided one-half interest in the minerals. The result is that the grantor has breached his warranty, but that he has and

> holds in virtue of the deed containing the warranty the very interest, one-half of the minerals, required to remedy the breach. Such state of facts at once suggests the rule as to after-acquired title, which is thus stated in American Jurisprudence: 'It is a general rule, supported by many authorities, that a deed purporting to convey a fee simple or a lesser definite estate in land and containing covenants of general warranty of title or of ownership will operate to estop the grantor from asserting an after-acquired title or interest in the land, or the estate which the deed purports to convey, as against the grantee and those claiming under him. Vol. 19, p. 614, s 16. *See also Robinson v. Douthit*, 64 Tex. 101; *Baldwin v. Root*, 90 Tex. 546, 40 S.W. 3; *Jacobs v. Robinson*, 113 Tex. 231, 254 S.W. 309; *Caswell v. Llano Oil Company*, 120 Tex. 139, 36 S.W.2d 208; *Moore v. Crawford,* 130 U.S. 122, 9 S.Ct. 447, 449, 32 L.Ed. 878.

The reasoning enunciated in *Duhig* has been consistently applied by the Texas Courts. In *Blanton v. Bruce*, 688 S.W.2d 908, 911-912 (Tex.Civ.App.–Eastland 1985, writ ref'd n.r.e.), the Court applied the logic and arguments of *Duhig* even in the absence of any warranty:

> The question is whether the rule announced in *Duhig v. Peavy-Moore Lumber Co.,* 135 Tex. 503, 144 S.W.2d 878 (1940), applies to the Oldham-Sparks deed. The Blantons argue that *Duhig* is not controlling because the deed does not contain a "general warranty." The deed uses the words "granted, sold and conveyed ... and by these presents do grant, sell and convey." It is not a quitclaim deed. The grantor in the deed purports to convey the property described. The deed is a deed of conveyance without an expressed warranty.
>
> In *Duhig,* the court held that a grantor in a "general warranty" deed purporting to convey a fractional mineral interest is "estopped" to claim title in a reserved fractional mineral interest when to do so would, in effect, breach his warranty as to the title and interest the deed purports to convey. The court stated that its decision was based on the "application of a well settled principle of estoppel." The cases cited by the court, by analogy, involve the "well established rule of estoppel against the assertion by a grantor of an *after-acquired title* in contradiction of his covenant of warranty." See *McMahon v. Christmann,* 157 Tex. 403, 303 S.W.2d 341 (1957). *Duhig* must be viewed in the context of its facts. There, with the deed containing a "general warranty," the court cites cases which use the covenant of warranty as a vehicle to support the passage of after-acquired title. See Hemingway, *After-Acquired Title in Texas-Part I,* 20 Sw.L.J. 97 (1966). The court does not say that the announced rule will apply only when the deed contains a "general warranty." In *Lindsay v. Freeman,* 18 S.W. 727 (1892), the Supreme Court held that covenants of warranty are not necessary for the passage of after-acquired title by estoppel if the conveyance purports to convey a definite estate. . . . The language in the deed whereby the grantors convey the fee-simple estate in the land constitutes a recital which imports an assertion by them that they are the owners in fee-simple of the land;

and, having thus asserted the fact of their ownership, the grantors are estopped to deny such fact.

* * *

(I)n the case of *Hannon v. Christopher,* 34 N.J.Eq. 465, the court states that "the fair result of a more recent case would seem to be that whenever the terms of the deed, or of the covenants which it contains, clearly show that it was meant to convey an absolute and indefeasible title, and not merely that which the grantor had at the time, it will bind and pass every estate or interest which may vest in him subsequent to its execution, whether the warranty which it contains be general or special and *although it may contain no warranty whatever.*" The estoppel does not depend upon the obligation of the covenant of warranty, although the books sometimes loosely say so. It depends on good faith, right conscience, fair dealing, and sound justice. When a person competent to act has solemnly made a deed conveying not merely his interest had at the time, but a fee-simple estate, he shall not be allowed to gainsay it, to the injury of those whom he has misled thereby. (Emphasis added)

In *Scarmardo v. Potter*, 613 S.W.2d 756 (Tex.Civ.App.–Houston [14th Dist.] 1981, writ ref'd n.r.e.), the Court applied *Duhig* in the situation where a grantor had reserved an 1/8th mineral interest when there was already outstanding a prior reserved ½ mineral interest. The *Scarmardo* Court stated:

Potter, in his deed to Scarmardo, failed to mention Frieling's previously reserved one-half interest. Instead, he only reserved a one-eighth mineral interest in himself. . . . . Applying the rules and principles of law expressed in *Duhig*, we conclude that Potter breached his warranty at the very time of the execution and delivery of the deed to Scarmardo, for the deed warrants the title to the surface estate and to an undivided seven-eighths interest in the minerals. Potter thereby purported to convey to Scarmardo an undivided seven-eighths interest at a time when he only owned one-half. Under *Duhig*, Scarmardo is entitled to all of Potter's reserved interest. Since the reserved interest of Potter is insufficient to make Scarmardo whole, Scarmardo would have a cause of action in damages for breach of warranty for an additional undivided three-eighths of the mineral interest.

E. After-Acquired Title Doctrine

The after-acquired title doctrine was defined in *Cherry v. Farmers Royalty Holding Co.*, 138 Tex. 576, 160 S.W.2d 908 (Tex. Comm. App. 1942) as follows:

Where a grantor, who does not have a good title to land or minerals, conveys the same by warranty deed, and subsequently acquires good title, free from any encumbrances, the later title inures at once by contract of warranty, and by operation

> of law, to his warrantee in the deed, who has a good title against the original warrantor, and all persons in privity against him.

By way of example, if Uncle Buddy acquires title to the surface of Blackacre and then conveys Blackacre by general warranty deed to Cousin Marge without any reservation or exception of minerals and then inherits or otherwise acquires the minerals in and to Blackacre, Uncle Buddy's mineral interest will, pursuant to the after-acquired title doctrine, pass immediately upon his acquisition to Cousin Marge.

F. Mutual Mistake/Merger Doctrine

The grounds for mutual mistake are (1) a mistake of fact, (2) held mutually by the parties, and (3) which materially affects the agreed upon exchange. *Wallerstein v. Spirt*, 8 S.W.3d 774, 780 (Tex.App.--Austin 1999, no pet.).

However, if the claim is not made to set aside an instrument for mutual mistake before a conveyance made to a third party bona fide purchaser for value and without notice of the mistake, the purchaser will acquire title free from the claim of mutual mistake. *See Harrell v. Atlantic Refining Company*, 339 S.W.2d 548, 554 (Tex.Civ.App. — Waco 1960, writ ref'd n.r.e.):

> The record in the case reflects that plaintiff Atlantic and Atlantic's assignor, Houston Oil Company, were bona fide purchasers for value and cannot be bound by mutual mistake, if any, which might have existed between Graves-Taub and defendants.

The merger doctrine comes into play when a contract and deed executed pursuant to a contract contain differing terms and there is no evidence that the difference was the result of mistake.

In *Baker v. Baker*, 207 S.W.2d 244, 250 (Tex.Civ.App.–San Antonio 1947, no writ) the Court there stated the merger rule as follows:

> Restatement of Contracts, Vol. 2, Sec. 413, thus states the rule: 'The acceptance of a deed of conveyance of land from one who has previously contracted to sell it, discharges the contractual duties of the seller to the party so accepting except such as are embodied in the deed or are within the rule stated in Sec. 240(1b).'

To the same effect is *Wells v. Burroughs*, 65 S.W.2d 396, 397 (Tex.Civ.App.–Texarkana 1933, no writ) wherein the Court stated:

> And the deed having been read to plaintiffs, they could not claim they were ignorant or mistaken as to the contents thereof. *Parker v. Schrimsher* (Tex. Civ. App.) 172 S. W. 165; 7 Tex. Jur. § 31, p. 933. All contracts prior to the execution of the deed are presumed to have been merged in the deed, which expresses all the agreements of the parties. *Harper v. Town & Improvement Co.* (Tex. Com. App.) 228 S. W. 188;

> *Eldora Oil Co. v. Thompson* (Tex. Com. App.) 244 S. W. 505. Hence the plaintiffs would be presumed to have absolutely conveyed the land just as the deed declares.

Spain v. Fuston, 242 S.W.2d 892 (Tex.Civ.App.–Fort Worth 1951, no writ) and *Scull v. Davis*, 434 S.W.2d 391(Tex.Civ.App.–El Paso 1968, writ ref'd n.r.e.) also state the same rule.

G. Texas Homestead

From and oil and gas perspective, the primary issue with regard to property which is homestead is to make sure that both spouses sign the oil and gas lease, regardless of whether the property is the separate property of one of the spouses. Failure to have both spouses sign with regard to homestead renders the conveyance void.

Art. XVI, Sec. 50 of the Texas Constitution provides that:

> (b) An owner or claimant of the property claimed as homestead may not sell or abandon the homestead without the consent of each owner and the spouse of each owner, given in such manner as may be prescribed by law.

As stated in *Gulf Production Co. v. Continental Oil Co.*, 164 S.W.2d 488 (Tex. 1942):

> The requirements of the law for the joinder of the wife in a deed conveying an interest in her homestead requires that she not only consent to the sale, but to all the terms and conditions thereto, including the consideration, and she acts therein sui juris, and none of the terms and conditions of her contract can be waived or altered by the husband without her consent. Stalling v. Hullum, 79 Tex. 421, 15 S.W. 677; *Id.* 89 Tex. 431, 35 S.W. 2; *Lyon & Gribble v. Ozee*, 66 Tex. 97, 17 S.W. 405.

To the same effect is *Thompson v. Thompson*, 236 S.W.2d 779 (Tex. 1951), wherein the Court stated:

> In the case of *Bradley v. Howell*, Tex.Civ.App., 126 S.W.2d 547, writ dismissed, correct judgment, it was held that in order to constitute a valid lease of the oil, gas and other minerals on the homestead the wife must join in the lease, and sign and acknowledge the same as required by law; also that she may change her mind and 'back out' of the deal at any time before delivery of the lease, and therefore no suit for specific performance may be maintained as to the homestead.

H. Sufficiency of Deed Descriptions

The general rule regarding sufficiency of deed descriptions is contained in the case of *Wilson v. Fisher*, 188 S.W.2d 150 (Tex. 1945):

> In so far as the description of the property is concerned the writing must furnish within itself, or by reference to some other existing writing, the means or data by which the particular land to be conveyed may be identified with reasonable certainty. *Morrison v. Dailey* (Tex. Sup.) 6 S.W. 426; *Osborne v. Moore*, 112 Tex. 361, 247 S.W. 498.

One of the more recent cases discussing sufficiency descriptions is *Graff v. Berry*, Case No. 06-07-00058-CV (Tex.App.-Texarkana [6th Dist.] 3-18-2008), wherein the court stated:

> Texas law merely requires the description to be sufficient to identify the property with reasonable certainty. The description does not have to be mathematically certain. *Templeton v. Dreiss*, 961 S.W.2d 645, 659 (Tex.App.-San Antonio 1998, pet. denied). The description employed will be sufficient if "a surveyor could go upon the land and mark out the land designated." *Wooten*, 177 S.W.2d at 57; *see Wilson v. Fisher*, 144 Tex. 53, 188 S.W.2d 150, 152 (1945); *Dixon*, 150 S.W.3d at 195; *Gilbreath v. Yarbrough*, 472 S.W.2d 185, 189 (Tex.Civ.App.-Tyler 1971, writ ref'd n.r.e.). In addition, the description is sufficient if someone familiar with the area can locate the property with reasonable certainty. "If enough appears in the description so that a person familiar with the area can locate the premises with reasonable certainty, it is sufficient to satisfy the Statute of Frauds." *Vinson v. Brown*, 80 S.W.3d 221, 227 (Tex.App.-Austin 2002, no pet.); *see Gates v. Asher*, 154 Tex. 538, 280 S.W.2d 247, 248-49 (1955); *Cherokee Water Co. v. Freeman*, 145 S.W.3d 809, 819 (Tex.App.-Texarkana 2004, pet. denied).

When the description in a deed is insufficient, then the deed is void under the statute of frauds. *See Crosby v. Davis*, 421 S.W.2d 138 (Tex.Civ.App. — Tyler 1967, writ ref'd n.r.e.) which stated:

> Upon examining the foregoing description contained in the deed, it becomes obvious that the description does not, within itself, contain a sufficient description identifying the location of the land. Nor does the deed contain any reference therein to any other existing writing for further description and identification of the land. In other words, the deed contains no 'nucleus' or 'key' (such as 'our land'), to which extraneous evidence may be directly tied to determine the identity of the land sought to be conveyed. Therefore, parol testimony showing this was the only land owned by grantors was not admissible to show the identity and location of the land. The description in the deed being wholly insufficient to identify the land, the deed was void under the statute of frauds.

Parol evidence will not be admitted and cannot be used to correct a legally insufficient description although parol evidence is allowed for the limited purpose of explaining the descriptive words and identifying the land as long as the conveyance contains a “nucleus of description”. *Jones v. Mid-State Homes, Inc.*, 356 S.W.2d 923 (1962). If the parol testimony is required to do more than

directly connect with the descriptive data, it will not be allowed and the description will be legally insufficient. *Id.*

I. Four Corners Rule

The "four comers" rule is the cornerstone rule of construction used by courts to determine the legal interpretation to be afforded deeds which are not ambiguous but as to which parties have differing interpretations. The rule was stated in *Luckel v. White*, 819 S.W.2d 459, 461-462 (Tex. 1991):

> The primary duty of a court when construing such a deed is to ascertain the intent of the parties from all of the language in the deed by a fundamental rule of construction known as the "four comers" rule. *Garrett v. Dils Co.*, 157 Tex. 92, 94-95, 299 S.W.2d 904, 906 (1957); 1 E. KUNTZ, THE LAW OF OIL AND GAS, § 16.1 (1987); 6A R. POWELL, THE LAW OF REAL PROPERTY, p 899[3], at 81A-108 (P. Rohan ed. 1991). "That intention, when ascertained, prevails over arbitrary rules." *Harris v. Windsor*, 156 Tex. 324, 328, 294 S.W.2d 798, 800 (1956). The court, when seeking to ascertain the intention of the parties, attempts to harmonize all parts of the deed. *Altman v. Blake*, 712 S.W.2d at 118. "[T]he parties to an instrument intend every clause to have some effect and in some measure to evidence their agreement." *Id.* Even if different parts of the deed appear contradictory or inconsistent, the court must strive to harmonize all of the parts, construing the instrument to give effect to all of its provisions. *Benge v. Scharbauer*, 152 Tex. 447, 451, 259 S. W .2d 166, 167 (1953). The court should "not strike down any part of the deed, unless there is an irreconcilable conflict wherein one part of the instrument destroys in effect another part thereof." *Id*.

See also Bowers v. Taylor, Cause No. 01-05-00667-CV (Tex.App.--Houston [1st Dist.] 2007, no pet.), which held that in the construction of an unambiguous deed, the primary duty of a court is to ascertain the intent of the parties utilizing all of the language in the deed; and *Averyt v. Grande, Inc.*, 717 S. W.2d 891, 893 (Tex. 1986) which held that courts are to give "legal meaning to the language of the deed by construing all of its provisions in harmony and only if deed provisions irreconcilably conflict, apply one provision to the exclusion of the other."

A corollary or adjunct to the "four corners" rule is that, in the absence of an ambiguity, deeds are to be enforced as written, even if the deed as drafted somehow failed to express the original intent of the parties. *Chambers v. Huggins*, 709 S.W.2d 219, 221 (Tex.App.--Houston [14th Dist.] 1986, no writ). As stated in *Centerpoint Energy v. Old TJC*, 177 S.W.3d 425, 433 (Tex.App.--Houston [1 st Dist.] 2005, pet. denied):

> . . . the meaning of the instrument must be determined from review of the deed's four corners and application of the rules of construction. Regardless of what they meant to say, effect must given to what the parties did say in the 1990 Deed.

The court in *Moon Royalty, LLC v. Boldrick Partners d/b/a Statewide Minerals Co.* , Cause No. 11-06-00226-CV (Tex.App.--Eastland 2007, no pet.) also affirmed such precedent:

> Lack of clarity does not create an ambiguity. *Forbau v. Aetna Life Ins. Co.*, 876 S. W.2d 132,134 (Tex. 1994). Our primary goal is to ascertain the parties' true intention as expressed in the document. *Luckel v. White*, 819 S.W.2d 459,461 (Tex.1991). The intent that governs, however, is not the intent that the parties meant but failed to express but, rather, the intent that is expressed. *Gore Oil Co. v. Roosth*, 158 S. W .3d 596, 599 (Tex.App.--Eastland 2005, no pet.).

The intention of the parties as expressed in the deed is to be "ascertained from the entire instrument, and not isolated portions thereof". *Chambers*, 709 S. W.2d at 221.

Justice Calvert, in a concurring opinion in *Southland Royalty Co. v. Pan Am. Petroleum Corp.*, 378 S.W.2d 50 (Tex. 1964) wrote that the intention of the parties, whatever it might have been, takes a back seat to that intention which is expressed and actually used in an instrument:

> "Intention of the parties" is often guesswork at best. Sometimes the true intention of one or even of both parties may be defeated, as when the rule is applied of giving a contract the meaning its plain, clear language implies, irrespective of what the parties may claim it was intended to mean. So, while use of rules of interpretation and construction may not always result in ascertaining the true intention of parties in using particular language in a contract, their use yet must be better than pure guesswork in most cases else they would never have been evolved.

J. Termination of Lease Included in Pooled Unit

Wagner & Brown, Ltd. v. Sheppard, Case No. 06-0845 (Tex. 11-21-2008) dealt with a situation where a lease which had been pooled subsequently terminated due, not to a failure to maintain continuous production and/or operations, but instead to a failure to pay royalties timely as specifically required by the lease with the stated penalty being loss of lease for failure to pay royalties timely. This case held that the lessor's mineral interest which was pooled by the lessee pursuant to an oil, gas and mineral lease, is bound by the pooling and unit formed even after the lease expires.

As stated, in *Wagner & Brown*, the lease at issue had an express termination provision if royalties were not paid timely. The other situation most likely to occur which would cause a lease expiration despite the existence of a unit capable of commercial production would be the failure to pay shut-in royalties timely.

VII. DISPUTES AND RESOLUTIONS OF DISPUTES

The foregoing discussion of cases gives a pretty good idea of the variety of areas involving oil, gas and mineral disputes, but it is by no means comprehensive of all issues which have been tried and decided.

As for resolution of disputes, it is accomplished in oil and gas cases just as it is in other types of cases. Either the parties settle their dispute or the courts will eventually resolve the dispute, sometimes correctly and sometimes incorrectly. For an example of a wrongly decided case, see *Alford v. Krum*, 671 S.W.2d 870 (Tex. 1984), which was thankfully overruled by *Luckel v. White*, 819 S.W.2d 459 (Tex. 1991).

Short of trying cases, resolution of disputes often occurs during or following a mediation. If the parties are willing to arbitrate or are operating under an agreement which has an arbitration clause, then the dispute will be submitted to arbitration for resolution. Parties can also settle disputes through their counsel and on occasions outside of their respective counsel. CAVEAT: A party's attorney cannot forbid his or her client to talk to the other side, but he or she also cannot encourage such communication and cannot use his or her client as a conduit to avoid opposing counsel.