

# MINERAL ISSUES IN CONVEYANCE DOCUMENTS

HOUSTON BAR ASSOCIATION

REAL ESTATE SECTION

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## **The Background**

Oil and gas exploration began in Texas in the 1880s, in Navarro County, near Corsicana. The Corsicana Field is the oldest field in Texas, and is still producing today. When the Corsicana Field was discovered, and until the end of World War I, oil and gas rights were still being worked out by oil and gas lawyers, and variety of strange creatures were invented, discarded, re-invented and finalized. By the mid 1920s, however, the basics had been developed, and A.W. Walker, a professor at the University of Texas, was able to produce his seminal work on *The Nature of the Property Interests Created by an Oil and Gas Lease in Texas*.<sup>1</sup>

The ownership of the mineral rights under a tract of land is capable of many different variations<sup>2</sup>, and while the various treatises on oil and gas law can be consulted for the various interests that can be created,<sup>3</sup> in the interests of time and space, this paper is limited to a discussion of some of the more prevalent problems that the real estate practitioner is likely to face: severance of the minerals and royalty estate and the change in ownership of the executive right. Appended to this paper are examples of each of those, but please understand that these are the most common interests that are created, and do not encompass the entire universe of interests that can be created. Furthermore, creative minds in the legal industry have expanded upon the list of interests, and will probably continue to do so in the future.

The focus today will be on what can be expected by a real estate practitioner who is advising his client on what the client can expect, and how to plan for the future use of a particular tract of land, or, alternatively, what the client can keep in hopes of future development of the minerals.

In order to do that, most real estate practitioners rely upon the information furnished by a title company in attempting to understand the potential issues that may or may not arise when a conveyance of real property is contemplated.

## **The Title Commitment**

The problem with relying on the title company is that the title company doesn't always present the information in a fashion that will allow the party relying upon the information to understand what is going on. Recently, I had the opportunity to work on the conveyance of some ranch property in central Texas, and the title company helpfully provided me with information that read substantially as follows:

All mineral interest, the royalties, bonuses, rentals, and all other rights in connection with said mineral rights, bonuses, and rentals, along with all terms, provisions and conditions described in instrument from an earlier Grantor to an earlier Grantee, dated July 21, date, recorded in Volume 123, Page 456, of the Deed Records of Particular County, Texas, to which

instrument reference is here made for all purposes. Title to said interest not checked subsequent to date of aforesaid instrument.

It was helpfully followed by an additional disclaimer,

All leases, grants, exceptions or reservations of coal, lignite, oil, gas and other minerals, together with all rights, privileges, and immunities relating thereto, appearing in the Official Public Records whether listed in Schedule B or not. There may be leases, grants, exceptions or reservations of mineral interest that are not listed.<sup>4</sup>

My client has plans for the use of the surface, and part of the way those plans will be implemented depends upon knowing what the ownership of minerals might be. What we were faced with was less than useful. We couldn't tell who owned the minerals, who owned the royalties and who owned the executive rights.

Generally, title insurance is not available to insure interests acquired in oil and gas. [Citation] Thus, the essential link between the public record and persons desiring to acquire and develop oil and gas properties, explore for oil and gas, and market oil and gas production is provided through the process of title examination and opinion ...<sup>5</sup>

### **Minerals, Defined**

Before we go on, let's make sure that we all understand what those terms mean:

Mineral rights are generally understood to be oil and gas and the constituent elements that are produced through a common well bore.<sup>6</sup>

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.<sup>7</sup>

However, as we know, more than oil or gas can be classified as a mineral. For example, coal and lignite are frequently viewed as minerals. In *Reed I*,<sup>8</sup> the Supreme Court stated that whether a mineral belonged to the surface estate or the mineral estate depended on whether there was a surface expression of the substance. In *Reed II*, the Court backed off that, and went back to an "intent of the parties" type of view.<sup>9</sup> *Acker* lists a number of minerals that are associated with the surface that are considered generally to be part of the surface estate,<sup>10</sup> and stands for the proposition that unless the deed states it to the contrary, a reservation or grant of the minerals that can only be recovered by the methods that will destroy the surface will belong to the surface owner.

The word "mineral" has been used "in many senses, and has no definite or certain meaning. It is not capable of a definition of universal application, but is susceptible to limitation or expansion according to the intention with which it is used in the particular instrument or statute."<sup>11</sup> However, it has been further stated that "substances which are

minerals within the scientific, geological, and practical meanings of the term [legally] constitute minerals within the purview of a clause reserving all oil, gas, and minerals."<sup>12</sup>

So, generally speaking, oil and gas are clearly understood to belong to the mineral estate, and are usually the ones that are reserved or granted in documents that purport to transfer interests in "oil, gas or other minerals." Also, generally speaking, "other minerals" will be those substances that may be removed by methods other than surface destruction methods. Two issues are immediately apparent:

1. Can we vary the other minerals doctrine by specific language and
2. When is a mineral valuable?

The Court's rationale in announcing the surface destruction test was to make life a bit simpler – that is "If the deposit lies near the surface, the substance will not be granted or retained as a mineral if it is shown that *any* reasonable method of production would destroy or deplete the surface."<sup>13</sup>

I would argue that if the mineral deed or reservation includes language such as the following:

Grantors reserve and except unto Grantors, their heirs, successors-in-title and assigns, all oil, gas, vaporous hydrocarbons, coal, lignite, ores, metals, minerals and mineral products of every kind and nature (herein collectively referred to as "oil, gas and other minerals"), and which are or may be recoverable by wells, mines, shafts, open pits, strip mining or any other method (whether now in use or to be developed in the future), including but not limited to, mining or other methods which are destructive of the surface ...

The foregoing should be sufficient to clearly state the intent of the parties, and would overcome the issue of whether surface destruction would be the outcome. It is not in anybody's interest to be arguing about whether a particular kind of sand or white clay is or is not a mineral.<sup>14</sup>

It is arguable that the surface destruction test disappeared in any event, by reason of a later case,<sup>15</sup> the court held that a reservation in deed of severance rights to oil, gas, and other minerals included, as a matter of law, uranium, whether found on or below the surface.

The interesting question in *Moser* is since uranium, as a matter of law, is covered by a mineral reservation, when do we measure value? Uranium wasn't a valuable mineral until sometime in the 1930s or 1940s, and, more than likely, the average landowner and the average lawyer hadn't heard of radioactive materials beyond what he could see on his watch dial. So far as I have been able to determine, that question hasn't been answered yet.

## **Royalties, Defined**

A royalty interest may be broadly defined as a right to a fractional share of production of petroleum products, free of cost or expense incident to exploration, development, or production. ... It is sometimes referred to as the "landowner's royalty," and it will exist where the landowner does not develop the estate himself.<sup>16</sup>

[A royalty is] a share of production reserved or to be paid during the life of a lease is commonly and ordinarily understood in the oil and gas industry to be royalty.<sup>17</sup>

While a royalty interest is an estate in land, it doesn't have the same attributes as a mineral interest in land<sup>18</sup>. For example, a royalty interest owner doesn't have the right to execute oil and gas leases, nor does the royalty interest owner have the right to grant seismic permits.<sup>19</sup> Effectively, the royalty interest is the mineral interest stripped of all attributes other than the right to receive royalties from production, typically, but not always, expressed as a fraction of production.<sup>20</sup>

## **Fractions**

One of the issues that faces the practitioner is the need to describe what is being conveyed. Because of the peculiarities of the oil business, conveyances are frequently worded as being a fraction of something. For example, one may reserve a 1/16<sup>th</sup> mineral interest, or convey a 1/16<sup>th</sup> royalty,<sup>21</sup> or if sufficiently misunderstood, might end up creating more than one interest, and with more than one fraction.<sup>22</sup> Please be careful, since a conveyance of 1/16<sup>th</sup> *of* the royalty is decidedly different than a 1/16<sup>th</sup> royalty; the former will convey 1/16<sup>th</sup> of the current royalty, which if it is a 1/8<sup>th</sup> royalty will result in the grantee receiving  $1/16 \times 1/8$  or 1/128 of the royalty, while the second will result in a 1/16<sup>th</sup> royalty, no matter the actual size of the total royalty.<sup>23</sup>

## **Term or Perpetual?**

Mineral or royalty interests may be created in a variety of different manners. A royalty interest or a mineral interest may be created for a term of years,<sup>24</sup> for the life of an oil or gas lease or it may be perpetual.<sup>25</sup>

## **The Executive Right**

Finally, just to add to the confusion, among the rights that can be created is something called the "executive right." It is akin, but not precisely equivalent to, a power of attorney.<sup>26</sup> The holder of the executive right has the right to execute oil and gas leases, to reserve royalties and to deal with the mineral estate, as determined by the instrument creating or reserving the executive right.<sup>27</sup> "... Unless executive rights are expressly reserved or excepted in a deed, they pass under the deed, even if their proportion is greater than the mineral interest conveyed."<sup>28</sup>

There has been litigation regarding the duty the holder of the executive right owes the mineral or royalty owner, but at the very least, it is a duty of “utmost good faith” and “The duty of utmost good faith owed by an executive has been settled since *Schlittler v. Smith* ... .”<sup>29</sup>

### **Title Examination**

By now, the listing of the various types of interests that may be created, along with the oil and gas lease, allows us to reach an interim conclusion: the typical title commitment or insurance policy does not discuss any of these in any great detail, and the type of interest that has been created has various implications for the purchaser of real estate. The reason that it is so important is because the underlying mineral estate is the dominant estate.

... the grant or reservation of minerals carries with it, as a necessary appurtenance thereto, the right to use so much of the surface as may be necessary to enforce and enjoy the mineral estate conveyed or reserved. This is because a grant or reservation of minerals would be wholly worthless if the grantee or reserver could not enter upon the land in order to explore for and extract the minerals granted or reserved. 31 Tex. Jur., p. 559 et seq., and authorities there cited.<sup>30</sup>

In order to determine what the interest that was created in the past, there probably isn't much of a substitute for a title examination, which is unfortunate, in some respects.

There is probably no other state in the United States where the examination of titles is more difficult than in Texas, largely because the federal government never owned any of the lands in Texas and the titles come from four distinct sources: the King of Spain, the Republic of Mexico, the Republic of Texas, and the State of Texas. Further, the descriptions contained in the instruments of record, because of the irregular lines of many of the surveys involved, not being in the form of regular squares as are sections, are the source of a great deal of trouble to the examiner of titles, and a source of much litigation. In many instances, the original surveys conflict, but this is very often not disclosed by the abstract. In any event, the examiner must trace out the description in each instrument to be aware of any obvious conflicts or irregularities, if any, in such descriptions, as well as inadequate and insufficient descriptions.<sup>31</sup>

I won't go into the intricacies of title examination, other than to note that it is long, arduous and expensive, and if there was a simpler way, I'd tell you. I don't know of one, but the real estate practitioner should realize that merely dismissing a mineral exception in the title policy can lead to some severe problems. Explaining to a property owner that the appearance of a bulldozer on his property, preparing to build a pad for

drilling is something that a lawyer can't stop is not a great deal of fun. I would suggest that a careful real estate practitioner might want to make sure that he has one or two experienced oil and gas title examiners in his contact list.

### **Exceptions and Reservations**

Now that we've discussed what the various interests are, we can turn our attention to the issue of exceptions and reservations in deeds or other instruments, and how to do them.

In today's world, there really isn't a distinction between a reservation or an exception,<sup>32</sup> although in the past, it was a real distinction.

A reservation is a clause in a deed whereby the grantor doth reserve some new thing to himself out of that which he granted before. This doth differ from an exception, which is ever a part of the thing granted, and of a thing in esse at the time; but this is of a thing newly created, or reserved out of a thing demised, that was not in esse before. 1-14 Kuntz, Law of Oil and Gas § 14.2 citing *Craig v. Wells*, 11 NY 315 (1854), quoting *Shep. Touch.*, 80.

An exception in a deed withholds from the grantee title to some existing part of the property embraced by the description which would otherwise pass under the instrument, with the result that an exception of the minerals or an interest in the minerals to the grantor retains title to the oil and gas in the grantor. A reservation creates some new right in the grantor which is "re-served" or regranted to him.<sup>33</sup>

While the use of one or the other, properly, is highly technical in nature, a careful practitioner might want to spend some time learning about the distinctions, since if the deed or document ever needs to be construed in litigation, the distinction might be of importance.

#### **Some points of importance:**

Never, ever create a reservation in favor of a stranger. It creates significant problems.<sup>34</sup> It will not pass title to the stranger,<sup>35</sup> and it may also create a problem for the grantee. It may be tempting to reserve an royalty interest in favor of the grantor's grandchild, but it doesn't work. "...a reservation or exception in favor of a stranger to the deed conveys no title to such stranger. [citation]<sup>36</sup>

Be careful where you place the exception or reservation. When using a form deed, don't just add it at the end of the habendum clause, which creates some significant issues.<sup>37</sup> Properly, it belongs in the granting clause. Furthermore, mere recitals will not effect a proper reservation or exception.<sup>38</sup>

Despite some recent thoughts to the contrary,<sup>39</sup> the *Duhig* rule is still in effect and should be considered. For those of you that don't remember, this was the rule articulated in *Duhig v. Peavy-Moore Lumber Co.*<sup>40</sup> Here is what happened:

- One half of the minerals were reserved in a prior, recorded deed;
- The grantor created a general warranty deed, the granting clause was first, followed by the habendum and warranty clauses
- The mineral reservation followed the habendum and warranty clauses
- Grantor retained a half interest in the minerals, in the last paragraph of the deed.

Result, the prior grantor kept his half, the grantee got half and the grantor in this deed got nothing.

Stated another way:

Where a grantor conveys an interest in the minerals and in the same instrument reserves a mineral interest, and where there is a prior interest outstanding that is not excepted from the operation of the deed, so that effect may not be given to both the interest that grantor has purported to convey and the interest grantor has attempted to reserve, under the rule of *Duhig v. Peavey-Moore Lumber Co.*, the grantee is not limited to a suit in damages for failure of title, but the attempted reservation will fail to the extent necessary to make the grantee whole. Where complete failure of the reserved interest is insufficient to make the grantee whole, he will also have a cause of action in damages for failure of title.<sup>41</sup>

### **How To Draft The Instruments**

Now that we have described the various types of interests that may be created, let me turn to the forms that I would use in trying to reserve or grant the various interests that I have described. Please note that while I have the greatest respect for the forms that have been promulgated by the Real Estate Section of the State Bar, you should be aware that you will need to be very careful in using the State Bar forms. The reason for the caution is because of the issue of the placement of the reservation or grant of the interest, which, as I pointed out earlier, should be in the granting clause, and not added as a paragraph at the end of the document.

I have included, as part of the materials, forms of the instruments that I use. The usual cautions about using someone's forms are applicable, but please note, these are forms and are intended to be changed, modified and otherwise altered to fit the situation. Despite my admonition that there are technical differences between exceptions and reservations, I have chosen not to adhere to the technical requirements, basically because nobody understands them any more (and I admit to being one of those), and the failure to do so creates more problems than it is worth.

I have included a sample mineral deed and a sample royalty reservation. You can switch these around, and use the mineral description in a reservation, or you can convey the royalty as you may desire. I didn't want to clutter this up with a number of different forms, and hence have limited myself to these two.

All the usual rules about conveyances apply, including correct property descriptions, capacity of parties and all the rest. I have not listed them all, and I have assumed that you are familiar with them and won't repeat them here.

A word about form book forms and forms from treatises. While I have the greatest respect for those that work on from books and write treatises, much of what they do is either out of date, or intended to work generically, in a number of different jurisdictions. Texas is its own jurisdiction, and trying to adapt forms from other places can create problems. Even these forms will be dated in a short period of time, and probably ought to be replaced, but you are on your own after today.

**Sample Mineral Deed, Annotated**

**NOTICE OF CONFIDENTIALITY RIGHTS:**

**IF YOU ARE A NATURAL PERSON, YOU MAY REMOVE OR STRIKE ANY OR ALL OF THE FOLLOWING INFORMATION FROM ANY INSTRUMENT THAT TRANSFERS AN INTEREST IN REAL PROPERTY BEFORE IT IS FILED FOR RECORD IN THE PUBLIC RECORDS: YOUR SOCIAL SECURITY NUMBER OR YOUR DRIVER'S LICENSE NUMBER.**

MINERAL DEED

THE STATE OF TEXAS           §  
  §  
COUNTY OF HARRIS           §

This Mineral Deed is from Groucho Grantor, dealing with his sole property (“Grantor”), having an address of 126 Street, Houston, Texas 77000 to the following persons:

Harpo Grantor  
621 Anywhere Street  
Houston, Texas 77200

Zeppo Grantor  
303 Main Street  
Hilltop, Georgia 30144

Gummo Grantor  
45 65th Street  
New York, New York 01234

Each of the foregoing parties, other than Grantor, are referred to in this Mineral Deed as “Grantees” or in the singular as a “Grantee.”

Grantor, for and in consideration of \$10.00 and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged and confessed by Grantor, does hereby SELL, ASSIGN, CONVEY, TRANSFER, SET OVER And DELIVER, without warranties or covenants of title, express, implied or statutory, except as set forth below,<sup>1</sup> in equal one-third parts unto each Grantee and each Grantee’s successors in title and assigns, the following properties and rights:

- 1. All oil, gas, vaporous hydrocarbons, coal, lignite, ores, metals, minerals and mineral products of every kind and nature (herein collectively referred to as “oil, gas and other minerals”), owned or claimed by Grantor and which are or may be recoverable by wells, mines, shafts, open pits,

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<sup>1</sup> I usually do this since I am never sure what warranties the parties want. I disclaim all warranties, and then just add back the ones I want. As in most states (and in Texas by statute), the term grant and convey raises particular implied warranties. (Tex. Prop. Code, §5.023, *Implied Covenants*.)

strip mining or any other method (whether now in use or to be developed in the future), including but not limited to, mining or other methods which are destructive of the surface, and any and all rights to receive royalties, overriding royalties, net profits interests or other payments out of or with respect to those oil, gas and other minerals, and which oil, gas and other minerals are on, in, upon or under and that may be produced, saved and sold from all or any part of the lands described in Exhibit A hereto, which is hereby incorporated by reference, and which minerals, royalties and other rights are of record in the county and state above named, together with any rights, titles, claims, choses in action or other rights which have or may have accrued in favor of Grantor or which Grantor has or may have asserted<sup>2</sup>;

2. So far as owned by Grantor, the right and privilege to explore and to prospect for, develop, produce, recover by wells, mines, shafts or any other method, whether now in use or to be developed in the future, to drill for, to mill, to prepare for market, to store, to market, to remove and to own all oil, gas and other minerals on, in, upon or under the above described land, together with all rights to enter upon and to occupy the above described lands and the free and uninterrupted right of ingress to, through, under, upon and from the above described lands.<sup>3</sup>

TO HAVE and TO HOLD the above described titles, interests, rights and privileges in and to said lands, together with all and singular the rights and appurtenances thereto in anywise belonging, unto each Grantee and to each Grantee's successors-in-title and assigns, forever; and Grantor does hereby bind Grantor and Grantor's successors-in-title and assigns, to warrant and forever defend all and singular the above described interests and rights in and to the said land unto each of the Grantees, and each Grantee's successors-in-title and assigns, against every person whomsoever lawfully claiming or to claim the same or any part thereof, by, through and under Grantor, but not otherwise, subject only to any valid and subsisting lease executed by Grantor or Grantor's predecessors in title.

The reference herein to valid and subsisting leases is made solely for the purpose of protecting the Grantor on Grantor's warranties and does not create, nor shall it constitute a recognition of, any rights whatsoever in any third party.

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<sup>2</sup> This is where a variation might be done. As written, this is designed to cover all oil, gas, minerals, ores and substances of value, even if they aren't valuable on the day of conveyance, and even if the conveyance would result in the destruction of the surface. This is specifically written to allow one to dial it back as needed.

<sup>3</sup> Given the way that the first paragraph is written, the second paragraph is probably not required. However, that kind of statement is frequently appended, to remove all doubt.

This Mineral Deed has been executed by Grantor on the date shown below for Grantor's acknowledgment.

\_\_\_\_\_  
Groucho Grantor

STATE OF TEXAS                   §

§

COUNTY OF HARRIS               §

This instrument was acknowledged before me on April \_\_, 2015 by Groucho Grantor.

\_\_\_\_\_  
Notary Public

*Exhibit Intentionally Omitted*

## Sample Warranty Deed with Royalty Reservation, Annotated

### NOTICE OF CONFIDENTIALITY RIGHTS:

IF YOU ARE A NATURAL PERSON, YOU MAY REMOVE OR STRIKE ANY OR ALL OF THE FOLLOWING INFORMATION FROM ANY INSTRUMENT THAT TRANSFERS AN INTEREST IN REAL PROPERTY BEFORE IT IS FILED FOR RECORD IN THE PUBLIC RECORDS: YOUR SOCIAL SECURITY NUMBER OR YOUR DRIVER'S LICENSE NUMBER.

### WARRANTY DEED

THE STATE OF TEXAS           §  
  §  
COUNTY OF HARRIS           §

This Warranty Deed is from Groucho Grantor, dealing with his sole property ("Grantor"), having an address of 126 Street, Houston, Texas 77000 to Harpo Grantor, a single man ("Grantee"), having 621 Anywhere Street, Houston, Texas 77200.

Grantor, for and in consideration of \$10.00 and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged and confessed by Grantor, does hereby SELL, ASSIGN, CONVEY, TRANSFER, SET OVER And DELIVER, without warranties or covenants of title, express, implied or statutory, except as set forth below, to Grantee and Grantee's successors in title and assigns, the property described in Exhibit A to this Deed;

LESS and EXCEPT, and Grantor hereby RESERVES unto Grantor and Grantor's successors-in-title and assigns, in addition to any previous reservations, grants or other encumbrances, one-half of all royalties which may accrue or be paid on account of any future oil, gas or mineral lease, or mineral lease or any other agreement or conveyance which purports to permit the production of oil, gas or other minerals from the property described in Exhibit A to this Deed.<sup>1</sup>

TO HAVE and TO HOLD the above described titles, interests, rights and privileges in and to said lands, together with all and singular the rights and appurtenances thereto in anywise belonging, unto each Grantee and to each Grantee's successors-in-title and assigns, forever; and Grantor does hereby bind Grantor and Grantor's successors-in-title and assigns, to warrant and forever defend all and singular the above described interests and rights in and to the said land unto each of the Grantees, and each Grantee's successors-in-title and assigns, against every person whomsoever lawfully claiming or to claim the same or any part thereof.

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<sup>1</sup> Designed to avoid the *Duhig* issue.

This Warranty Deed has been executed by Grantor on the date shown below for Grantor's acknowledgment.

\_\_\_\_\_  
Groucho Grantor

STATE OF TEXAS                   §

§

COUNTY OF HARRIS               §

This instrument was acknowledged before me on April \_\_, 2015 by Groucho Grantor.

\_\_\_\_\_  
Notary Public

*Exhibit Intentionally Omitted*

## Mineral Deed with Reserved Executive Rights

### NOTICE OF CONFIDENTIALITY RIGHTS:

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#### MINERAL DEED

THE STATE OF TEXAS           §  
  §  
COUNTY OF HARRIS           §

This Mineral Deed is from Groucho Grantor, dealing with his sole property ("Grantor"), having an address of 126 Street, Houston, Texas 77000 to the following persons:

Harpo Grantor  
621 Anywhere Street  
Houston, Texas 77200

Zeppo Grantor  
303 Main Street  
Hilltop, Georgia 30144

Gummo Grantor  
45 65th Street  
New York, New York 01234

Each of the foregoing parties, other than Grantor, are referred to in this Mineral Deed as "Grantees" or in the singular as a "Grantee."

Grantor, for and in consideration of \$10.00 and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged and confessed by Grantor, does hereby SELL, ASSIGN, CONVEY, TRANSFER, SET OVER And DELIVER, without warranties or covenants of title, express, implied or statutory, except as set forth below, in equal one-third parts unto each Grantee and each Grantee's successors in title and assigns, the following properties and rights:

1. One half of all oil, gas, vaporous hydrocarbons, coal, lignite, ores, metals, minerals and mineral products of every kind and nature (herein collectively referred to as "oil, gas and other minerals"), owned or claimed by Grantor and which are or may be recoverable by wells, mines, shafts, open pits, strip mining or any other method (whether now in use or to be developed in the future), including but not limited to, mining or other methods which are destructive of the surface, and any and all rights to receive royalties, overriding royalties, net profits interests or other

payments out of or with respect to those oil, gas and other minerals, and which oil, gas and other minerals are on, in, upon or under and that may be produced, saved and sold from all or any part of the lands described in Exhibit A hereto, which is hereby incorporated by reference, and which minerals, royalties and other rights are of record in the county and state above named, together with any rights, titles, claims, choses in action or other rights which have or may have accrued in favor of Grantor or which Grantor has or may have asserted;

2. So far as owned by Grantor, the right and privilege to explore and to prospect for, develop, produce, recover by wells, mines, shafts or any other method, whether now in use or to be developed in the future, to drill for, to mill, to prepare for market, to store, to market, to remove and to own all oil, gas and other minerals on, in, upon or under the above described land, together with all rights to enter upon and to occupy the above described lands and the free and uninterrupted right of ingress to, through, under, upon and from the above described lands.

LESS and EXCEPT, and Grantor RESERVES unto Grantor and his successors-in-title and assigns all oil, gas and other minerals not herein expressly conveyed, TOGETHER WITH the exclusive right to make and execute any and all future oil and gas leases or other instrument covering the property herein conveyed, and all and any part thereof, without being joined therein by any or all of the Grantees, or their respective successors-in-title and assigns.<sup>42</sup>

TO HAVE and TO HOLD the above described titles, interests, rights and privileges in and to said lands, together with all and singular the rights and appurtenances thereto in anywise belonging, unto each Grantee and to each Grantee's successors-in-title and assigns, forever; and Grantor does hereby bind Grantor and Grantor's successors-in-title and assigns, to warrant and forever defend all and singular the above described interests and rights in and to the said land unto each of the Grantees, and each Grantee's successors-in-title and assigns, against every person whomsoever lawfully claiming or to claim the same or any part thereof, by, through and under Grantor, but not otherwise, subject only to any valid and subsisting lease executed by Grantor or Grantor's predecessors in title.

The reference herein to valid and subsisting leases is made solely for the purpose of protecting the Grantor on Grantor's warranties and does not create, nor shall it constitute a recognition of, any rights whatsoever in any third party.

This Mineral Deed has been executed by Grantor on the date shown below for Grantor's acknowledgment.

\_\_\_\_\_  
Groucho Grantor

STATE OF TEXAS                   §

§

COUNTY OF HARRIS               §

This instrument was acknowledged before me on April \_\_, 2015 by Groucho Grantor.

\_\_\_\_\_  
Notary Public

*Exhibit Intentionally Omitted*

## Table of Authorities

### Cases

- Acker v. Guinn*, 464 S.W.2d 348, 352, 14 Tex. Sup. Ct. J. 229, 38 Oil & Gas Rep. 273 (Tex. 1971)
- Allison v. Smith*, 278 S.W.2d 940, 941 (Tex. Civ. App. – Eastland, 1955)
- Altman v. Blake*, 712 S.W.2d 117, 118, 29 Tex. Sup. J. 457, 91 Oil & Gas Rep. 346 (Tex. 1986)
- Anadarko Petroleum Corp. v. BNW Prop. Co.*, 393 S.W.3d 846 (Tex. App.—El Paso 2012)
- Day and Company, Inc.. v. Texland Petroleum, Inc.*, 786 S.W.2d 667 , 33 Tex. Sup. J. 297 105 Oil & Gas Rep. 590 (Tex. 1990).
- French v. Chevron U.S.A.*, 896 S.W.2d 795,798, 38 Tex. Sup. J. 445 (Tex. 1995)
- Moser v. United States Steel Corp.*, 676 S.W.2d 99, 27 Tex. Sup. J. 473, 82 Oil & Gas Rep. 143 (Tex. 1984)
- Reed v. Wylie*, 554 S.W.2d 169, 20 Tex. Sup. J. 445, 57 Oil & Gas Rep. 607 (Tex. 1977)
- Reed v. Wylie*, 597 S.W.2d 743, 23 Tex. Sup. J. 256, 65 Oil & Gas Rep. 286 (Tex. 1980)
- Texas Co. v. Daugherty*, 107 Tex. 226, 176 S.W. 717 (1915)
- Veterans Land Bd. v. Lesley*, 281 S.W.3d 602 (Tex. Civ. App.—Eastland 2009)

### Statutes

TEX. NAT. RES. CODE §85.001, §86.002 and §91.001

### Other Authorities

- 53 Am Jur 2d MINES AND MINERALS, § 6
- A.L.R.3d 1146, GRANT, LEASE, EXCEPTION, OR RESERVATION OF "OIL, GAS, AND OTHER MINERALS," OR THE LIKE, AS INCLUDING COAL OR METALLIC ORES, § 1[a]
- Oil, Gas and Mineral Law Section of the State Bar of Texas in 2001. Oil, Gas and Mineral Law Section of the State Bar of Texas, *Selected Writings of A.W. Walker, Jr.*, (May 2001)

### Treatises

- Aloysius A. Leopold, LAND TITLES AND TITLE EXAMINATION
- Eugene Kuntz, A TREATISE ON THE LAW OF OIL AND GAS, (Matthew Bender, Rev. Ed.)
- Griffith v. Taylor*, 156 Tex. 1,7, 291 S.W.2d 673, 676, 5 Oil & Gas Rep. 1371 (1956)
- Patrick H. Martin and Bruce M. Kramer, WILLIAMS & MEYERS, OIL AND GAS LAW, (LexisNexis Matthew Bender 2014)
- Richard. Hemingway, THE LAW OF OIL AND GAS, (West, 3d. ed., 1991)

### Articles

- A.W. Walker, *Fee Simple Ownership of Oil and Gas in Texas*, 7 Tex.L.Rev. 125 (1928)

Jon Ray, *The Mineral/Royalty Distinction*, Advanced Oil, Gas and Mineral Law Course, September, 1996

Joseph Shade: *Petroleum Land Titles: Title Examination & Title Opinions*, 46 Baylor L. Rev. 1007, 1012 (1994)

Mark D. Taylor, *Title to Uranium Is Held by the Mineral Estate Owner As A Matter of Law: Moser v. United States Steel Corp.*, 676 S.W.2d 99 (Tex. 1984) (*Moser II*), 16 Tex. Tech L. Rev. 809, 815 (1985)

## End Notes

<sup>1</sup> A.W. Walker, *Fee Simple Ownership of Oil and Gas in Texas*, 7 Tex. L. Rev. 1 (1928). He followed that by four additional articles, the last being published in 1933. A selection of his works were assembled and published by the Oil, Gas and Mineral Law Section of the State Bar of Texas in 2001. Oil, Gas and Mineral Law Section of the State Bar of Texas, *Selected Writings of A.W. Walker, Jr.*, (May 2001).

<sup>2</sup> Aloysius A. Leopold, LAND TITLES AND TITLE EXAMINATION, § 16.30. *Examples of exceptions and reservations of mineral interests – Conveyance excepting or reserving mineral rights* (West, Texas Practice Series, 3d ed.), citing *Veterans Land Bd. v. Lesley*, 281 S.W.3d 602 (Tex. Civ. App.—Eastland 2009), *aff'd in part, rev'd in part* on other grounds, 352 S.W.3d 479 (Tex. 2011).

<sup>3</sup> Eugene Kuntz, A TREATISE ON THE LAW OF OIL AND GAS, (Matthew Bender, Rev. Ed.); Patrick H. Martin and Bruce M. Kramer, WILLIAMS & MEYERS, OIL AND GAS LAW, (LexisNexis Matthew Bender 2014); Aloysius A. Leopold, LAND TITLES AND TITLE EXAMINATION, (West, Texas Practice Series, 3d ed.); Richard Hemingway, THE LAW OF OIL AND GAS, (West, 3d. ed., 1991).

<sup>4</sup> Adapted from the form used by Stewart Title and Alamo Title. Your mileage may vary.

<sup>5</sup> Joseph Shade: *Petroleum Land Titles: Title Examination & Title Opinions*, 46 Baylor L. Rev. 1007, 1012 (1994).

<sup>6</sup> TEX. NAT. RES. CODE §85.001, §86.002 and §91.001.

<sup>7</sup> *Acker v. Guinn*, 464 S.W.2d 348, 352, 14 Tex. Sup. Ct. J. 229, 38 Oil & Gas Rep. 273 (Tex. 1971); *reh denied*, 1971. Citing *Texas Co. v. Daugherty*, 107 Tex. 226, 176 S.W. 717 (1915) and A.W. Walker, *Fee Simple Ownership of Oil and Gas in Texas*, 7 Tex.L.Rev. 125 (1928).

<sup>8</sup> *Reed v. Wylie*, 554 S.W.2d 169, 20 Tex. Sup. J. 445, 57 Oil & Gas Rep. 607 (Tex. 1977), opinion withdrawn and substitute opinion issued (see note 9).

<sup>9</sup> *Reed v. Wylie*, 597 S.W.2d 743, 23 Tex. Sup. J. 256, 65 Oil & Gas Rep. 286 (Tex. 1980).

<sup>10</sup> *Acker*, 464 S.W.2d 348, 351.

<sup>11</sup> While the general rule is that sand, gravel, and clay are not considered minerals, [citations] certain clays [citations] or sand having a peculiar property giving it a special value, such as pure white quartz sand valuable for making glass, will be considered minerals. 53 Am Jur 2d MINES AND MINERALS, § 6, *Special value or usefulness*.

<sup>12</sup> 59 A.L.R.3d 1146, GRANT, LEASE, EXCEPTION, OR RESERVATION OF "OIL, GAS, AND OTHER MINERALS," OR THE LIKE, AS INCLUDING COAL OR METALLIC ORES, § 1[a] *Prefatory matters – Scope*.

<sup>13</sup> Mark D. Taylor, *Title to Uranium Is Held by the Mineral Estate Owner As A Matter of Law: Moser v. United States Steel Corp.*, 676 S.W.2d 99 (Tex. 1984) (*Moser II*), 16 Tex. Tech L. Rev. 809, 815 (1985)

<sup>14</sup> See note 11.

<sup>15</sup> *Moser v. United States Steel Corp.*, 676 S.W.2d 99, 27 Tex. Sup. J. 473, 82 Oil & Gas Rep. 143 (Tex. 1984).

<sup>16</sup> Richard Hemingway, THE LAW OF OIL AND GAS, §2.5 *Attributes of the Mineral Estate – The Right to Royalty* (West, 3d. ed., 1991).

<sup>17</sup> *Griffith v. Taylor*, 156 Tex. 1,7, 291 S.W.2d 673, 676, 5 Oil & Gas Rep. 1371 (1956).

<sup>18</sup> *Altman v. Blake*, 712 S.W.2d 117, 118, 29 Tex. Sup. J. 457, 91 Oil & Gas Rep. 346 (Tex. 1986).

<sup>19</sup> *French v. Chevron U.S.A.*, 896 S.W.2d 795,798, 38 Tex. Sup. J. 445 (Tex. 1995) While not addressed in this paper, the person who has the right to grant seismic permits can allow a seismic company to conduct operations over the property. It is another reason to make sure that one is aware of where the mineral rights are located.

<sup>20</sup> *French*, 896 S.W.2d 795,798. See also, Jon Ray, *The Mineral/Royalty Distinction*, Advanced Oil, Gas and Mineral Law Course, September, 1996.

<sup>21</sup> *French.*, 896 S.W.2d 795, 798 38 Tex. Sup. J. 445 (Tex. 1995).

- <sup>22</sup> *Tipps v. Bodine*, 101 S.W.2d 1076 (Tex. Civ. App. – Texarkana 1936); Laura Burney, *Interpreting Mineral And Royalty Deeds: The Legacy Of The One-Eighth Royalty And Other Stories*, 33 St. Mary's L. J. 1 (2001)
- <sup>23</sup> Math is a tough subject even for one with a professional degree. Fractions have always been a stumbling block and lawyers drafting mineral instruments have certainly not been exempt. Jon Ray, *The Mineral/Royalty Distinction*, Advanced Oil, Gas and Mineral Law Course, September, 1996, at page H-1. See, as well, *Dawkins v. Hysaw*, 450 S.W.3d 147 (Tex. Civ. App. – San Antonio 2014) for the intersection between probate matters, partitions, minerals and fractions.
- <sup>24</sup> *Guaranty Nat, Bank And Trust Of Corpus Christi v. May*, 513 S.W.2d 613 (Tex. Civ. App. – Corpus Christi 1974), *no writ*.
- <sup>25</sup> *Alford v. Krum*, 671 S.W.2d 870, 27 Tex. Sup. J. 434, 81 Oil & Gas Rep. 189 (Tex. 1984), overruled by *Luckel v. White*, 819 S.W.2d 459, 35 Tex. Sup. J. 40, 115 Oil & Gas Rep. 121 (Tex. 1991). While *Alford* was overruled, the discussion of what kind of interest is involved is still worth reviewing. For the different ways that a mineral estate may be limited in duration, see David A. Thomas, ed., 2 *Thompson on Real Property*, Third Thomas Editions, *Chapter 20 Defeasible Fees* (2014).
- <sup>26</sup> As one of the five interests comprising the mineral estate, the executive right is a separate and distinct property interest, which may be conveyed or reserved separately and/or conveyed or reserved relative to any of the other interests. Aloysius A. Leopold, LAND TITLES AND TITLE EXAMINATION § 14.13.50 (3d ed.), citing *Anadarko Petroleum Corp. v. BNW Prop. Co.*, 393 S.W.3d 846 (Tex. Civ. App. – El Paso 2012).
- <sup>27</sup> *Day & Co. v. Texland Petroleum, Inc.*, 786 S.W.2d 667, 669, 33 Tex. Sup. J. 297, 105 Oil & Gas Rep. 590 (Tex. 1990).
- <sup>28</sup> *Anadarko Petroleum Corp. v. BNW Prop. Co.*, 393 S.W.3d 846, 850 (Tex. App. – El Paso 2012)
- <sup>29</sup> *Schlittler v. Smith*, 128 Tex. 628, 101 S.W.2d 543, 545 (1937), cited in *Manges v. Guerra*, 673 S.W.2d 180, 183, 27 Tex. Sup. J. 421, 80 Oil & Gas Rep. 561 (Tex. 1984).
- <sup>30</sup> *Harris v. Currie*, 142 Tex. 93, 99, 176 S.W.2d 302, 305 (1943).
- <sup>31</sup> Aloysius A. Leopold, LAND TITLES AND TITLE EXAMINATION, § 10.1 *Methods of examining Texas land titles* (West, Texas Practice Series, 3d ed.).
- <sup>32</sup> *King v. First Nat'l Bank*, 144 Tex. 583, 192 S.W.2d 260, 163 A.L.R. 1128 (1946).
- <sup>33</sup> Kuntz, 1-14 A TREATISE ON THE LAW OF OIL AND GAS, § 14.2 *Distinction between reservation and exception* (Matthew Bender, Rev. Ed.), citing *Craig v. Wells*, 11 NY 315 (1854). See 1-3 Williams & Meyers, OIL AND GAS LAW § 310 *Deeds With Reservation or Exception: Introduction* (LexisNexis Matthew Bender 2014).
- <sup>34</sup> *Harris, Reservations in Favor of Strangers to the Title*, 6 Okla.L.Rev 127 (1953).
- <sup>35</sup> *Hunter Co. v. Fain*, 281 S.W.2d 750, 5 Oil & Gas Rep. 262 (Tex. Civ. App. – Eastland 1955), *writ ref'd, n.r.e.*
- <sup>36</sup> *Large v. T. Mayfield, Inc.*, 646 S.W.2d 292, 76 Oil & Gas Rep. 557 (Tex. Civ. App. – Eastland 1983).
- <sup>37</sup> 1-3 Williams & Meyers, OIL AND GAS LAW § 310 *Deeds With Reservation or Exception: Introduction* (LexisNexis Matthew Bender 2014).
- <sup>38</sup> *Wright v. E.P. Operating Ltd. Pshp.*, 978 S.W.2d 684, 142 Oil & Gas Rep. 217 (Tex. App. – Eastland 1998). This was a major problem in *Duhig*, see note 40 below and accompanying text.
- <sup>39</sup> Terry Hogwood, *Ding Dong Duhig is Dead*, 35 Section Report, Oil Gas & Energy Resources Law 43 (2010),
- <sup>40</sup> *Duhig v. Peavy-Moore Lumber Co.* 135 Tex. 503, 144 S.W.2d 878 (1940).
- <sup>41</sup> Joseph Shade, *Petroleum Land Titles: Title Examination & Title Opinions*, 46 Baylor L. Rev. 1007, 1043-1044 (1994).
- <sup>41</sup> A slight variation on the language in *Allison v. Smith*, 278 S.W.2d 940, 941 (Tex. Civ. App. – Eastland, 1955), *writ refused nre*, disapproved of by *Day and Company, Inc.. v. Texland Petroleum, Inc.*, 786 S.W.2d 667, 33 Tex. Sup. J. 297 105 Oil & Gas Rep. 590 (Tex. 1990).