# REAL ESTATE VS. OIL AND GAS DEVELOPERS

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# REAL ESTATE VERSUS OIL AND GAS DEVELOPERS

## I. SCOPE OF ARTICLE

This article addresses a few of the issues likely to face a real estate practitioner when a surface estate owner or developer and a mineral estate owner or oil and gas operator find themselves irreconcilably opposed in their uses of the same land.

## II. INTRODUCTION

Why should a real estate practitioner care about oil and gas? The answer is that understanding the inner workings of the mineral estate and its effects on surface development will work to a practitioner's benefit, and will provide him or her with valuable tools to resolve certain surface versus mineral estate disputes before the disputes escalate into a "turf war." As to the irreconcilable differences between the surface and mineral estates, there needs to be an accommodation between them. Indeed, the owners of the two estates must decide whether they will conduct themselves as adversaries or as friends.

Real estate and energy are "big business" in Texas. The two industries often clash when they both need to use the surface of the same land to accomplish their respective, but often incompatible, goals. Clashes are especially prevalent in situations where oil and/or gas[1] are suspected or discovered in an urban or near urban area. Land that previously experienced single or mutually compatible surface uses may now have another surface use: to provide access to and allow development of the mineral estate. Although advances have occurred in both mineral development technology and legal circles, oil and gas operations are typically a huge concern to the surface owner who may face issues such as surface damage, interference with existing surface uses, increased difficulty in effectuating future development and land use, environmental concerns and decreased economic and aesthetic value of the surface. For the surface owners, these concerns often outweigh the value of the minerals, particularly if the surface owner does not own all or part of the minerals.

The problem for surface estate owners and developers is the uphill battle to make sure the owner of the mineral estate, which is dominant in Texas subject to certain limitations, accommodates the surface estate owners' and developers' use of the surface of the land. The problem for mineral owners and operators is that often the surface owners and developers want to exclude the mineral owners and operators from using any part of the surface. The purpose of this article is to make real estate practitioners aware of some of the issues that may arise between the surface and mineral estates and the need for the two estates to reach an accommodation. The topics addressed include: (a) common law covenants, both implied and express; (b) statutory law of the State, counties, cities; (c) the role of the Railroad Commission of Texas; (d) the general mineral exception to title insurance policies and (d) ownership of minerals in public road right-of-ways.

## III. COMMON LAW: IMPLIED COVENANTS

### A. A Tale of Two Estates: Mineral Estate Dominant

1. Mineral Severance

Under Texas common law, when the mineral estate has been severed from the balance of the land, two separate estates come into existence - the surface estate and the mineral estate. *Harris v. Currie*, 142 Tex. 93, 176 S.W.2d 302, 305 (1944). The severance may be by a mineral grant, as in a deed or lease, or by a mineral reservation in a conveyance. *Id*.; *Humphreys-Mexia Co., v. Gammon*, 113 Tex. 247, 254 S.W. 296, 299 (1923). The surface estate includes the surface of the land and, as a matter of law, certain substances such as stone, limestone, caliche, surface shale, water, sand, gravel and near surface lignite, iron and coal. *Moser v. U.S. Steel Corp*., 676 S.W.2d 99, 102 (Tex. 1984); *Reed v. Wylie*, 597 S.W.2d 743, 747-748 (Tex. 1980). The mineral estate includes the minerals (except those described above), the right to develop and lease the minerals (including the implied right of ingress and egress) and the right to receive bonus, royalty and delay rental payments or receive production in kind. *French v. Chevron*, 896 S.W.2d 795, 797 (Tex. 1995).

A few issues may rise when an owner who owns both the surface and mineral estates chooses to allow mineral development while still using the surface for other purposes. A more complex situation arises, however, when the surface and mineral ownership is the same, but there are multiple owners who may have different views about the issues and how to handle them. The most complex scenario occurs when mineral estate and surface estate ownership is not identical. Unless the parties entered into an agreement regarding surface use at the time of the mineral severance, if the surface uses conflict with the mineral development, disputes will inevitably arise.

2. Dominant Estate

Under Texas common law, the mineral estate is dominant over the surface estate, subject to the limitations discussed below. The right of the mineral estate to be dominant is an implied right. *Getty Oil*

[1] The development of other minerals creates issues similar to those addressed in this paper; however, this paper will cover only issues arising from oil and gas development.

*Company v. Jones*, 470 S.W.2d 618, 621 (Tex. 1971). The rationale is that the mineral owner's estate would be worthless without the right to reach the minerals. *Moser v. U.S. Steel*, 676 S.W.2d 99, 103 (Tex. 1984). The dominant estate rule allows the owner or lessee of the mineral estate to utilize, free of cost, so much of the surface estate and in such manner as is reasonably necessary to develop the mineral estate. *Ball v. Dillard*, 602 S.W.2d 521, 523 (Tex. 1980); *Humble Oil & Refining Co. v. Williams*, 420 S.W.2d 133, 134 (Tex. 1967); *Warren Petroleum Corp. v. Monzingo*, 157 Tex. 479, 304 S.W.2d 362, 363 (1957). The corollary is that the owner of the subservient surface estate is not entitled to reimbursement for damage to the surface by the mineral estate owner, unless: (a) one or more of the common law limitations discussed below applies or (b) a written covenant in an instrument in the title chain or a lease or other agreement between the parties provides for payment of surface damages. *Vest v. Exxon Corp*. 752 F.2d 959, 963 (5th Cir. 1985); *Humble Oil*, 420 S.W.2d at 134-135. Furthermore, the lessee has no implied requirement to restore the surface to its original condition. *Warren Petroleum*, 304 S.W.2d at 363-364. These rulings mean the mineral owner or lessee can conduct geophysical operations; drill wells; build roads; lay pipelines above ground (absent a requirement to place them below ground or below plow depth); dig canals; and place tanks, power stations, telephone lines, mud pits, housing facilities for employees and other structures on the surface of the land without reimbursing the surface owner for damages and without restoring the surface, so long as such use is reasonably necessary for the mineral operations being conducted on that tract of land and is not negligently conducted. *Yates v. Gulf Oil Corp.*, 182 F.2d 286, 291-292 (5th Cir. 1950); *Carrigan v. Exxon Co. U.S.A.*, 877 F.2d 1237, 1242-1243 (5th Cir. 1989).

## B. Common Law Limitations on Mineral Rights

Texas common law provides three primary limitations upon the mineral owner's rights. First, the mineral owner's use may not be excessive and the use must be reasonably necessary to conduct the mineral operations. Second, the mineral lessee is liable for negligent use of the surface and negligently inflicted damage. Third, the owner of the dominant mineral estate must exercise due regard for the surface owner's rights when using the land for mineral development.

### 1. Reasonably Necessary Use

The common law provides that the mineral owner's use may not be excessive and that the use must be reasonably necessary to conduct mineral operations. The reasonably necessary restriction extends not only to the lateral surface but also to the air space and the subsurface of the land. *Getty Oil Company v. Jones*, 470 S.W.2d 618, 621 (Tex. 1971). One very important application of this restriction is that a mineral lessee's use of the surface must benefit the leased land and to benefit lands other than the leased land, such as may occur in an instance of pooled tracts, is unreasonable as a matter of law. *Robinson v. Robbins Petroleum Corp*., 501 S.W.2d 865, 868 (Tex. 1973). See also William M. Kerr, Jr., *Surface Use Waivers for the Real Estate Investor*, 19 STATE BAR OF TEX. ADVANCED REAL ESTATE DRAFTING COURSE (2008).

### 2. Liability for Negligent Use

The mineral lessee is liable for negligent use of the surface and negligently inflicted damage. *General Crude Oil Co. v. Aiken*, 162 Tex. 104, 344 S.W.2d 668, 671 (1961). As with any negligence claim, the proximate cause of the claimed damages must be proved. *Anthony v. Chevron U.S.A. Inc*., 284 F.3d 578, 583 (5th Cir. 2002). However, a claimant may be able to assert negligence per se and avoid proof of negligence if the incident is a violation of the rules of the Railroad Commission of Texas ("RRC") designed to protect certain classes of persons, of which a claimant-owner is one. *Mieth v. Ranchquest, Inc.*, 177 S.W.3d 296, 305 (Tex. App.-Houston [1st Dist.] 2005, no pet.).

### 3. Accommodation Doctrine

The owner of the dominant mineral estate must exercise due regard for the surface owner's rights when using the surface. This requirement is known as the "accommodation doctrine." Like the mineral estate's right of dominance, the surface owner's right to be accommodated is an implied right. *Getty Oil*, 470 S.W.2d at 621-622. In the *Getty* case, the pumping equipment used by the lessee interfered with the surface owner's existing irrigation system. The irrigation system was the only reasonable means of developing the surface estate; however, an alternative type of pumping equipment was available to the mineral lessee. The court held that the circumstances of both the surface owner and the lessee should be considered and, where (a) the mineral lessee's use or proposed use substantially interferes with the existing surface use and (b) the lessee has alternative methods available to use on the leased premises, the rules of reasonable usage may require the lessee to use an alternative method of development. In other words, while the mineral lessee's right to reasonably use the surface is paramount, it is not absolute. *Getty*, 470 S.W.2d at 621; *Tarrant County Water Control & Improvement Dist. No. One v. Haupt, Inc*., 854 S.W.2d 909, 911-912 (Tex. 1993).

The surface owner has the burden of proof to show that the mineral owner failed to use reasonable

care in pursuing its rights, such as showing the oil and gas operations destroy or substantially impair (i.e. more than cause some interference with) the landowner's current use of the surface and thus are not reasonably necessary conduct by the oil and gas operator. *Davis v. Devon Energy Production Co.*, 136 S.W.3d 419, 424 (Tex. App. - Amarillo 2004, no pet.). The surface owner must further show that the oil and gas operator has more than one means to access and use the surface in developing the minerals and that (i) the other means of access and production will not interfere with the surface owner's existing use, (ii) the other means of access and production are reasonable and (iii) any alternative uses of the surface, other than the existing use by the surface owner, are impracticable and unreasonable under all the circumstances. *Tarrant County Water Control & Improvement Dist. No. One v. Haupt, Inc*., 854 S.W.2d 909, 911-912 (Tex. 1993); *Valence Operating Co. v. Texas Genco, LP*, 255 S.W.3d 210, 215-216 (Tex. App. - Waco 2008, no pet.). Each of these elements is fact-specific and the trier of the fact must determine on a case-by-case basis whether the elements for accommodation have been satisfied. Endeavoring to use the accommodation doctrine may be time consuming and expensive and the outcome is by no means certain, thus the reference earlier in this paper to the uphill battle facing surface owners and developers. *Haupt, Inc. v. Tarrant County Water Control & Improvement Dist. No. One*, 870 S.W.2d 350, 353 (Tex. App. - Waco 1994, no writ). For additional discussion, see David Patton, *The Mineral Estate and Conflicting Interests - The Accommodation Doctrine and Surface Damage Acts*, 34 UNIV. OF TEX. SCHOOL OF LAW OIL, GAS & MINERAL L. INST. (2008); David E. Jackson, *Surface Use: The Dominant Estate, Reasonable Use and Due Regard*, 24 STATE BAR OF TEX. ADVANCED OIL, GAS AND ENERGY RESOURCES LAW COURSE (2006); Rick D. Davis, Jr., *Accommodation Doctrine*, 32 UNIV. OF TEX. SCHOOL OF LAW OIL, GAS & MINERAL LAW INST. (2006).

## IV. COMMON LAW: EXPRESS COVENANTS

### A. Sources of Express Covenants

As noted above, the rights of the dominant mineral estate and the corresponding right of the surface estate to be accommodated are implied rights. *Getty Oil Co. v. Jones*, 470 S.W.2d 618, 621 (Tex. 1971). Express surface use covenants preempt these implied rights and an implied right or obligation may not re-write an express covenant. *Yzaguirre v. KCS Resources, Inc.*, 53 S.W.3d 368, 374 (Tex. 2001).

1. Prior Covenants in the Chain of Title

Surface use covenants are often in existence prior to a party's purchase of property. These covenants can be found in deeds, oil and gas leases and similar instruments in the title chains or in documents referred to in the documents in the title chains of a mineral owner or oil and gas operator and a surface owner or developer. *Westland Oil Development, Corp. v. Gulf Oil*, 637 S.W.2d 903, 908 (Tex. 1982). These existing surface use covenants are binding upon all those who take through these respective chains of title, inasmuch as the subsequent owners are on notice of the covenants through the recorded documents in their respective title chains. *Id.*

2. Creating Covenants

If a title examination determines there are no prior covenants in the chain of title to assist a surface owner in restricting the mineral owner's use of the surface, and the surface owner still owns the minerals or has the ability to enter an agreement with the mineral owner(s) (be they a fee mineral owner or an oil and gas lessee), covenants can be created to protect the surface which will bind the mineral estate and inure to the benefit of successors in interest to the surface estate.

*a. Reservations in Conveyances*

One way to create surface protection covenants is for a combined surface/fee mineral owner to impose restrictive covenants through a reservation or exception of the minerals in instruments out of such owner. *Landreth v. Melendez*, 948 S.W.2d 76, 78-81 (Tex. App. – Amarillo 1987). For example, in the *Landreth* case:

i. a deed conveyed the surface and excepted/reserved [2] the minerals,
ii. in the exception/reservation, the grantor included an *express* covenant that defined the mineral owner's rights to use the surface as part of operations,
iii. the deed's *express* covenant displaced the implied accommodation doctrine, and
iv. the deed's *express* covenant bound subsequent purchasers of the surface estate. *Id.*

The surface owner may bind subsequent surface owners through an express covenant in a reservation or exception, because the express covenant is of record, thereby putting the subsequent surface owners on notice of the mineral owner's right to use the surface.

[2]The deed in *Landreth* technically contained an exception rather than a reservation, but the *Landreth* court consistently referred to a reservation. *Landreth*, 948 S.W2d at 81. The analysis applies equally to exceptions and reservations both of which are means to deduct an estate from the estate granted. *King v. First National Bank of Wichita Falls*, 144 Tex. 583, 192 S.W.2d 260, 262 (1946).

Interestingly, in the *Landreth* case, the combined surface/mineral owner had executed an oil and gas lease three years prior to the execution of the surface deed containing the exception/reservation. By granting the minerals to the lessee in the oil and gas lease, the owner had already severed the oil and gas from the surface before creating the express covenant in the exception/reservation in the subsequent deed that bound the later surface owner. *Landreth v. Melendez*, 948 S.W.2d 76, 78-81 (Tex. App. – Amarillo 1987); *Natural Gas Pipeline Co. of America v. Pool*, 124 S.W.3d 188, (Tex. 2003) (execution of an oil and gas lease severs the minerals from the surface). As discussed in the next section, the mineral owner normally would not be bound by such a limitation, because the limitation was imposed after the mineral severance occurred. *Landreth*, 948 S.W.2d at 81. However, as the *Landreth* case illustrates, the mineral owner can choose to adopt the limitation or ratify it, which the mineral owner did in *Landreth* because the restriction inured to the mineral owner's benefit.

*b. Separate Agreements*

Another way to protect the surface from the effects of mineral development is for the parties to an oil and gas lease to impose surface limitations through separate agreements. *Prairie Producing Co. v. Martens*, 705 S.W.2d 257, 258-260 (Tex. App. – Texarkana 1986, writ ref'd n.r.e.). One effect of executing a later agreement (e.g. a unitization agreement) is that it may trump an express covenant in a previously executed oil and gas lease (e.g. the obligation to bury pipelines to a certain depth). *Carrigan v. Exxon Co. USA*, 877 F.2d 1237, 1239-1243 (5th Cir. 1989).

*c. E-Mail "Agreements"*

Because express covenants can be created by separate agreement, parties need to focus on the often overlooked Uniform Electronic Transactions Act which Texas has adopted. TEX. BUS, AND COMM. CODE §§43.001 et seq. (through April 1, 2009) and §§322.001 et seq. (after April 1, 2009). If the parties agree to conduct business by email, then an exchange of emails can form a contract that fully satisfies the Statute of Frauds and modifies an oil and gas lease, revives a terminated agreement or imposes or releases surface use restrictions. *Id*. This Act is a uniform law that draws its essence from decisions in Texas and in the other states to yield a uniform body of law. *Id*.; *see also, International Casing Group, Inc. v. Premium Standard Farms, Inc*., 358 F.Supp.2d 863, 873-874 (W.D. Mo. 2005) [email header, even without typed name of the sender, comprises an electronic signature]; *Sims v. Stapleton Realty, Ltd.*, 739 N.W.2d 491, n. 4, 2007 WL 2386494 * 4 (Wisc. App. 2007) [the typed first name or the typed first and last name on an email each comprises an electronic signature]. Accordingly, consider every word in a business email including the header and signature block before clicking the send or reply button.

*d. Covenant, Conditions and Restrictions*

Parties can create express covenants through covenants, conditions and restrictions ("CCRs"). *Owens v. Ousey*, 241 S.W.3d 124, 129-131 (Tex. App. – Austin 2007, pet. denied); see also: *Dyegard Land Partnership v. Hoover*, 39 S.W.3d 300 (Tex. App. – Fort Worth 2001, no writ). Express covenants can also be created by implied reciprocal negative easements. *Ousey*, 241 S.W.3d at 129-131. Regardless of the method used to create the CCRs, the CCRs will only be effective to restrict oil and gas operations if they are imposed prior to the severance of the minerals. *Property Owners of Leisure Land, Inc. v. Woof & Magee, Inc*., 786 S.W.2d 757, 760 (Tex. App. – Tyler 1990, no writ); *Stephenson v. Glass*, 276 S.W. 1110, 1112 (Tex. Civ. App. – San Antonio 1925) writ ref'd n.r.e., 279 S.W. 260 (1926). Therefore, CCRs enacted after the severance of the minerals "… do not determine the scope of the implied surface easements that are incidental to the ownership of the minerals." *Property Owners of Leisure Land*, 786 S.W.2d at 760.

3. Post-Severance Covenants

The foregoing discussions contemplate that the express surface covenants are created before or concurrently with a mineral severance. What happens, however, if the minerals have been severed prior to the surface owner's or real estate developer's contemplated purchase and/or use of the property? The first indication parties may have of a mineral severance is when they receive a title commitment reflecting a prior severance of all or part of the minerals under the land in question. The absence of pre-severance covenants does not mean a surface owner or real estate developer has no available remedies; however, it does require some thought and planning to deal with the situation. As Terry Cross states in his article, parties can take one of two fundamental approaches. Terry I. Cross, *Planning and Drafting for Co-Existent Surface and Mineral Development*, 20 STATE BAR OF TEX. ANNUAL ADVANCED REAL ESTATE DRAFTING COURSE (2009). They can use a micro approach creating a detailed list of do's and don'ts regarding surface use or they can take a macro approach similar to the common law discussed above, which measures rights by reasonableness, negligence, due regard, etc. *Id.* For a detailed discussion of the fears (e.g. even the mineral owner with the smallest undivided interest can decide to drill and where so long as it is reasonable) and potential cures (e.g. no-drill lease agreement,

surface waiver agreements and surface location agreements in favor of the surface estate) for post-severance issues, we refer you to the following sources for comprehensive coverage: Terry I. Cross, *Planning and Drafting for Co-Existent Surface and Mineral Development*, 20 STATE BAR OF TEX. ANNUAL ADVANCED REAL ESTATE DRAFTING COURSE (2009); William M. Kerr, Jr, *Surface Use Waivers for the Real Estate Developers*, 19 STATE BAR OF TEX, ANNUAL ADVANCED REAL ESTATE DRAFTING COURSE (2008).

## B. Considerations When Preparing and Using Express Covenants

1. Technical Considerations

*a. Meaning of Terms*

Express covenants, whether a pre-severance covenant, a CCR or a post-severance agreement should be enforced as written, with words being given their plain, ordinary and generally accepted meanings. An exception to this general rule is that effect must be given to any technical oil and gas terminology used in the text. *Heritage Resources, Inc. v. Nationsbank*, 939 S.W.2d 118, 121 (Tex. 1996). An oil and gas term may have an established meaning understood by the parties and used in the industry in which they operate which supplants any conflicting language in the document and renders the conflicting language surplusage. *Id.*

*b Do Not Confuse "Understanding" with the Plain Text and Industry Custom*

Courts will not give effect to the express covenants and agreements just because someone subsequently construes the meaning of the covenant a certain way or someone wishes the covenant to mean something other than what is written. *Calpine Producer Services, Inc. v. The Wiser Oil Co.*, 169 S.W.3d 783, 787 (Tex. App. – 2005, no pet.).

As stated previously, although words in a surface use agreement will generally be given their ordinary meaning, a difficulty may arise if the "ordinary meaning" is not the same meaning between both parties. *Fenner v. Samson Resources Co*., 2005 WL 2123043 ** 3-4 (Tex. App. – Houston [1st Dist.] 2005, pet. denied). In the *Fenner* case, the surface owner thought "restoring the surface" meant returning the surface to its original pre-development condition. The mineral owner, however, thought it meant to restore the upper boundary or top portion of the surface generally. *Id.* The *Fenner* court said the mineral owner correctly read the plain text. *Id.*

2. Practical Considerations

*a. Drillsite Designations and Surface Waivers*

Two methods for creating express covenants restricting the use of the surface are drillsite designations (designating well and facility locations prior to drilling) and surface waivers (prohibiting mineral operations upon the surface of the applicable land). An example of each type of agreement is attached to William Kerr's paper. William M. Kerr, Jr, *Surface Use Waivers for the Real Estate Developers*, 19 STATE BAR OF TEX, ANNUAL ADVANCED REAL ESTATE DRAFTING COURSE (2008). In securing either a drillsite designation or a surface waiver, it is important that a practitioner understand what the other side needs, be it the mineral owner or oil and gas operator in order for it to effectively develop the mineral estate or the surface owner or developer in order for it to limit the impact of mineral development on the surface as much as possible.

For example, mineral owners may not be willing to limit themselves to a certain location or waive their right to use the surface of the leased land and drill from an offsite location, especially if they have not performed a seismic study of the area. Without a seismic study, the mineral owner who agrees to restrict its use of the surface and ability to pick the best drilling location may make recovery of the oil, gas and minerals less likely because of faulting or some other subsurface feature affecting production. On the other side, surface owners, and particularly residential developers, may be unwilling to give up the use of land which could otherwise be developed into revenue producing lots. The more valuable the land the more likely the surface owner or developer is to want a full surface waiver, rather than relying on common law rules or minimal surface use provisions in oil and gas leases. Nevertheless, both sides may find it advantageous to enter into a drillsite agreement or surface rights waiver, given the potential for conflict and the possibility of expensive, protracted litigation and the general uncertainty for both mineral and surface owners.

Another consideration for landowners and developers who are attempting to reach an agreement on a drillsite or a surface waiver is to identify and obtain the agreement of all outstanding mineral owners. If the mineral estate was severed from the surface many years ago, as is often the case in Texas, a large number of mineral owners may exist. Determining the identity of the mineral owners could involve costly title research. This cost may be a worthwhile investment, however, since any co-tenant (co-owner) of the mineral estate has the right to extract (or lease to a party who will extract) the oil, gas or other minerals without the consent of the remaining co-tenants. Consequently, the non-joinder of a single mineral owner could render the purpose of a drillsite agreement or surface waiver moot, because that single mineral owner has the right to drill or lease the minerals for development.

*b. CCRs*

If feasible, consider using CCRs for subdivision development instead of instrument-by-instrument covenants. Using CCRs should lead to greater uniformity throughout the subdivision, eliminate gaps in coverage and allow the surface owners to pool their money and resources, through their homeowners association, to more effectively enforce the CCRs.

*c. Constitutional Restrictions*

The constitutional restrictions on governmental action (e.g. the prohibition on the wrongful deprivation of an owner's property without just compensation) do not, standing alone, *directly* apply to private contracts and covenants. *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948). Such restrictions do, however, apply when the courts are used to enforce them. *Id*. at 13-14. Therefore, private covenants and CCRs may not be as enforceable to restrict oil and gas operations as they first appear to be, if the courts have to enforce the restrictions subject to the full panoply of constitutional limitations on governmental action.

3. Damage Recovery: A Possible Problem

The prior discussion highlights *how* express covenants or the common law due-regard doctrine may limit the dominant mineral estate. The real question is *can* these provisions be effectively enforced. Surface owners and developers may find that the Texas law of remedies provides *circumscribed* and sometimes *unsatisfactory* enforcement.

*a. Temporary vs. Permanent Injury.*

For example, Texas law differentiates between "temporary" injury to the surface and "permanent" injury to the surface. *Mieth v. Ranchquest, Inc*., 177 S.W3d 296, 303-304 (Tex. App. – Houston [14th Dist.] 2003, no pet.). The type of injury dictates the type of available remedy. *Id.*

A "permanent" injury occurs if the surface is made less productive, even if the injury is not perpetual. *Id.* A "permanent" injury also occurs if the alleged source of the injury (e.g. oil and gas operations) is constant and the impact of the injury may be evaluated. *Schneider National Carriers, Inc. v. Bates*, 147 S.W.3d 264, 281-283 (Tex. 2004). The proper measure of damages for an alleged "permanent" injury is the diminution-in-value of the entire tract. *Mieth*, 177 S.W.2d at 303.

A "temporary" injury is a non "permanent" injury that may be remediated at reasonable expense. *Id.* at 303-304. If, however, the remediation costs exceed the diminution-in-value, then the diminution-in-value measure for a "permanent" injury again applies. *Id.* An injury is deemed to be a "permanent" injury if the remediation costs exceed the value of the entire tract. *North Ridge Corp. v. Walraven*, 957 S.W.2d 116, 119 (Tex. App. – Eastland 1997, pet. denied). The concepts of permanent and temporary injuries are mutually exclusive, consequently damages for both may not be recovered in the same action. *Primrose Operating Co,, Inc. v. Senn*, 161 S.W.3d 258, 259-263 (Tex. App. – Eastland 2005, pet. denied). When the diminution-in value measure of damages applies, then remediation costs may not be recast as diminution damages. *Id.*

*b. Effect of Injury Type and Measure of Damages*

The distinction of injury type and resulting measure of damages is not merely an academic curiosity; it is a material limitation. By way of example, consider the scenario in which an oil and gas operator occupies ten acres out of a 50 acre farm. The surface owner claims that the oil and gas operator has contaminated two of the 50 acres contained in the tract. Barring some sort of specific action directed by the RRC or the Texas Commission on Environmental Quality, the cost to restore the surface is likely to exceed the value of the entire 50 acres or the diminution value of the entire 50 acres. Thus, the surface owner is limited to the monetary value of the property and cannot compel the mineral owner to restore the two acres. The same result is reached even if the surface owner or real estate developer imposed an express covenant to restore the property. *P. G. Lake, Inc. v. Sheffield*, 438 S.W.2d 952, 955-956 (Tex. Civ. App. – Tyler 1969, writ ref'd n.r.e.). The remedy of specific performance gives way to the diminution-in-value measure of damages. *Id.*

The *Fenner* case mentioned previously also demonstrates how unsatisfied a surface owner or real estate developer may be when trying to enforce express covenants. *Fenner v. Samson Resources Co.*, 2005 WL 2123043 ** 3-12 (Tex. App. – Houston [1st Dist.] 2005, pet. denied) [court sided with the mineral owner on what "restoring the surface" meant]. *Fenner* may be distinguished based upon the unique facts in that case, but it is still an object lesson of the difficulties facing surface owners. *Id. But see*, Ernest E. Smith, *Recent Developments in Texas, United States, and International Energy Law*, 1 TEX. J. OIL, GAS, AND ENERGY L. 100, 103 (2006) [surface owners have been largely unsuccessful in litigating surface claims in recent years].

The conceptual heart of these cases is the maxim that market value fully compensates for all present and future injuries. *Schneider National Carriers, Inc. v. Bates*, 147 S.W.3d 264, 281-283 (Tex. 2004). Thus, courts have held that the diminution-in-value measure of damages satisfies the goal of any remedy – full compensation – and avoids the bane of any remedy – economic waste. *North Ridge Corp. v. Walraven*, 957

S.W.2d 116, 119 (Tex. App. – Eastland 1997, pet. denied); *Primrose Operating Co,, Inc. v. Senn*, 161 S.W.3d 258, 259-263 (Tex. App. – Eastland 2005, pet. denied); *P. G. Lake, Inc. v. Sheffield*, 438 S.W.2d 952, 955-956 (Tex. Civ. App. – Tyler 1969, writ ref'd n.r.e.). If the diminution-in-value measure of damages achieves full compensation, then the argument that an alternative measure should be employed to find a remedy to wholly compensate the surface owner or real estate developer is not available.

*c. Drafting Around*

It may be possible to draft round the damage limitations discussed above. A contract provision that imposes a royalty on the mineral owner if the mineral owner does not comply with a covenant (e.g. a restoration covenant or a pipeline burial covenant) may produce the desired damages. The enforcement of such a royalty does not seek to redress any permanent injury or any temporary injury (where excessive remediation costs may conceptually yield economic waste). Rather, it seeks to enforce a money payment similar to other money payments, like a shut-in royalty or delay rental. Because these payments do not comprise economic waste or do not involve a permanent injury, the money payment should be enforceable. Further, these payments are not liquidated damages. They are payments for the right to defer complying with an express covenant. Again, because of the nature of this type of payment, it should be an enforceable restriction on an oil and gas operator.

## V. THE UTILITY OF MUNICIPAL ORDINANCES AND REGULATIONS TO LIMITED OIL AND GAS OPERATIONS

Oil and gas operations are subject to valid regulations by cities. *Unger v. State*, 629 S.W.2d 811, 812-813 (Tex. App. - Fort Worth, 1982 writ ref'd); *Helton v. City of Burkburnett*, 619 S.W.2d 23, 23-24 (Tex. App. - Fort Worth 1981, writ ref'd n.r.e.); *Klepak v. Humble Oil & Refining Co.*, 177 S.W.2d 215 218 (Tex. Civ. App. - Galveston 1944, writ ref'd w.o.m.). A surface owner or real estate developer may rely upon a city's right to enact regulations, but it is an open question whether the array of enacted regulations are valid and will provide an effective limitation on oil and gas operations.

### A. Reliance on City Ordinances and Regulations

Regarding governance, Texas cities are classified as either "general-law" cities or "home-rule" cities. TEX. LOC. GOV'T CODE ANN., Chapters 1, 6-9, 51 and 211 (Vernon 2008 and Supp. 2009). Each type of city has the power to adopt ordinances and regulations for the public good. *Id.* Each city may legislate within its city limits and within its Extra-Territorial Jurisdiction or "ETJ". *Id.*; TEX. LOC. GOV'T CODE ANN. §42.021 (Vernon 2008 and Supp. 2009). *See also*, Judge Rick Strange, *Fort Worth Basin Surface Conflict Issues*, 31 OIL, GAS AND ENERGY RESOURCES LAW, Section Report 8 (2006).

Real estate practitioners should proceed with caution if they, or their surface estate clients, rely on municipal ordinances to restrict oil and gas operations on land the client wishes to use or develop. The likelihood of success in relying on such ordinances or regulations is only as valid and reasonable as the ordinance or regulation itself. "[T]he right of an oil and gas operator to conduct drilling activities is not an absolute right," and ordinances are allowed only when they are a "*reasonable* restriction by the state." *Shelby Operating Co. v. City of Waskom*, 964 S.W.2d 75, 83 (Tex. App. – Texarkana 1997, writ denied) (emphasis added); *Helton v. City of Burkburnett*, 619 S.W.2d 23, 24 (Tex. App. – Fort Worth 1981, writ ref'd n.r.e.). Likewise, the ordinances must be a *valid* exercise of a city's police powers; however, it is noted there is presumption in favor of the city ordinances and regulations. *Helton*, 619 S.W.2d at 24.

Note also, reliance on municipal ordinances and regulations need not be limited to the well known cities in Texas. Consider, for example, that the respective towns of Annetta North and Annetta, comprising about 1,000 persons[3] dispersed over idyllic farmland, each have extensive oil and gas ordinances and regulations.

### B. Principal Constitutional Limits on City Ordinances and Regulations

1. Give and Take, But Mostly Take

A "city must enact reasonable regulations to promote the health, safety, and general welfare of its people." *City of College Station v. Turtle Rock Corp.*, 680 S.W.2d 802, 805 (Tex. 1984). Any ordinance or regulation that results in a taking of private property for public use without just compensation, however, violates the Texas and U.S. Constitutions. TEX. CONST. ART, I, §7; U. S. CONST. AMEND. 5 and 14; *Sefik v. City of McKinney*, 198 S.W.3d 884, 891-892 (Tex. App. – Dallas 2006, no. pet.).

A taking may be: (a) a physical taking, such as an unwarranted physical occupation of property rights, or (b) a regulatory taking, such as an extraction from the property owner of rights as a condition for government approval of a permit or other action or restriction that unreasonably interferes with a property owner's rights of use and enjoyment. *Id.*; *City of Carrollton v. RIHR Inc.*, ___ S.W.3d ___, 2010 WL 965746 *4 (Tex. App. – Dallas 2010, no pet. h.). Both physical and regulatory types of takings have been involved in certain oil and gas ordinances and regulations.

[3] 2000 Census.

2. Regulatory Taking: Extraction Analysis

A municipal extraction occurs "… if the government entity requires an action by [the oil and gas operator] as a condition to obtaining governmental approval of the requested land development." *City of Carrollton v. RIHR Inc.*, ___ S.W.3d ___, 2010 WL 965746 *5 (Tex. App. – Dallas 2010, no pet. h.) Because most municipal oil and gas ordinances and regulations involve conditions that the oil and gas operator must satisfy in order to obtain a permit to conduct any operations, the regulatory taking by extraction analysis is particular importance.

The standard set forth in the *Flower Mound* case has become the standard for any taking by extraction cases. *Town of Flower Mound v. Stafford Estates Limited Partnership*, 135 S.W.3d 620, 622-643 (Tex. 2004). Under the ruling in *Flower Mound*, a city ordinance or regulation will be found invalid unless it: (i) bears an essential nexus to the substantial advancement of some legitimate government interest, and (ii) is roughly proportionally to the projected impact of the proposed [operations]." *Id.* at 634. A city ordinance or regulation is invalid unless the city "… make[s] some form of individualized determination that the required [extraction] is related both in nature and extent to the impact of the proposed [operations]" *Id* at 645. The *Flower Mound* test animates vital Texas and U.S. Constitutional taking clauses. *Id.* at 622-643. It does not limit invalidation to ad-hoc decision-making. *Id.* at 641. It prevents the possibility that a city "… could 'gang-up' on [oil and gas operators] to force extractions that a majority of constituents would not only tolerate but applaud, so long as burdens they would otherwise bear were shifted to others." *Id.* Municipal ordinances or regulations, in application, may be so pervasive or overbearing that they prevent an oil and gas operator from total use or enjoyment of the mineral estate or interfere with that use or enjoyment. *Sheffield Development Co. v. City of Glenn Heights*, 140 S.W.3d 660, 671-672 (Tex. 2004). These types of ordinances and regulations implicate a taking by interference analysis. *Id.* As such, they may be outside the realm of *reasonable* restriction and may not provide the limitation on oil and gas operations on which a landowner or developer would like to rely.

3. Regulatory Taking: Interference Analysis

The *Penn Central*[4] guidelines set forth in the *Sheffield Development* case are the standard for analyzing any takings by interference. *Sheffield Development,*140 S.W.3d at 671-672. There is no existing formulaic test or mathematical equation. *Id.* Rather, the court points to the following guidelines that must be weighed and evaluated:

- the presence of a legitimate governmental purpose;
- the economic impact of the regulation on the oil and gas operator;
- the extent to which the regulation has interfered with distinct investment-backed expectations, and
- the character of the governmental action.

*Id.* at 672 and 674-675.

## C. Other Limits on City Ordinances and Regulations

Other limits on city ordinances and regulations include due process considerations. Specifically, city ordinances and regulations that delegate a "veto" power or "consent" power to adjoining landowners, instead of requiring notice to adjoining landowners, are inherently suspect on due process and/or delegation of powers grounds. *Minton v. City of Fort Worth Planning Commission*, 786 S.W.2d 563, 564 (Tex. App. – Fort Worth 1990, no writ) citing, *State of Washington v. Roberge*, 278 U.S. 116 (1928) and *Eubank v. City of Richmond*, 226 U.S. 137 (1912).

City ordinances and regulations are questionable if private parties "… are not bound by any official duty, but are free to withhold consent for selfish reasons or arbitrarily and may subject [the oil and gas operator] to their will or caprice." *Roberge*, 278 U.S. at 122. Cities have reacted to *Roberge* and enacted valid ordinances and regulations under a *Roberge* analysis. *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 678 (1976); *Moore v. City of Kirkland*, 2006 WL 1993443 * 2 (W.D. Wash. 2006). Indeed, a "lawful and ordinary use of property is not prohibited because [it is] repugnant to the sentiment of a particular class." *Spann v. City of Dallas*, 111 Tex. 350, 235 S.W. 513, 516 (1921). While we note that the *Spann* case is a pre-comprehensive zoning case, its sentiment remains viable.

City ordinances and regulations which result in the private appropriation of a public right may comprise an invalid purpresture. *Southern Union Co. v. City of Edinburg*, 129 S.W.3d 74, 93 (Tex. 2003); *Jamail v. Stoneledge Condominium Owners Association*, 970 S.W.2d 673, 676 (Tex. App. – Austin, no pet.). The doctrine of purpresture is not well known or used, although the Texas Supreme Court has recognized it as late as 1969 and 2003. *Southern Union*, 129 S.W.3d at 93; *Hill Farm, Inc. v. Hill County*, 436 S.W.2d 320, 321 (Tex. 1969).

Further, TEX. CONST. ART. I, §17 prohibits both the "taking" and the "damaging" of property by a city. *Lomax v. Henderson*, 559 S.W.2d 466, 469 (Tex. Civ.

[4] Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978).

App. – Waco 1977, writ denied n.r.e.). A city's ordinance or regulation that interferes with the use and enjoyment of the mineral estate may be a "damaging", even if it does not rise to the level of a "taking." *Id.* We note, however, that later cases may limit the *Lomax* case, insofar as its use as an "eminent domain" aid. *Burris v. Metropolitan Transit Authority of Harris County*, 266 S.W.3d 16 (Tex. App. – Houston [1st Dist.] 2008, no pet.).

### D. The City Ordinance or Regulation as Ally to the Landowner

Despite the above-referenced limitations, properly drafted and implemented municipal ordinances are a valuable tool to landowners and developers in dealing with actual or potential oil and gas operations on their lands. The size of the city may not be an indication of whether its ordinances and regulations will be of assistance to surface owners, because some small municipalities have complex regulations and vice versa. For example, the oil and gas ordinances of the City of Copperas Cove demonstrate that very detailed regulations may exist for very small cities. Modeled upon the oil and gas ordinances for the Town of Flower Mound,[5] the City of Copperas Cove has a thirty-five (35) page set of oil and gas ordinances. Similarly, as noted earlier, the cities of Annetta North and Annetta, comprising about 1,000 persons each, have extensive oil and gas ordinances and regulations.

Further, certain municipal restrictions work to the benefit of landowners and developers in that an oil and gas operator does not acquire any vested rights in a permit until the operator satisfies all conditions for the permit. *Shelby Operating Co. v. City of Waskom*, 964 S.W.2d 75, 79-80 (Tex. App. – Texarkana 1997, pet. denied). Although the right to develop the minerals is dominant, such dominance does not enable the mineral owner to ignore the conditions required to obtain a permit and, until all conditions are satisfied, a city may amend an ordinance or regulation. *Id.* Accordingly, the landowner or developer may not need to be the party taking the initiative regarding proper permitting. If an oil and gas operator fails to comply with all conditions for a permit, the city, rather than the landowner or developer, may sue to stop oil and gas operations. *City of Mont Belvieu v. Enterprise Operating, LP*, 222 S.W.3d 515, 517-520 (Tex. App. – Houston [14th Dist.] 2007, no pet.).

Because of the city ordinances and regulations, the oil and gas operator must look beyond the requirements of its oil and gas lease to satisfy all requirements for developing the minerals. For example, even if a lease does not require an oil and gas operator to act in a certain way, a city ordinance may impose a different requirement and the city may sue to enforce the requirement. *Shelby Operating*, 964 S.W.2d at 83.

Finally, the time it takes time to comply with or to mobilize third parties to comply with the many permitting requirements may be substantial. For example, some permits require specialized videos, maps, plats, road conditions, or site conditions. These permit requirements often must be in place before an oil and gas operator can perform non-drilling or pre-drilling operations, such as building the pad, bringing a small rig onsite to set the conductor pipe or building a road (even when such operations do not require a permit from the RRC). *See* TEX. ADMIN. CODE §3.5; *Ridge Oil Co. v. Guinn Investments, Inc.*, 148 S.W. 143, 158-161 (Tex. 2004); *Gray v. Helmerich & Payne, Inc.*, 834 S.W.2d 579, 582 (Tex. App. – Amarillo 1992, writ denied). The time involved in obtaining the municipal permits may be critical near the end of the primary term of the oil and gas lease. Many oil and gas operators rely upon these types of non-drilling or drilling operations at the end of an oil and gas lease term to perpetuate that lease. *Enterprise Operating*, 222 S.W.3d at 517-520; *Ridge Oil Co. v. Guinn Investments, Inc.*,, 148 S.W.3d 143, 158-161 (Tex. 2004); *Gray*, 834 S.W.2d at 582; *Stanolind Oil and Gas Co. v. Newman Brothers Drilling Co.*, 157 Tex. 489, 305 S.W.2d 159, 170-175 (1957); *Rogers v. Osborn*, 152 Tex. 540, 281 S.W.2d 311, 312-316 (1953). Jesse Pierce supplies a good discussion of the interplay between operations and lease savings clauses. Jesse Pierce, *Termination of Oil, Gas and Mineral Leases: Savings Clauses and Defensive Doctrines*," 26 STATE BAR OF TEX. ANNUAL ADVANCED OIL, GAS AND ENERGY RESOURCES LAW COURSE (2008). The operator may not be able to start certain operations before complying with the municipal permitting process or, once started, may have those operations stopped by a cease and desist order if the required municipal permit was not obtained. *Enterprise Operating*, 222 S.W.3d at 517-520. The oil and gas operator is likely to pay attention to these possible delays, inasmuch as they may hinder or effectively stop oil and gas operations and put perpetuation of the oil and gas lease at risk.

### E. RRC Rules and Regulations as a Limitation on City Ordinances and Regulations

1. Concurrent Authority of Cities

It is noted that while the RRC is the state agency regulating oil and gas operations in the State of Texas, including granting permits to operator to drill oil and gas wells, cities may share some concurrent powers to the extent they do not pre-empt state statutes. *Gray v. Helmerich & Payne, Inc.*, 834 S.W.2d 579, 582 (Tex. App. – Amarillo 1992, writ denied). "An [city]

[5] Based upon conversation with counsel.

ordinance or charter provision that attempts to regulate a subject matter preempted by state statute is unenforceable to the extent it conflicts with that statute." *City of Mont Belvieu v. Enterprise Operating, LP*, 222 S.W.3d 515, 520 (Tex. App. – Houston [14th Dist.] 2007, no pet.). However, simply because the legislature has enacted a law addressing a particular subject matter does not mean the legislature has completely preempted that subject matter. *Id.* Such is the case with the RRC's regulation of oil and gas operations.

Although the RRC regulates oil and gas operations statewide, cities have the concurrent authority to enact non-conflicting ordinances and regulations that embrace oil and gas operations. *Unger v. State*, 629 S.W.2d 811, 812 (Tex. App. - Fort Worth 1982, writ ref'd). Concurrent authority may allow a city to require a permit to use a drilling rig within the city's boundaries or the ETJ, even though the RRC has authorized the oil or gas operation and issued a permit to the operator to drill a well. *Enterprise Operating*, 222 S.W.3d at 517-520. While the RRC's issuance of a permit to an oil and gas operator satisfies the agency's requirements, cities and third parties are still free to protect their alleged rights and property by creating city requirements, such as additional permits as a prerequisite to drilling. *Berkley v. RRC of Texas*, 281 S.W.3d 240, 243 (Tex. App. – Amarillo 2009, no pet.).

2. RRC Rules Do Not Adjudicate Property Rights

Also, the RRC's issuance of a permit does not adjudicate property rights, determine title to land or void contracts. *Gray*, 834 S.W.2d at 582; *Duncan Land & Exploration, Inc. v. Littlepage*, 984 S.W.2d 318, 328-330 (Tex. App. – Fort Worth 1998, writ denied). For example, the RRC does not require a permit for oil and gas operations preliminary to actual drilling (as defined by the RRC). A landowner or developer, who wants the oil and gas operator to secure a permit before conducting any operations on the land must look to an express covenant or a valid city ordinance or regulation for that type of permit obligation. *Id.* Thus, in the early states of oil and gas operations, the RRC rules and regulations are not likely to impact or limit city ordinances and regulations covering pre-drilling activities. For a summary reflecting the breadth of the types of preliminary "non-drilling" oil and gas operations that do not trigger the need for a RRC permit, see TEX. ADMIN. CODE §3.5 and *Ridge Oil Company, Inc. v. Guinn Investments, Inc.*, 148 S.W. 143, 158-161 (Tex. 2004).

The RRC's issuance of a shut-in order, by itself, does not affect the oil and gas lease or rights of the parties under an oil and gas lease. As reflected in the *Littlepage* case, the violation of the shut-in order by the oil and gas operator did not bar a suit to enforce the operator's lease rights. *Littlepage*, 984 S.W.2d at 328-330. This result in *Littlepage* is curious, but the holding seemingly derives from the findings by the majority of the Fort Worth Court of Appeals that there was never a basis to shut-in the well, the RRC unjustifiably dragged its feet, the oil and gas operator had an untenable choice of either violating the order to keep the lease in effect or comply with the order and losing the lease, and the landowner acted with unclean hands. *Id.*

3. As a Matter of Public Policy

A word of caution is in order regarding reliance on city ordinances and regulations to limit oil and gas operations. The rules and regulations of the RRC are deemed to be the public policy of Texas. Other than valid city ordinances or regulations based upon physical safety concerns (e.g. moving a rig may be a safety hazard or may damage certain roads) or unique location concerns (e.g. noise or concentration of houses), city ordinances or regulations that impose detailed operational limitations on mineral owners and oil and gas operators may be inherently suspect. Under the *Flower Mound* analysis discussed in Section V.B of this paper, a mineral owner or oil and gas operator may argue successfully that the RRC's rules and regulations define the public interest and any city ordinance or regulation that exceeds the public interest in unenforceable. *Town of Flower Mound v. Stafford Estates Limited Partnership*, 135 S.W.3d 620, 622-643 (Tex. 2004). On the other hand, if the city ordinance or regulation functionally replicates the result under the RRC's Subdivision Rules, as discussed above, then the city or landowner or real estate developer may successfully argue that the municipal ordinance or regulation implements the public policy of Texas. In summary, while city oil and gas ordinances do provide some restrictions on oil and gas operations, landowners and developers should thoroughly understand the limitations and risks involved in relying on municipal ordinances and regulations to limit oil and gas operations on the land they intend to use or develop.

**F. Unsettled Case Law**

1. *Shelby, Unger, Helton and Klepak cases*

Practitioners are further directed to *Shelby, Unger, Helton and Klepak*, which represent the vanguard of the case law rejecting most challenges by oil and gas operators to municipal ordinances and regulations. See *Shelby Operating Co. v. City of Waskom*, 964 S.W.2d 75, 83 (Tex. App. – Texarkana 1997, writ denied); *Unger v. State*, 629 S.W.2d 811, 812-813 (Tex. App. - Fort Worth 1982, writ ref'd); *Helton v. City of Burkburnett*, 619 S.W.2d 23, 24 (Tex. App. – Fort Worth 1981, writ ref'd n.r.e.); *Klepak v. Humble Oil & Refining Co.*, 177 S.W.2d 215, 218 (Tex. Civ. App. – Galveston 1944, writ ref'd w.o.m.). *See also*, William

M. Kerr, Jr., *Surface Use Waivers for the Real Estate Investor*, 19 STATE BAR OF TEX. ADVANCED REAL ESTATE DRAFTING COURSE 7 (2008); Terry I. Cross, *Planning and Drafting for Co-Existent Surface and Mineral Development*, 20 STATE BAR OF TEX. ANNUAL ADVANCED REAL ESTATE DRAFTING COURSE, 16-17 (2009).

These cases, however, date between 1944 and 1999 and pre-date the *Flower Mound* and *Sheffield Development* cases. *Town of Flower Mound v. Stafford Estates Limited Partnership*, 135 S.W.3d 620 (Tex. 2004); *Sheffield Development Co. v. City of Glenn Heights*, 140 S.W.3d 660 (Tex. 2004). Further, these cases represent the pre-*Flower Mound-Sheffield Development* standard which upheld, without much discussion, the right of a city to regulate oil and gas operations. None of these cases have analyzed the prevailing oil and gas ordinances and regulations under a *Flower Mound-Sheffield Development* standard which requires a stricter scrutiny associated with governmental action that impacts fundamental rights.

In his article, Terry Cross notes the *ability* of cities to regulate oil and gas operations is not open to serious question and further notes that the current challenge is in determining whether a city has *overstepped* the bounds of its police power. Cross, *Planning and Drafting for Co-Existent Surface and Mineral Development*, 20 STATE BAR OF TEX. ANNUAL ADVANCED REAL ESTATE DRAFTING COURSE at 16-17. Cross further notes there are no recorded cases evaluating specific ordinances or regulations under the analysis as outlined above. *Id.* Rather than being settled, the validity of most oil and gas ordinances and regulations is an open question. It is unlikely that any cost-minded oil and gas operator, landowner, or city will want to incur the costs and uncertainties of litigating these ordinances. Additionally, cities, once challenged, often amend their ordinances and regulations to deflect the challenge. At the same time, the above discussed challenges (or the threat of a challenge) can be powerful weapon.

*2.* Texas Genco: Panacea or Over-Hyped

In their article, Harper Estes and Douglas Prieto note that the promise of the *Getty* case as a weapon for surface owners and developers has been unfulfilled. Harper Estes and Douglas Prieto, *Contracts as Fences: Representing the Agricultural Producer in and Oil and Gas Environment*, 73 TEX. BAR. J. 378, 379 (May 2010). They further question whether recent developments vis a vis the *Texas Genco* cases[6] have produced any traction for surface owners or developers. *Id.* at 380.

While the surface owner prevailed repeatedly in the *Texas Genco* cases, one should note that the cases were fact driven and that the specificity of these cases may limit their impact. One should further note that the *Texas Genco* cases are jury verdict cases. It is unlikely, in our opinion, that the standard surface versus mineral dispute would involve facts identical or even similar to those in the *Texas Genco* cases. The facts of the *Texas Genco* are as follows:

- Texas Genco owned the surface rights inside and outside a landfill.[7]
- Texas Genco designated a landfill that consisted of a series of "cells" which were dug, but then filled in a directed sequence;
- The "cells" were in existence when they were excavated, were an integral part of the overall operation, and were themselves a "use" when they were excavated.
- There was a vertical well located inside the landfill that pre-existed the designation of the landfill.
- Changes in the RRC spacing rules allowed the oil and gas operator to drill many new wells.
- The oil and gas operator drilled several wells inside the edge of the landfill.
- Texas Genco accommodated the pre-existing well and the edge wells and operated the landfill co-existing with multiple wells.
- These wells, which were accommodated, ultimately hemmed in the landfill.
- When the oil and gas operator proposed to drill a vertical well into one existing cell and a directional well into two other existing cells, Texas Genco reached a saturation point and objected.
- The jury could find that these objected-to wells substantially impaired the landfill operation by requiring material changes that impacted the effectiveness of the landfill due to special TCEQ regulations.
- Texas Genco offered a location outside the landfill, but still on land owned by Texas Genco, to drill a directional well.
- Texas Genco also secured a location on a neighboring unit (in which the oil and gas operator participated), but the oil and gas operator was not required to use this location.
- The oil and gas operator admitted, and the jury could have found, that the oil and gas operator

[6] *In Re Texas Genco*, 169 S..3D 764 (Tex. App. – Waco 2005, orig. proc.); *Texas Genco, LP. v. Valence Operating Co.*, 187 S.W.2d 118 (Tex. App. Waco 2006, pet. denied); *Valance Operating Co. v. Texas Genco, LP*, 255 S.W.2d 210, (Tex. App. – Waco 2008, no pet.).

[7] J. *Johnson*, Tex. Prac. Guide Real Estate Transactions § 17.83 (Thomson Reuters 2009).

could fully develop and drain the gas reserves in an economic manner from the non-landfill location.

- The oil and gas operator secured a permit from the RRC to drill the proposed directional well into two of the cells and thus a directional well was a feasible, industry option.
- There was no apparent evidence, or no apparent accepted evidence, of the special risks of directional drilling.
- Texas Genco offered to pay $200,000 per well to help defray an extra costs.
- The dispute involved a major utility and major oil and gas operator and not the typical surface owner and oil and gas operator.

Given the facts of the *Texas Genco* cases, it is unclear how the cases would have been decided had the set of facts been more "run of the mill". Terry Cross correctly questions whether the *Texas Genco* cases expanded the definition of an "existing use" to an "I think about it, therefore it is" standard where a surface owner or developer can hope a jury would find "plans, hopes or dreams" as an existing use. Terry I. Cross, *Planning and Drafting for Co-Existent Surface and Mineral Development*, 20 ADVANCED REAL ESTATE DRAFTING COURSE (2009). It is additionally telling that Professors Smith and Weaver conclude that the *Texas* Genco cases did not re-define an "existing use" as a "planned use" or transform an inconvenience to farming as a substantial impairment of a current use. Ernest E. Smith and Jacqueline Lang Weaver, 1 TEX. LAW OF OIL AND GAS § 2,1[B][2](2d ed. 2009).

The extent of any resulting expansion of the definition of an "existing use" depends on how one characterizes the "cells" into which the oil and gas operator in the *Texas Genco* cases proposed to drill the wells. For example:

- The cells were improvements, in themselves, and not fallow land, and thus were a use in existence. Harper Estes and Douglas Prieto, *Contracts as Fences: Representing the Agricultural Producer in and Oil and Gas Environment*, 73 TEX. BAR. J. 378, 380 (May 2010).
- The cells were part of an existing plan that was partially in effect, similar to staged developments in progression where one stage needs to be completed before the next stage is reached (e.g. subdivision development of water sewers and drainage, to roads to lots to houses to amenities to completion or planned farming where the irrigation dictates the portions of the fields in use). Ernest E. Smith and Jacqueline Lang Weaver, 1 TEX. LAW OF OIL AND GAS, §2,1[B][2] (2d ed. 2009); Ernest E. Smith, *The Growing Demand for Oil and Gas and the Potential Impact Upon Rural Land*, 4 TEX. J. OIL, GAS & ENERGY L. 1, 22 (2008-2009).
- Use requires some form of excavation, building or improvement unlike a hunting, grazing or wildflower tract. Smith, 4 TEX. J. OIL, GAS & ENERGY L. at 22.
- Use is defined generally to mean to convert to one's own service, to put to a purpose, or to hold, occupy, enjoy or make the benefit of. *Big H Auction, Inc. v. Saenz Motors*, 665 S.W.2d 756, 758 (Tex. 1984).

All of these discussions about the character of the "cells" may lead to a dispute about how broad an "existing use" is, but they all support the conclusion of Professors Smith and Weaver that an "existing use" is not one on paper or in the mind of a surface owner or developer, but rather one that is, at the very least, partially physically implemented. Ernest E. Smith and Jacqueline Lang Weaver, 1 TEX. LAW OF OIL AND GAS, §2,1[B][2] (2d ed. 2009).

Likewise, another commentator, Richard Brown, questions whether the *Texas Genco* cases establishes a *per se* rule that the mineral estate will always have to directionally drill. Richard Brown, *Oil, Gas and Mineral Law*, 60 SMU L. REV. 1189, 1212 (2007). Mr. Brown questions whether it is worth the risk for surface owners and developers to gamble on receiving the next favorable jury verdict. *Id.* We do not believe the *Texas Genco* cases announce a *per se* rule. As noted previously, the cases are very fact driven. Directionally drilled wells may be part of industry practice, but that does not mean that a directionally drilled well under the facts of a different case would always be a reasonable alternative. Further, the *Texas Genco* cases do not upset the traditional rule announced in the *Sun Oil* case that any requested accommodation has to be on the unit covering the same property that the surface owner owns. *Sun Oil Co. v. Whitaker*, 483 S.W.2d 808, 812 (Tex. 1972).

In summary, we caution against reliance upon the *Texas Genco* cases as a panacea for surface versus mineral estate issues.

## VI. RAILROAD COMMISSION

### A. Introduction

As J. Paul Getty once opined, the meek shall inherit the Earth, but not its mineral rights. As referenced above, it is black letter law that the mineral estate is dominant in the State of Texas. However, if mineral dominance is considered "black letter" law, familiarity with the oil and gas regulatory world of the RRC is, to many practitioners, a grayish sort of thing to be avoided if at all possible. Nevertheless, understanding the inner workings of the RRC and its

effects on surface development is something that will work to a practitioner's benefit and provide him or her with an additional tool to resolve certain surface estate versus mineral estate disputes.

As referenced earlier in the paper, the surface and mineral estates may reach amicable accommodations through either common law doctrines, express agreements between the parties, municipal ordinances and regulations or statutes put forth by the State Legislature. An express agreement between the surface and mineral estate may be the preferred method, because it can accommodate special circumstances with respect to the particular development. However, what if you represent the surface estate and you cannot reason with the mineral estate? What if the mineral estate has the financial backing to litigate accommodation doctrine issues for years on end? At that point, you may need outside help in the form of the qualified subdivision.

## B. Background of Railroad Commission Rules and Regulations

If a real estate practitioner wishes to reach a satisfactory agreement with respect to surface uses by the mineral estate, as noted earlier in this paper, it is critical that he or she understand what the other side *needs* in order for it to effectively develop the mineral estate. In that regard, having some knowledge of the rules and regulations that the mineral estate must abide by, including the RRC's rules and regulations, assists the real estate practitioner in more effectively dealing with mineral estate owners and oil and gas operators. Discussed below are several basic matters that should assist a real estate practitioner in his or her limited dealings with the RRC.

### 1. RRC's Mission

In terms of background, the RRC is one of the oldest regulatory agencies in the State of Texas, having been created in 1891 under a constitutional and legislative mandate and was, as the name suggests, originally created to prevent discrimination in railroad charges. Given the large amounts of land the railroads owned at the time, it made sense for the RRC to also regulate the emerging oil and gas industry in the late 1800's. Over time, the RRC's primary mission shifted from the regulation of rail transportation to stewarding the State's natural resources. The RRC's primary mission is to regulate the orderly production of oil and gas, to prevent the waste of the State's natural resources, and to protect the correlative rights of its citizens.

### 2. Method for Accomplishing RRC's Mission

Two of the main mechanisms for accomplishing this mission are through the use of allowables and the implementation of field rules.

*a. Allowables*

"Allowables" address the amount of acreage required for a mineral estate to effectively develop the premises under question. Allowables result from an allocation formula employed by the RRC to prevent waste and protect correlative rights by "fairly distributing the available market for production from the reservoir." *Texas Oil and Gas, Discussions of Law, Practice and Procedure*, Railroad Commission of Texas, page 7 (1992). Acreage assigned to a well for allowable purposes cannot be assigned to any other well, regardless of whether such wells are to be completed in the same reservoir. In other words, there cannot be double assignment of acreage for allowable purposes. 16 TEX. ADMIN. CODE §3.40 (2002); 16 TEX. ADMIN. CODE §3.49 (2004)

The RRC has a wide degree of latitude in determining the formula and may base it on productive acreage, initial potential, net-acre feet, deliverability, pressure, or some varying combination thereof. Productive acreage is, therefore, not the only basis for determining an allowable. 16 TEX. ADMIN. CODE §3.31(j) (1997) Indeed, in many fields in the State of Texas, the allocation formula has been indefinitely suspended and they are operating under Absolute Open Flow, or AOF. The RRC has administratively suspended the allocation formulae for many fields because "each operator from that field has a market, for 100% of the deliverability… for its respective wells". 16 TEX. ADMIN. CODE §3.31(j)(3)(B) (1997). One should be aware, however, that the RRC may reinstate such allowables "…at the request of an operator from a field with a suspended allocation formula or at any time the commission deems reinstatement necessary to protect correlative rights or prevent waste." 16 TEX. ADMIN. CODE §3.31(j)(3)(B) (1997).

*b. Field Rules*

The second tool in the RRC's arsenal is the "field rule", which uses well spacing and density provisions to promote regular development in a field in such a way that the wells are not clustered together and damaging to the reservoir. *Texas Oil and Gas, Discussions of Law, Practice and Procedure*, Railroad Commission of Texas, page 4. Well spacing provides for the minimum distance that a well may be located with respect to lease lines, property lines, or subdivision lines ("lease line spacing"), as well as the minimum distance that a well can be located with respect to another well completed in the same reservoir on the same lease ("between well spacing"). Density provisions establish the number of acres that are required for each well in a given reservoir. *Id*. While each field has its specific lease line and density

provisions, lease line spacing is generally handled by the RRC under "Statewide Rule 37" (16 TEX. ADMIN. CODE §3.37 (1997)) and density is handled under "Statewide Rule 38" (16 TEX. ADMIN. CODE §3.38 (2004)). Thus, in a mineral estate versus surface estate dispute, if the surface owner wants to designate acreage for drilling purposes, but the proposed acreage would result in a violation of lease line spacing, the negotiations may not go very far.

A field, or common source of supply as determined by pressure communication, is regulated by the RRC under one of three different rule systems. These systems are classified as Statewide Rules, County Regular Rules, and Special Field Rules. Briefly, the three systems of field rules are as follows:

- Statewide Spacing Rules. The vast majority of fields in the State of Texas are governed by Statewide Rules. The RRC defines Statewide Field Rules as being 467 feet lease line spacing, 1,200 feet between well spacing, and forty (40) acres density for each well from a single property in a particular field. Under Statewide Rules of "467/1200", one should be aware that density for a GAS WELL is also forty (40) acres.

- County Regular Rules. Under County Regular Rules (which are more commonly referred to as District Spacing Rules), special spacing is applicable only in RRC Districts 7B and 9, and McCulloch County which is located in District 7C. Specifically, the following counties are affected:

  Archer (09), Baylor (09), Brown (7B), Callahan (7B), Clay (09), Coleman (7B), Comanche (7B), Coryell (7B), Denton (09), Eastland (7B), Erath (7B), Grayson (09), Hardeman (09), Haskell (7B), Hood (7B), Jack (09), Jones (7B), Knox (09), Lampasas (7B), McCulloch (7C), Nolan (7B), Palo Pinto (7B), Parker (7B), San Saba (7B), Shackelford (7B), Somervell (7B), Stephens (7B), Stonewall (7B), Taylor (7B), Throckmorton (7B), and Wichita (09).

  District Spacing is only applicable in situations where the completions are in depths of 5,000 feet or less. If the completions are deeper than 5,000 feet, then Statewide Rules become applicable. District Spacing is often overlooked in negotiations dealing with acreage requirements, but doing so may be a problem in that the acreage requirements differ based upon depth. Indeed, if one is unaware of the spacing rules in these counties at depths less than 5,000 feet, that person may find that tying the acreage to the RRC's acreage requirements would provide only two (2) acres for a well drilled between zero and 2,000 feet subsurface, only ten (10) acres for a well drilled between 2,000 and 3,000 feet subsurface, and twenty (20) acres for a well drilled between 3,000 and 5,000 feet subsurface.

- Special Field Rules. The third and final form of Field Rule is the Special Field Rule. Basically, under Special Field Rules, an operator may request different spacing and density requirements due to geologic variations in the field itself. To obtain Special Field Rules, the party requesting it must file an application that shows the basis for such a request and that identifies the correlative interval via well logs on file with the RRC. Special Field Rules allow an operator to create larger pooled units if the retained acreage lease provision incorporates a "governmental authority" pooling provision. These rules are also helpful in mitigating a lessor's claims for "failure to develop" and in increasing (or decreasing, as the case may be) allowables.

3. Impact of Allowables and Field Rules on Landowners and Developers

The main tools of allowables and field rules are used by the RRC to dictate many facets of oil and gas production. While certainly not the only tools available to the RRC, they are among the most effective. In order to reach an amicable solution to surface versus mineral issues, a practitioner should be aware of the field rules and allowables pertinent to the particular conflict at hand so that both sides are aware of what is needed to develop the minerals.

## C. Qualified Subdivision Rule

1. Usefulness of the Rule

As discussed above, the mineral estate has the right to use as much of the surface as is reasonably necessary to explore and produce the minerals without the obligation to pay the surface owner for damages. Notwithstanding the surface estate's potential progress in accommodation doctrine cases, such as the *Texas Genco* case discussed above, the mineral estate in the State of Texas is still dominant. *Texas Genco, L.P. v. Valence Operating Co.*, 187 S.W.3d 354 (Tex.App.-Waco 2006, pet. filed). Reliance upon the benefits of the accommodation doctrine may not be a wise, proactive solution to the problem between conflicting mineral and surface uses. As we have noted, when the surface estate relies on the accommodation doctrine, the surface estate has the burden of proof to show that the mineral estate has other means to exploit the minerals that will not interfere with existing surface

uses, that the other means are reasonable, and that the alternative surface uses are unreasonable in the situation presented. We have further noted that such an endeavor will most likely be time consuming and the outcome of any potential accommodation doctrine lawsuit is less than certain.

Enter the qualified subdivision rule promulgated under Chapter 92 of the Texas Natural Resources Code. TEX. NAT. RES. CODE ANN. §§92.001 et seq. (Vernon 2001 and Supp. 2009). As outlined in Chapter 92, in 1983 the Texas legislature enacted an exception to the common law in which the exception provides surface owners with a method to curtail the mineral estate's use of the surface in certain circumstances. In Chapter 92, entitled "Mineral Use of Subdivided Land", the Texas legislature held that the growth patterns of certain cities and counties required the "full and efficient utilization and development of all the land resources of this state, as well as the full development of all the minerals of this state" and that a specific accommodation was necessary to limit the mineral estate's use of the surface to "designated operations sites for exploration, development, and production of minerals and the designated easements only as necessary to adequately use the operations sites." TEX. NAT. RES. CODE ANN. §§92.001 and 92.005 (Vernon 2001).

If an applicant under the qualified subdivision rule is ultimately successful, it will be able to require the mineral estate owner to use only the area contained in designated operations sites for exploration, development, and production of minerals and the attending designated easements necessary to use the operations sites. TEX. NAT. RES. CODE ANN §92.005 (Vernon 2001). The mineral estate may then drill vertical or directional wells, as necessary, from the designated operations site, or from a site outside of the qualified subdivision, if the operations do not unreasonably interfere with the use of the surface of the qualified subdivision outside the operations site. *Id*. Both parties are benefited.

The application of the qualified subdivision rule has been delegated to the Railroad Commission of Texas, which reviews the same to determine "…the adequacy of the number and location of operations sites and road and pipeline easements." TEX. NAT. RES. CODE ANN. §92.004 (Vernon 2001). Pursuant to the jurisdiction granted to it in Chapter 92 of the Texas Natural Resources Code, the RRC has adopted the standards set forth in "Statewide Rule 76" or the "qualified subdivision rule". 16 TEX. ADMIN. CODE §3.76 (2000).

2. Qualified Subdivision Prerequisites

The practitioner should be aware that the use of the procedures in Chapter 92 of the Texas Natural Resources Code is not global to all situations. TEX. NAT. RES. CODE ANN. §92.002 (Vernon 2001). Chapter 92 holds that a qualified subdivision is limited to parcels described as follows:

> … a tract of land of not more than 640 acres:
>
> (A) that is located in a county having a population in excess of 400,000, or in a county having a population in excess of 140,000 that borders a county having a population in excess of 400,000 or located on a barrier island;
> (B) that has been subdivided in a manner authorized by law by the surface owners for residential, commercial, or industrial use; and
> (C) that contains an operations site for each separate 80 acres within the 640-acre tract and provisions for road and pipeline easements to allow use of the operations site. *Id.*

Thus, the rule is primarily applicable to large metropolitan areas or to counties that are essentially suburbs of such areas. These restrictions are in line with the legislature's intent to reconcile the needs of city growth with the goal of full mineral development of the state's resources.

3. Procedure

*a. Application*

To determine "…the adequacy of the number and location of operations sites and road and pipeline easements", the RRC holds a hearing. TEX. NAT. RES. CODE ANN. §92.004 (Vernon 2001). The RRC requires that any application for a qualified subdivision be submitted to the director of the Oil and Gas Division at the RRC. Pursuant to Statewide Rule 76 (16 TEX. ADMIN. CODE §3.76 (2000), the application must include a statement indicating that:

- The proposed tract is: (a) in a county with a population in excess of 400,000 persons; (b) in a county with a population in excess of 140,000 persons but said county borders another county with a population in excess of 400,000 persons; or, (c) located on a barrier island.
- The proposed tract has been subdivided, in a manner authorized by law, for residential, commercial, or industrial use.
- The applicant has the appropriate authority to represent, and does represent, all of the surface owners of the land contained in the proposed qualified subdivision.

- The names and addresses of all owners of possessory mineral interests and all mineral lessors for land that is contained in the proposed qualified subdivision.
- The plat of the proposed qualified subdivision that clearly indicates each proposed 80-acre tract with its operations site, road easements, and pipeline easements in a form no larger than 8 1/2 inches by 11 inches.
- A brief description of the mineral development in the area, including the field completions and number of oil and gas wells located within a two and one-half mile radial boundary of the proposed qualified subdivision.
- A list of all RRC oil and gas fields that underlie the proposed qualified subdivision, along with the spacing and density requirements of same (see section I.2., above).

*b. Notice*

Under the qualified subdivision rule, notice is required to be given to the applicant and owners of possessory mineral interests and mineral lessors of land contained in the proposed qualified subdivision. 16 TEX. ADMIN. CODE § 3.76(d) (2000). Pursuant to Section 1.45 of the RRC's General Rules of Practice and Procedure, the RRC shall issue notice at least ten days prior to the hearing and shall include the time, place, and nature of the hearings, the RRC's legal authority and jurisdiction under which the hearing is to be held, the statute(s) and rule(s) involved, and a concise statement of the matters asserted.

In the event that, after a due diligent search, an applicant is unable to locate all parties in interest that are required to be notified under the qualified subdivision rule, notice by publication is necessary. General Rules of Practice and Procedure, §1.46 (Nov. 2000). Under the RRC's General Rules of Practice and Procedure, an applicant shall publish the Commission's Notice of Application or Notice of Hearing in a newspaper of general circulation in the county or counties where the land that is the subject of the application or hearing is located, or as otherwise directed by RRC, to give adequate notice to affected persons. The notice shall be published no less than once a week for four consecutive weeks, with the first publication being published at least 28 day's before the protest deadline in the Notice of Hearing. The applicant must file proof of publication in the form of a publisher's affidavit or present at the hearing a copy of the newspaper notice along with testimony by someone with personal knowledge of the publication dates and locations of same. *Id*.

3. Hearing

The qualified subdivision hearing is held at the RRC's Austin offices by a hearings examiner, who reviews evidence put forth by the applicant. As referenced above, the owners of the possessory mineral estate and mineral lessors are given notice of the hearing and may put forth evidence, if present, showing the inapplicability of the rule to the given situation. It is noted that the applicant has the burden of proof in establishing the applicability of the provisions and showing that the proposed subdivision allows for the proper development of the minerals. General Rules of Practice and Procedure, §1.46 (Nov. 2000). Upon considering the evidence, the hearings examiner prepares a Proposal for Decision, or "PFD", in which the examiner recommends to the elected Railroad Commissioners whether to accept, reject or amend the application to ensure that the minerals of the subdivision may be fully and effectively developed. 16 TEX. ADMIN. CODE §3.76(d) (2000).

The PFD will set forth the reasons for the proposed decision, and a copy of the PFD will be circulated to all parties involved in the hearing. If a party of record disagrees with the findings and rationale set forth in the PFD, that party may file exceptions to the PFD within fifteen (15) days after the date of service for the PFD. Likewise, replies to such exceptions may be filed by the opposing parties within ten (10) days after the deadline for filing exceptions. The RRC will set the matter for a public conference, and the parties are provided the opportunity to attend. *Id*. The RRC also provides a procedure where a party may request to address the elected Commissioners; however, the opportunity to address the Commission may not always be granted.

The Commissioners, at public hearing, have the opportunity to question the findings of fact and conclusions of law presented by the hearings examiner in the PFD. After deliberation on the matter, a majority of the Commissioners vote to approve, reject or amend the application. The applicant or the owner of the possessory mineral interest may appeal the order of the RRC as provided by law.

4. Timeline to Develop

A practitioner wishing to apply the qualified subdivision rule should note that, if successful, the final order is not open-ended in terms of time. Rather, the qualified subdivision will terminate if, by the third anniversary of the RRC's final order, "…the surface owner has not commenced actual construction of roads or utilities within the qualified subdivision, and a lot within the qualified subdivision has not been sold to a third party." TEX. ADMIN. CODE § 3.76(g) (2000).

## VII. TITLE POLICIES: GENERAL MINERAL EXCEPTION

### A. General Mineral Exception in Title Insurance Policies

The discussion above focuses on situations where the landowner or developer already owns the land, presumably has a title insurance policy in place and probably knows whether the mineral estate has been severed in whole or in part and whether the surface owner holds title to any of the minerals. What, however, are the options if a potential landowner or developer is purchasing the property for a particular use or development and the title commitment contains the standard general mineral exception and also reflects a possible mineral severance?

With the recent increase in oil and gas activity in Texas, particularly in urban and near urban areas, landowners and developers have become more aware of the distinction between the surface and mineral estates and what the typical title insurance policy does and does not insure with respect to mineral ownership. Title companies have become more concerned about potential liability for failure of title to the minerals and damages to the surface resulting from development of the mineral estate. The result has been the inclusion of a general mineral exception in title insurance policies to protect the title companies. Insured parties have reacted by attempting to shift some of the burden for failure of title to the full mineral estate back to the title companies through deletion of the mineral exception from their title insurance policies or limitation of the exclusion through the purchase of title endorsements.

Initially, much discussion ensued over whether the general mineral exception violated Procedural Rule P-5 of the Texas Department of Insurance Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the state of Texas (the "Basic Manual"). Frederick J. Biel, *Proposed Title Insurance Rules Regarding Minerals*, 20 STATE BAR OF TEX. ADVANCED REAL ESTATE DRAFTING COURSE (2009). The matter was settled in November, 2009, when the Texas Commissioner of Insurance adopted Procedural Rule P-5 which allows title companies to except or exclude minerals (coal, lignite, oil, gas and other minerals) "in, under and that may be produced from the land" from the description of the land being insured on Schedule A of the title insurance policy. Basic Manual, Section IV, Procedural Rules P-5 and P-5.1.A.1 (2009); Brack Bryant and Keenan Kolendo, *Options for Clients Facing the General Mineral Exception*, TEX. LAWYER, March 29, 2010 at 24. The rule also allows the title company to exclude "all leases, grants, exceptions or reservations of coal lignite, oil, gas and other minerals . . . *appearing in the Public Records whether listed on Schedule B or not*" (emphasis added). Basic Manual, Section IV, Procedural Rules and Definitions, Procedural Rule P-5.1.A.2 (2009). When the title company includes the general mineral exception or exclusion from either P-5.1.A.1 or P-5.1.A.2, it must, upon request, issue one or more of the applicable endorsements provided for in Procedural Rule P-50.1. Basic Manual, Section IV, Procedural Rules and Definitions, Procedural Rule P-5.1.B (2009).

### B. Deleting or Limiting the General Mineral Exception

1. Title Search

Because the general mineral exclusion is an absolute exception or exclusion and the insurance coverage under the available endorsements is limited, the purchasing landowner or developer should attempt to have the title company delete, or at least limit the effect of, the mineral exception. Title insurers may not be willing to remove or limit the exception unless there is evidence the minerals have not been severed or, if severed, oil and gas development is not likely in the area. Confirming ownership and possible mineral severance requires conducting a title search back to the first conveyance out of the sovereign, usually the Republic or State of Texas. Bryant, et al., TEX. LAWYER, March 29, 2010, at 24. The best confirmation of ownership and mineral severance is to have a landman (a) conduct a search from the sovereign to present of the public records (real property, probate, court proceedings and RRC records) of the county or counties in which the property is located and (b) identify, with help as needed from an attorney, any mineral severances, the current mineral owners and any mineral development activity affecting the land. *Id*. This landman conducted title search is costly (several thousand dollars) and takes time (at least several weeks); however, because having the landman trace the mineral ownership back to the first conveyance out of the sovereign is the only way to confirm with certainty the presence of any mineral severance and the current mineral ownership, there is reason to give this option consideration.

Alternatively, the land purchaser can ask the title company to abstract title to the sovereign. The problems with this approach are discussed by Brack Bryant and Keenan Kolendo in their article as follows: (a) for title insurance purposes, title companies often view a search back to 1900 to be the same as a search to the sovereign, but a mineral severance may have occurred prior to 1900; (b) some title companies may be unable to search to the sovereign because their abstract plant's records do not go back that far; (c) the title company may be unwilling to extend the search to the sovereign because it is more expensive than the search required by the Texas Insurance Code; (d) the scheduled closing of the transaction may not allow the

time needed to conduct a search to the sovereign; and (e) the title insurer may decide as a matter of policy to include the general mineral exception. Brack Bryant and Keenan Kolendo, *Options for Clients Facing the General Mineral Exception*., TEX. LAWYER, March 29, 2010, at 24. Using the title company to perform the title search, while not as reliable as obtaining a landman search, does provide reasonably reliable confirmation whether the mineral estate has been severed from the surface entirely or in part. *Id.*

Once the results of the either type of title search are available, the land purchaser should then request, and will likely receive, removal of the general mineral exception from the title commitment or replacement of the general mineral exception with a specific exception for any actual mineral severance revealed by the title search. *Id.* Upon closing, the purchaser should then receive a title insurance policy insuring any loss arising from an undisclosed mineral severance. *Id.*

2. Other Options

If the title company is unwilling or unable to conduct a title search to the sovereign, another approach is to obtain an affidavit of non-production from the seller issued for the benefit of the title company. The affidavit may persuade the title company to remove or limit the general mineral exception, particularly if the seller has owned the property for a substantial length of time or little, if any, mineral production has occurred in the area and there is no indication that future oil and gas activity is likely. . Brack Bryant and Keenan Kolendo, *Options for Clients Facing the General Mineral Exception*., TEX. LAWYER, March 29, 2010, at 24.

A title company may also be willing to conduct a search of the RRC map and production records and request well permits from the RRC, or engage a third party to do the same. Depending on the level of oil and gas activity in the area revealed by such a search, the title company may agree to remove or limit the general mineral exception. *Id*. These approaches are less effective in securing the deletion or limitation of the general mineral exception from the title insurance policy or easing the purchaser's worry about use of the surface for mineral development, because neither approach will confirm the existence of a previous severance of all or a portion of the mineral estate.

3. Title Insurance Policy Endorsements

As provided in Procedural Rule 5.1.B, if the title company includes the general mineral exception in the title insurance policy, it must, upon request, issue the applicable endorsement, a T-19 endorsement. Basic Manual, Section IV, Procedural Rules and Definitions, Procedural Rule P-50.1 (2009). The T-19 endorsements insure, up to the face amount of the title insurance policy, against damage to present or future improvements (T-19.2 endorsement) and permanent buildings (T-19.3 endorsement), excluding lawns, shrubs or trees, caused by the exercise of any mineral right existing on the date the title insurance policy is issued. Basic Manual, Section II, Restrictions, Encroachments, Mineral Endorsement (2009). The advantage of requesting the applicable endorsements is that the insured may obtain them in addition to the other options discussed above, without the delay title searches and other options entail, at a minimal cost of $50.00 for each endorsement. Basic Manual, Section III, Rate Rules, R-29 (2009); Bryant, et al., TEX. LAWYER, March 29, 2010, at 25. The disadvantage of the endorsements is they provide no confirmation of the mineral ownership or whether parties in the title chain previously severed all or a portion of the minerals affecting the insured property.

### C. Best Practice

As with other aspects of the relationship between the surface estate and mineral estate, a flexible approach and the realization that there is no "one size fits all" method of dealing with the general mineral exception in title insurance policies will likely produce more positive results for the potential purchaser of land with a severed mineral estate. As Brack Bryant and Keenan Kolendo aptly note, some title companies will insist on including the general mineral exception in their title insurance policies; and others will delete or limit the exception to specific matters, particularly if a search to the sovereign is available, the land is not within a known oil and gas producing area or the title insurance policy is large or the client significant. Bryant, et al., TEX. LAWYER, March 29, 2010, at 25. The best practice is to work with a title agent that represents multiple underwriters, so the title company has the choice of finding an underwriter willing to provide the best insurance coverage for the particular circumstances. Brack Bryant and Keenan Kolendo, *Options for Clients Facing the General Mineral Exception*., TEX. LAWYER, March 29, 2010, at 25.

## VIII. RIGHT-OF-WAYS: SURFACE VS. MINERAL RIGHTS

As oil and gas operations become more prevalent in populated rural areas and urban or near urban areas, questions arise regarding the rights of the surface and minerals owners to use the numerous right-of-ways that cross or are located adjacent to their properties. In addition, the question arises regarding who owns the minerals lying within the boundaries of such right-of-ways. The right-of-ways most often the subject of discussion are those acquired for public road and railroad construction and maintenance purposes. These are the types of rights-of-ways that have given

rise to much of the right-of-way litigation in Texas and, as a result, the law controlling the right to mineral ownership and development within such right-of-ways.

**A. The Basics**

As discussed in Section VII of this paper, land purchasers can use oil and gas title examinations for the purpose of deleting or limiting the general mineral exception from their title insurance policies. Such examinations are also used by oil and gas company landmen or representatives prior to approaching a landowner to lease the minerals underlying the owner's land. One reason for conducting the examination is to determine if the landowner is the owner of the minerals lying within the boundaries of any right-of-ways crossing the owner's land.

1. Title Examinations

Mineral ownership within a right-of-way is principally determined by an examination of title reflected in the public records of the county or counties in which the right-of-way is located. The examination is based on conveyances out of the surface and mineral estate owners generally beginning from the point in time that the right-of-way was created down to the present. This type of examination is initially performed by a landman who will determine, with help as needed from an oil and gas title attorney, who owns the minerals under the right-of-way.

2. Type of Conveyance Determines Ownership of Right-of-Way Minerals

One of the first questions the landman needs to answer is what type of conveyance created the right-of-way. If the right-of-way conveyance is a fee conveyance, the assumption is the grantee receives the minerals in the right-of-way unless the instrument contains a clear mineral reservation, exception or condition limiting the grant. *Haynes et al. v. McLaine*, 154 Tex. 272, 276 S.W.2d 777, 782 (1955); *Hughes v. Gladewater County Line Indep. School Dist.*, 124 Tex 190, 76 S.W.2d 471, 473 (1934). If the right-of-way conveyance grants an easement, the grantee receives a right to use the land, but title to the fee, including the minerals, remains with the grantor.

3. Determining the Type of Conveyance

To determine the nature of the conveyance, two lines of authority provide guidance: first, *Calcasieu Lumber Co. v. Harris*, 77 Tex. 18, 13 S.W. 453 (1890) and second, *Right of Way Oil Company v. Gladys City Oil Co., Gas & Mfg. Co.*, 106 Tex. 94, 157 S.W. 737 (1913). The holdings in the two Supreme Court cases do not conflict, but instead analyze the nature of the grant creating the right-of-way: one stating what constitutes a fee simple conveyance and the other describing the grant of an easement.

The *Calcasieu* court established the rule that a deed which conveys an estate in fee in the granting clause conveys title to the land in fee, even if a subsequent clause refers to the strip of land conveyed as a "right-of-way". *Calcasieu*, 13 S.W. at 454-455. If the granting clause conveys the land itself (i.e. fee title to the land), a subsequent recital that the use of the land is for particular purpose, such as a highway or road purpose, does not limit the grant to a mere easement or imply the grant is conditional. The subsequent clause simply limits the use of the fee estate. *First Baptist Church of Ft. Worth v. Baptist Bible Seminary*, 162 Tex. 441, 347 S.W.2d 587, 591 (1961); Hughes, 76 S.W.2d at 473. The *Right of Way Oil* case held that if the granting clause says the land is granted as a right-of-way, then the deed does not convey the land in fee or the minerals beneath the right-of-way. *Right of Way Oil* , 157 S.W. 739. The deed grants only the right to use the land for a right-of-way, but does not convey title to the fee. *Id.* For the private landowner with property adjacent to a public road right-of-way, the question of whether the landowner owns the minerals under the public road right-of-way may not be easy to determine, even though the presumption is, absent a clear reservation of the minerals, that the conveyance a fee simple conveyance. The problem that often occurs is the deed granting the right-of-way and the surrounding circumstances may not be factually consistent with the cases discussed above. In other situations, the deed may use words such as "property" or "premises" which, standing alone, could be applied to either a fee conveyance or an easement, leaving the nature of the conveyance in doubt. *Gulf Coast Water Co., v. Hamman Exploration Co.*, 160 S.W.2d 92, 95 (Tex. Civ. App. - Galveston 1942, writ ref'd).

In these instances, checking the records of the State of Texas Department of Highways and Public Transportation may be helpful to discover if the State claims to own the minerals under the right-of-way area. It is not unusual for the State to actually claim the mineral estate in fee, even though the deed appears to convey only a right-of-way. If all else fails, under Section 32.201 (Preferential Right to Lease Certain land by Adjoining Mineral Owner) of the Texas Natural Resources Code discussed below, a mineral owner (who could also be the surface owner) has a right to seek a judicial determination of the States' title to minerals beneath the public highway right-of-way adjacent to the mineral owner's property. TEX. NAT. RES. CODE ANN., §32.201(h) (Vernon 2001 and Supp. 2009). Further, the statute grants legislative consent to sue the State to determine such title. *Id.*

4. Boundaries of Adjacent Mineral Owner's Estate

Another question can arise regarding the boundaries of an adjacent mineral owner's estate when the State's highway or road right-of-way is an easement and the lands abutting each side of the right-of-way have different ownership. The question generally arises when the deeds conveying the adjacent tracts to the various owners are silent regarding the mineral estate under the public right-of-way. Under long established Texas law, when the instrument is silent, the presumption is the owner of land abutting public alleys, streets or highways owns the land in fee (including minerals) to the center of such alleys, streets or highways, subject to any existing easements. *Joslin v. State*, 146 S.W.2d 208, 210 (Tex. Civ. App.--Austin 1940, writ ref'd). See also Alyusius A. Leopold, *Land Titles and Title Examinations*, TEXAS PRACTICE SERIES, §22.13 (Thompson/West, 3rd ed. 2005). The presumption that applies to the public alleys, streets and highways also applies to a railroad right-of-way. *Rio Bravo Oil Co. v. Weed, et al.*, 121 Tex. 427, 50 S.W. 2d 1080, 1084 (1932). The rule is true even if the calls for courses and distances are definitely located and extend only to the edge of the right-of-way and the quantity of the land is expressly stated, unless a contrary intention is stated in plain and unequivocal terms in the operative document. *Id.*; *Cantley v. Gulf Production Co.*, 135 Tex. 339, 143, S.W. 2d 912, 915 (1940). The rule does not apply, however, to conveyances made by the State or municipal governments, as it is presumed such governments intended to retain the mineral estate in their conveyances. Leopold, *Land Title and Title Examinations* at §22.13.

5. Additional Resource

An excellent source of information and place to start research about land title issues, including mineral ownership under road right-or ways, is Alyusius A. Leopold, *Land Titles and Title Examinations*, TEXAS PRACTICE SERIES (Thompson/West, 3rd ed. 2005).

**B. State of Texas Highway Lands**

1. Assumption of Grantor's Mineral Ownership

As noted above, where the grantor conveys a right-of-way in fee to a government entity, absent a clear reservation of the minerals by the grantor, the assumption is that the grantor owns the mineral estate and, therefore, conveys title to the minerals to the government entity as part of the fee right-of-way. If the landman's or attorney's examination or other circumstances give rise to a question regarding the grantor's ownership or the extent of the grantor's ownership of the mineral estate, then a title examination back to the sovereign would be necessary to confirm who owns the minerals. If the title examination reveals a prior mineral severance, then the government entity obtaining the right-of-way will only receive so much of the mineral estate as its grantor owns.

2. State Owns Public Roads and Highways of Texas

Assuming the grantor of a fee right-of-way to a government entity for public road purposes owns the mineral estate, the next question is what government entity owns the title to the minerals after the conveyance. Based on Texas case law and as explained in the July 5, 1960 Attorney General's Opinion attached to this paper as Exhibit "A", the public roads and highways of the State of Texas belong to the State and not the counties (or cities) within which they are located and the State has full control and authority over them. OP. TEX. ATT'Y GEN. NO. WW-870 (1960) citing *Travis County vs. Trogen*, 88 Tex. 302, 31 S.W. 358 (1895), *Robbins v. Limestone County*, 114 Tex. 345, 268 S.W. 915 (1925), and *State v. Hale*, 136 Tex. 29, 146 S.W.2d 731 (1941). The manner in which the road is acquired is immaterial, and the fact that the State Legislature may delegate to the counties (or cities) certain authority, power and supervision over the roads does not divest the State of title and vest it in the counties (or cities.). OP. TEX. ATT'Y GEN. NO. WW-870 at 3. Thus, even if legal title to a right-of-way is taken in the name of the county, since title is taken for the State and the benefit of the State and its people, the State, not the county, owns the public highway and road right-of-way. *Id.* at 2-3; *Robbins*, 268 S.W. at 918. Public roads have belonged to the State from the beginning of the State. *Robbins*, 268 S.W. at 918. The Attorney General further opined that by virtue of owning the land within a public right-of-way, the State owns the oil and gas thereunder and is the government entity with lawful authority to execute oil and gas leases. OP. TEX. ATT'Y GEN. NO. WW-870 at 4-5.

3. Leasing Minerals under State Owned Right of Ways

*a. Early Leasing Policy*

Prior to the OPEC oil embargo of 1973, the policy of the State, effected through the Texas Highway Department (now the Texas Department of Highways and Public Transportation) was to not lease minerals under right-of-ways acquired or that might be acquired in the future for public road purposes. *See* letter from the Texas Highway Department dated March 23, 1967 addressed to Ronald G. Byrnes (who is still practicing law) attached to this paper for its historical interest (Exhibit "B"). The policy was based upon a Legislative Council Report 56-4, dated December 1960, entitled "Lands Underlying State-Owned Rights of Way". Report 56-4 recommended that the State

policy be one of not leasing for oil and gas development under State right-of-ways obtained for public road purposes. The letter states the policy was never acted upon by the State Legislature; however, inasmuch as the Legislative Council Report reflects the "latest and most specific indication of Legislative thinking on the matter", the Texas Highway Department would keep its existing policy which was the same as that expressed in the Council's Report.

*b. Current Leasing Policy*

After the OPEC oil embargo, oil and gas exploration and production became politically important and Texas changed its policy substantially. Eventually, in 1985, the State Legislature passed legislation that generally allows the leasing of minerals under State owned public right-of-ways not located in a "producing area" (as defined in the statute) acquired to construct and maintain highways, roads, streets or alleys. TEX. NAT. RES. CODE ANN., §32.002 (Vernon 2001 and Supp. 2009). The State Land Board now handles the leasing of minerals under State owned public road right-of ways using bidding procedures set forth in the statute. *Id.* at §§32.101 et seq. The General Land Office administers the leases. *Id* at §§32.011 et seq.

*c. Adjoining Mineral Owner Preference*

Of particular interest is the provision in the bidding procedure that gives a preference to an adjoining "mineral owner" to lease the minerals under a State owned public right-of-way. *Id.* at §32.201(a). An adjoining "mineral owner" is "any person who owns the right to explore for, develop and produces oil and gas from any tract of land adjoining the lands owned by the state that were or may be acquired to construct or maintain a highway, road, alley, or other right-of-way." *Id*. This preference means the surface owner, or the mineral owner if the minerals are severed, or the lessee if the adjoining land is leased, has a preferential right to purchase a lease covering the State owned minerals under a public road right-of-way, subject to certain limitations. This discussion is an extremely simplified explanation of a very involved subject, and we direct you to the following treatise for a more extensive discussion: Alyusius A. Leopold, *Land Titles and Title Examinations,* TEXAS PRACTICE SERIES (Thompson/ West, 3rd ed. 2005).

## C. County and City Roads

As discussed above, the public roads and highways of the State of Texas, including the minerals under their right-of-ways, belong to the State and not the counties or cities within which they are located. The rule is true even if the county or city is the named grantee in a right of-way conveyance, holds legal title to the right-of-way, and is charged with construction and maintenance of the road. *Robbins v. Limestone County*, 114 Tex. 345, 268 S.W. 915, 918 (1925). The rational is that counties (and cities) are political subdivisions of the State and quasi corporations created by the State for more convenient administration of its laws and they hold their property, as they hold their existence, at the will of the State. *Id.* The rule does not mean that counties and cities cannot own minerals and execute oil and gas leases, but simply that they may not do so with respect to minerals located underneath right-of-ways whose purpose is for the construction and maintenance of public roads. *City of Corpus Christi v. Gregg*, 155 Tex. 537, 289 S.W.2d 746, 749 (1956); *Ehlinger, County Judge, et al. v. Clark*, 117 Tex. 547, 8 S.W. 2d 666, 670-672 (1928).

The rights of private landowners with property abutting county and city roads, streets and alleys are the same as the rights of landowners abutting State owned public road right-of-ways. The presumption applies that such owners own the land and minerals in fee to the center of the county and city roads, streets and alleys, unless otherwise provided expressly or by clear implication. *Weiss, et al. v. Goodhue, et al.*, 46 Tex. Civ. App. 142, 102 S. W. 793, 796-797 (Tex. Civ. App.1907, writ ref'd). The presumption applies to streets and alleys dedicated to public use by private fee landowners as well as streets dedicated for public use in platted subdivision, unless the minerals were severed from the surface prior to the creation and filing of the platted subdivision in the county records. Leopold, *Land Titles and Title Examinations* at §§19.1 et. seq.

## D. Irregular Tract Created by Right-of-Way

In obtaining right-of-ways for the purpose of constructing public highways and roads from landowners adjacent to a proposed or existing road, the result occasionally will be the creation of an irregularly shaped tract. For example, such a tract may be created when the State acquires easements for construction of a complex freeway interchange where multiple highways converge or an intersection associated with exiting or entering freeways. Based on the rules discussed above, when the public right-of-way acquired is an easement, the adjacent landowners will continue to own the minerals after the easement grant. The problem with the irregular tract is how to apply the rules regarding mineral ownership that were designed to handle public road right-of-ways where the centerline of the road or right-of-way is easily determined. Determining the boundaries of the mineral estate in an irregular tract is more complex.

The starting point is to conduct a title examination to determine ownership of the minerals estate at the time the State (or county or city) acquires the right-of-

way easement for public road purposes. The total mineral estate each adjacent landowner retains should be the amount of acreage conveyed in the right-of-way. However, the situation becomes more complex if the right-of-way easement being conveyed is added to an existing road right-of-way easement created previously from multiple tracts of land where the adjacent landowners retained ownership of the fee (including the minerals) to the center of the road. The situation is resolved by examining title to the minerals in each tract comprising the public right-of-way at the time the tract was conveyed and putting together the pieces of mineral ownership, much in the same manner as one assembles a jigsaw puzzle.

### E. Strip and Gore Doctrine

When small narrow tracts of land, distinct from the land adjoining each side, are created because of ambiguous descriptions of adjacent tracts of land, Texas courts, in order to avoid disputes and litigation that will inevitably arise from such a situation, have held that the land and, therefore, the minerals belong to the grantee landowner whose conveyance document contained the ambiguous description creating the small narrow strip. *Cantley v. Gulf Production Co.,* 135 Tex. 339, 143. S.W.2d 912, 915 (1940). The rule is based on the following presumption: where it appears the grantor conveyed all of the grantor's land leaving an adjoining long narrow strip or gore of land (created by the ambiguous description) that would be of little or no benefit or importance to the grantor, it is presumed the grantor intended to include the strip or gore in the grantor's conveyance of the larger tract to the grantee, absent plain and specific language to the contrary. *Id; Strayhorne v. Jones*, 157 Tex. 136, 300 S.W.2d 623, 638. The rule is commonly know as the strip and gore doctrine. However, it is also held that the strip and gore doctrine applies only in deeds where there is an ambiguity in locating the conveyed tract on the ground leaving a small strip of land in the grantor.

EXHIBIT "A"

TEXAS ATTORNEY GENERAL'S OPINION NO. 11-870 (1960)

EXHIBIT "A"

# THE ATTORNEY GENERAL OF TEXAS

AUSTIN 11, TEXAS

WILL WILSON
ATTORNEY GENERAL

July 5, 1960

Honorable E. Jack Cook
County Attorney
Kleberg County
Kingsville, Texas

Opinion No. WW-870

Re: Authority of Kleberg County to execute an oil and gas lease on a county road right of way.

Dear Mr. Cook:

You request the opinion of this office upon the question of the authority of Kleberg County to execute an oil and gas lease of the right of way of a county road in said county. A certified copy of the deed under which the county claims title to the oil and gas under the right of way is submitted with your request.

As an initial approach to your question, we deem it necessary to construe the right of way deed to determine if it conveys a fee simple title or a lesser estate, such as an easement.

We construe the deed to the county here involved as conveying a fee simple title, notwithstanding the phrase at the close of the granting clause, "said two strips being for the use of the county of Kleberg as a county road". This construction is supported by the weight of authority in this State, and is in accord with such cases as Haynes, et al vs. McLaine, 154 Tex. 272, 276 S.W.2d 777 (1955), and cases there cited, such as Hughes vs. Gladewater County Line Independent School District, 124 Tex. 190, 76 S.W.2d 471 (1934). These cases hold that in the absence of clear and explicit exceptions, reservations and conditions limiting the grant, a fee simple title will be assumed to have been granted instead of a lesser estate, such as an easement. A careful examination of this deed, including the granting clause and the habendum clause, leads to the conclusion that a fee simple title was granted. By the language of the deed, the the granting clause recites:

> "Have granted, sold and conveyed and by these presents do grant, sell and convey unto Ben F. Wilson, County Judge of Kleberg County, Texas, and his successors in office . . ."

followed by the description of the property. The habendum clause recites:

> "To have and to hold the above described premises, together with all and singular the rights and appurtenances thereto in any wise belonging, unto the said Ben F. Wilson, as County Judge of Kleberg County, Texas, and his successors and its assigns forever."

The warranty provision states "to warrant and forever defend all and singular the said premises unto the said Ben F. Wilson, as County Judge of Kleberg County, Texas, and his successors and its assigns . . ." The above quoted phrase as to the two strips being used by the county of Kleberg as a county road does not, in our opinion, convert the deed into a grant of a mere easement; it merely restricts its use, or makes the grant subject thereto. In brief, it is not such a clear exception, reservation and condition as to evidence the granting of merely an easement.

The fact that the deed is to the County Judge instead of directly to the county is not important. It is, nevertheless, a deed to the county.

Having concluded that the deed conveys a fee simple title and not merely an easement, we come to the crucial question: does the county own the land embraced within the highway that is conveyed by the deed? The fact that the deed conveys a fee simple title does not compel the conclusion that the county owns the land embraced in the right of way, including the oil and gas thereunder. The question of State versus county ownership of roads or highways has been considered by the Courts of this State several times, beginning with the case of Travis County vs. Trogden, 88 Tex. 302, 31 S.W. 358 (1895). At this early date, the Supreme Court held that the roads and highways of the State belong to the State and not to the counties within which they are located. See also Boone v. Clark, 214 S.W. 607 (Civ.App. 1919, writ ref.). The next case decided by the Supreme Court is Robbins vs. Limestone County, 114 Tex. 345, 268 S.W. 915 (1925). In that case, the legal title to the property was in the county, as is the case here. In that case, the Court said:

> "While the title, under the authority of law, was taken in the name of the county and under statutory authority, and the county was authorized and charged with the construction and maintenance of the public roads within its boundaries, yet it was for the state and for the benefit of the state and the people thereof."

The next case on this question considered by the Supreme Court is the case of State vs. Hale, 136 Tex. 29, 146 S.W.2d 731 (1941), in which the Court said:

> "That public roads belong to the State, and that the State has full control and authority over same, is now well settled. Travis County v. Trogden, 88 Tex. 302, 31 S. W. 358; Robbins v. Limestone County, supra."

Note that the Supreme Court in this case said that the question is now well settled that the State and not the counties own the roads and highways. Other cases in which the question has been considered and State ownership confirmed are: West vs. City of Waco, 116 Tex. 472, 478 and 294 S.W. 832, 833 (1927;) Harris County vs. Hall, 56 S.W.2d 943, 944 (Civ.App. 1933, error dism.); State vs. Malone, 168 S.W.2d 292, 296 (Civ.App. 1943, error ref. w.o.m.); Lower Nueces River Water Supply District vs. Live Oak County, 312 S.W.2d 696, 701 (Civ.App. 1958, no writ hist.).

We quote the following from the case of State vs. Malone referred to above to show that it is immaterial when and in what manner this road was acquired.

> "The public road constituting the highway had no doubt been in existence many years. In what manner the right of way was acquired does not appear from the record. But at what time or in whatever manner it was acquired the ownership was in the State. This question is fully discussed with citation and analysis of authorities in Robbins vs. Limestone County, 114 Tex. 345, 268 S.W. 915." (Emphasis supplied).

The fact that the Legislature may delegate to counties certain authority, power and supervision over roads and highways within their boundaries does not operate to devest the State of title and vest it in the counties. The Robbins vs. Limestone County case makes this quite clear.

We have not overlooked the effect that should be given in considering this question to Art. 5421p, Vernon's Civil Statutes. It is sufficient to say in connection with the construction and operation of this statute that by its specific term it applies only to such lands as may be owned by a political subdivision.

Since we have held that the State, and not the county, owns the public road involved in this opinion request, Art. 5421p, Vernon's Civil Statutes, has no application. We assume, in the absence of any information to the contrary, that there has been no severance of the surface and mineral estates as to the land covered by the deed. Hence, the State by virtue of its ownership of the land embraced in this right of way likewise owns the oil and gas thereunder.

The county, therefore, has no lawful authority to make a valid oil and gas lease on a county road right of way in the absence of some legislative authority conferring such power.

SUMMARY

The ownership of public roads is in the State and not the counties within which they are located. Therefore, Kleberg County has no legal authority to execute an oil and gas lease on the county road right of way in question.

Very truly yours,

WILL WILSON
Attorney General of Texas

By L. P. Lollar
L. P. Lollar
Assistant

William H. Pool Jr.
William H. Pool, Jr.
Assistant

LPL:WHP:jf:pm

APPROVED:

OPINION COMMITTEE

W. V. Geppert, Chairman

J. Arthur Sandlin

Phocion S. Park, III

Marvin Brown

REVIEWED FOR THE ATTORNEY GENERAL
BY: Leonard Passmore

EXHIBIT "B"

TEXAS HIGHWAY DEPARTMENT LETTER DATED MARCH 23, 1967
ADDRESSED TO RONALD G. BYRNES

EXHIBIT "B"



# TEXAS HIGHWAY DEPARTMENT

AUSTIN, TEXAS 78703



March 23, 1967

IN REPLY REFER TO
FILE NO. D-15

Oil and Gas Leases on State-Controlled
Rights of Way

Mr. Ronald G. Byrnes
Attorney at Law
3221 West Alabama Street
Houston, Texas

Dear Mr. Byrnes:

Mr. C. L. Snow, Assistant Attorney General, has relayed to us your inquiry of March 16, 1967, relative to the possibility of acquiring an oil and gas lease on State-controlled right of way.

Assuming the risk of belaboring a point, we lay out some background material which we feel is desirable in understanding our approach to this matter.

As you know, an interest in land for the purpose of constructing a public highway may be either an easement or fee and may be acquired by deed, quitclaim, eminent domain proceedings, donation or prescription. The 15th Legislature in 1876 declared all roads and highways theretofore legally laid out to be public roads. Down through the years, many agencies have pursued their separate ways and obtained rights of way by various means and public roads have been built thereon.

Consequently, the determination of what mineral rights, if any, the State has acquired in any particular parcel of right of way must be ascertained on an individual basis, and this is a difficult and often impossible task. Then too, our view has traditionally been that the rights of way entrusted to our jurisdiction are for the sole purpose of rendering service to the traveling public and that the leasing of them for oil and gas exploration is somewhat inconsistent with that purpose.

In 1940 we requested and received an official opinion of the Attorney General. It is numbered O-2481 and concludes that we have no authority in the absence of specific enabling legislation to execute such leases.

Thereafter, in 1951 the Legislature passed a bill (Art. 5382d, VCS) which created Boards for lease of lands owned by any Department, Board or Agency of the State of Texas. Pursuant to the provisions of this legislation, a Board for Lease of Highway Department lands was created in 1959. Before any specific tracts were designated to be advertised for lease, the 56th Legislature passed

H. S. R. No. 246 (House Journal of Texas, Vol. 1, p. 542) creating a five-member committee charged with reporting to the House all information relating to the leasing of highway rights of way for mineral development. This resolution also requested the Highway Department Board for Lease to defer any action until the Legislature could establish a State policy.

The Committee reported to the House in April 1959, making two recommendations. First, that Article 5382d be amended to exclude any authority to lease highway rights of way for oil and gas purposes and, second, that the Legislative Council be requested to make a comprehensive study of the problem and report back to the 57th Legislature its findings and recommendations. (House Journal of Texas, 56th Leg., April 9, 1959, Vol. 1, p. 1321)

The Council's study of this matter, and a great deal of background material, is contained in their Report Number 56-4, dated December 1960 and entitled Lands Underlying State-Owned Rights of Way. The Council's recommendation to the Legislature is quoted as follows: "That the Council recommend to the Legislature the passage of an act declaring the State policy to be that of not leasing for oil and gas development any rights of way obtained by the State of Texas for public road purposes that might have been acquired in the past, or that might be acquired in the future."

The Council's proposal has apparently never been acted upon by subsequent Legislatures, but inasmuch as it reflects the latest and most specific indication of legislative thinking on the matter, our policy has remained the same and is in agreement with that expressed by the Council.

I trust that this will make our position clear to you. If I can provide additional information or assistance, please feel free to call on me.

Yours very truly,

D. C. Greer
State Highway Engineer

By: A. H. Christian

A. H. Christian
Right of Way Engineer

cc: Attorney General