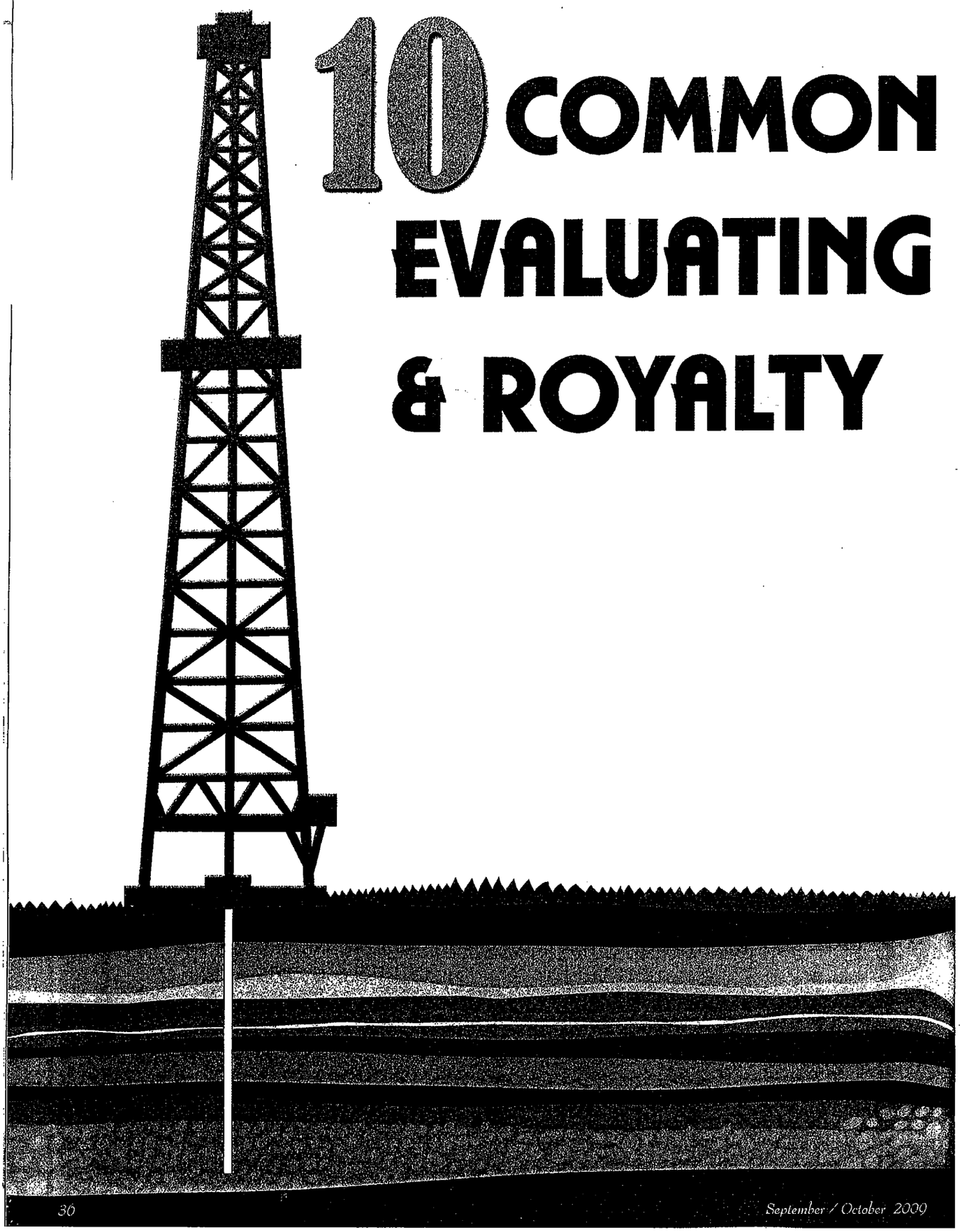
10 COMMON EVALUATING & ROYALTY



PITFALLS IN MINERAL TITLES

By Ronald D. Nickum

A pitfall is more than a mistake made in a transaction. It is a trap. In oil and gas conveyancing there are a number of traps, and they have been around a long time. The legal equivalent of a pitfall is a negligence or malpractice complaint, and no landman wants that. There haven't been a lot of malpractice complaints against landmen and hopefully that will continue to be the case; however, this author has seen at least one situation involving very large tracts of acreage in which landmen out of a reputable office combined serious mistakes with a belligerent attitude, and this did generate litigation. This article is about avoiding pitfalls when drafting or interpreting instruments that convey and reserve minerals and royalty in Texas.[2] The index to this paper acts as a checklist of these traps. A good resource for landmen is an article on forms of mineral and royalty conveyances presented at the 22nd Annual Oil, Gas & Energy Resources Law Course.[3] This article contains an analysis and discussion of nearly every clause and paragraph used in such instruments, and the paper may be used by a landman to look for clauses and interpret them in light of the case law that might apply to them.[4]

Pitfall 1 – Understand what you are looking for and where you should look, and use checklists

The first opportunity to make a significant mistake is overlooking places and issues that might be important. What are you looking for? Where should you look? Where do you start? You start by being absolutely sure of what the client wants. Is this a lease acquisition situation, a drilling situation or perhaps an acquisition of acreage? What are the exact parameters of your mission? You can have the office manager tell you, or you can read what the client wants. Ask to see the buy-sell agreement, the farmout agreement or the letter agreement. Bone up on what this title search is about. Then go to work. Use this checklist so you don't miss a source of information.

Check the Following Records:

Abstract Company
- ☑ Reception Book
- ☑ Main Tract Index
- ☑ Ask about separate volumes for tax liens, abstracted judgments, other idiosyncrasies

County Clerk
- ☑ Reception Book
- ☑ Grantor/Grantee Index
- ☑ Lessor/Lessee Index for oil and gas leases
- ☑ Tax liens
- ☑ Abstracted judgments

County Tax Assessor/Collector
- ☑ List of record ownership
- ☑ Tax delinquencies

County Clerk/Secretary of State of Texas
- ☑ UCC filings

Will you need to check all of these sources? That depends on your mission. It might be embarrassing — or costly — if you do not. When checking sources, do not assume that tax liens or judgments will automatically show up in the main tract index at the abstract office or the grantor/grantee index at the county

clerk's office. These records are sometimes kept in separate books or files and indexed separately. Moreover, some private abstractors have their ways. They may not list all title matters of importance in a tract index, choosing instead to place specific title matters in other books or files. You may look at a tract index and have no clue that there is another book or folder you should look into. Ask the abstractor if there is anything you should look at besides the tract index.

You may want to review financing statements.[5] These were recorded in the county clerk's office prior to 2001, but afterward they were and are required to be filed with the Texas secretary of state. Some of the forms you might want to look at include the *UCC Financing Statement (Form UCC1)* (Rev. 05/22/02), *UCC Financing Statement Addendum (Form UCC1Ad)* (Rev. 05/22/02) and *UCC Financing Statement Additional Party (Form UCC1AP)* (Rev. 05/22/02), which are the prescribed forms by the International Association of Commercial Administrators. The UCC1AP form may only be used in conjunction with the UCC1 form to add multiple debtors or secured parties. The *UCC Financing Statement Amendment (Form UCC3)* (Rev. 05/22/02), *National UCC Financing Statement Amendment Addendum (Form UCC3Ad)* (Rev. 07/29/98), and *UCC Financing Statement Amendment Additional Party (Form UCC3AP)* (Rev. 05/22/02) may only be used in conjunction with the UCC3 form to add multiple debtors or secured parties. UCC5 is the prescribed form to correct a filing. Pursuant to Chapter 9, Subchapter G, Texas Business & Commerce Code, county clerks are to record terminations on financing statements that were recorded in the county clerk's office prior to July 1, 2001. All other types of amendment filings would require the filing of a financing statement in the secretary of state's office. Documents pertaining to real estate records are to be filed in the county clerk's office.[6]

What minerals and royalty are being conveyed?

It is also important to understand the difference between fractions of minerals or royalty and fractional minerals or royalty. If there is a question, use this checklist to make it clear what you are dealing with in a conveyance.

- ☑ An undivided _/_ of minerals
- ☑ An undivided _/_ of grantor's minerals
- ☑ An undivided _/_ of royalty
- ☑ An undivided _/_ royalty

What mineral or royalty rights are being reserved?

Minerals come with rights. Royalty does not. In reading a deed be aware of the kinds of rights that come with, or may be reserved from, a deed:

- ☑ Executive rights
- ☑ An undivided _/_ of bonus
- ☑ An undivided _/_ of rentals
- ☑ An undivided _/_ of shut-in royalty

Is the land subject to the Relinquishment Act?

Passed in 1919, the Texas Relinquishment Act applies to permanent school fund lands.[7] Generally, the patent or amended patent will tell you if the lands are subject to the act. The oil and gas underlying these lands belong to the state. The act was an attempt to gain the surface owners' cooperation in the development of the oil and gas, imposing upon the surface owner the duty to act as the agent for the state in leasing the minerals and negotiating not only the bonus but also the terms of the oil and gas lease. The general land office form of lease must be used. Initially, it was thought that the act conveyed 15/16ths of the oil and gas to the surface owners while reserving for the state a share of the delay rentals and an undivided 1/16th of the oil and gas as a royalty.[8] Detractors complained that the act was an unconstitutional donation of assets of the permanent school fund.[9] The court affirmed the constitutionality of the act in *Greene v. Robison*,[10] con-

cluding that the act did not donate the oil and gas to the surface owners but instead made the surface owners the state's representatives for the purpose of procuring oil and gas leases for act land. Under the act, the state and the surface owner share equally the consideration paid for the lease, with the surface owner's share being compensation for damage to his lands, so that each is entitled to one-half of all bonuses, royalties, rentals or other consideration.[11] While the surface owner is not the state's general agent for all purposes, within the scope of the Relinquishment Act, the surface owner is the state's agent to the extent that the state's assets are entrusted to the control of the surface owner, who must not abuse that trust. Agents selling assets for owners — including surface owners under the Relinquishment Act — owe a fiduciary duty to the owners, and agents violate this duty by acquiring assets for their own benefit.[12] The Relinquishment Act thus also prohibits surface owners from acquiring working interests in the permanent school fund minerals underlying their property.[13] In *State v. Standard*, the surface owner negotiated a Relinquishment Act lease that gave the surface owner (but not the state) an option to acquire a working interest. The court held the lease was invalid because it provided for substantial consideration in which the state could not participate.[14]

Other burdens

Determine what other burdens you are required to list, including:

- ☑ Patent Information
- ☑ Applicability of the Relinquishment Act
- ☑ Easements
- ☑ Mortgages
- ☑ Options and Rights of First Refusal
- ☑ Working Interest Decimal Before Payout
- ☑ Working Interest Decimal After Payout
- ☑ APO/BPO Overriding Royalties
- ☑ Nonconsent Penalties
- ☑ Production Payments

Pitfall 2 – Don't interpret or construe ambiguous instruments

When oil and gas migrates from reservoirs into deeds it comes "together with all and singular the rights and appurtenances thereto in any wise belonging … ."[15] Those rights and appurtenances are listed in one of the most commonly quoted statements about minerals from *Altman v. Blake:*[16] "A mineral estate consists of the following five rights: (1) the right to develop (the right of ingress and egress), (2) the right to lease (the executive right), (3) the right to receive bonus payments, (4) the right to receive delay rentals, and (5) the right to receive royalty payments." It is now a settled rule that pursuant to the "greatest estate rule," a conveyance of minerals carries with it all of these rights unless one or more of them has been previously severed or is being reserved in the deed.[17] Thus, use of the term "minerals," "mineral estate" or "oil, gas and other minerals" incorporates the five appurtenant rights without need

of express enumeration. These rights are apportioned in accordance with the quantum of interest conveyed or reserved.[18] However, any one or more of these rights may be stripped from minerals without converting the mineral interest to a royalty.

Royalty, as opposed to minerals, comes with no appurtenant rights and for that reason it is generally referred to as "nonparticipating." A nonparticipating royalty owner has no right to develop or lease the land or its minerals or share in bonus or rentals.[19] While the mineral estate is akin to an exclusive possessory estate in land with all of the powers that go with it,[20] a nonparticipating royalty carries no rights or powers in the land except the right to a stated share of production from the land free and clear of expenses of finding and developing production.[21] The very act of severing royalty from the other four rights creates a nonparticipating royalty. The distinction between minerals and royalty is in one sense an issue of dollars and in another an issue involving use of words. We will talk about the use of words first.

A deed must correctly define what is being conveyed or reserved. This is accomplished by specific language. Sometimes the lawyer, the scrivener or the layman doesn't get it right.[22] The defining reference to minerals in place is the phrase "oil, gas and other minerals in and under."[23] This phrase is usually coupled with "and that may be produced from." Royalty is defined by the word "royalty" used with the phrase "in oil, gas and other minerals produced, saved and sold."[24] These phrases come from common sense, the minerals being "in and under" the land and the royalty becoming due when they are "produced, saved and sold."[25] The same simplicity translates to wind, solar and water resources. Unfortunately, there are a number of instances in the case law (and a great deal more instances in the deed records that are waiting to become case law) of ambiguities arising from word usage. A landman must create a run sheet naming owners and their fractions or decimals of interest. But what if those fractions or decimals are unclear? It is one thing to calculate royalty decimals; that is, to add, subtract and multiply clear numbers. It is something else again to try to interpret an ambiguous instrument. That is called "construction." Only a court has the power to construe a deed. Here are some examples of ambiguous language and how the language was construed. You might test yourself on your ability to determine what is being conveyed or reserved. Here are the cases. The answers are in the footnotes.

In an early case that made its way to the Texas Supreme Court[26] a deed provided:

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

receive the royalty retained herein only from actual production."

Is the reservation one of minerals or royalty? The use of the words "... oil, gas and other minerals in and under and that may be produced from ..." indicate minerals, not royalty. But what of the words "... and the grantor ... shall receive the royalty retained herein only from actual production"? That sentence uses the word "royalty." We know that when the word "royalty" is used the courts will presume that is what it is. So, what is your conclusion?[27]

Here is another decision example of a deed construction problem involving use of words connoting minerals and use of the term "royalty."[28] In a 1943 instrument titled "Mineral Deed," the owner of a 1/32nd mineral interest in a 32,808.5-acre tract deeded a 50-acre, 1/656.17th interest to a grantee which read as follows:

"That I, George Calvert, ... do grant, bargain, sell, convey, set over, assign and deliver unto Capton M. Paul, an undivided Fifty (50) acre interest, being an undivided 1/656.17th interest in and to all of the oil, gas and other minerals, in, under and that may be produced from the following described lands.[29]...

"It is understood and agreed that this conveyance is a royalty interest only, and that neither the Grantee, nor his heirs or assigns shall ever have any interest in the delay or other rentals or any revenues or monies received or derived from the leasing of said lands present or future or any part thereof, or the renewal or extension of any lease or leases now on said lands or any part thereof. Neither the Grantee herein nor his heirs or assigns shall ever have any control over the leasing of said lands or any part thereof or the renewal or extending of any lease thereon or for the making of any lease contract to develop or prospect the same for oil, gas or other minerals, which is hereby specifically reserved in the Grantor."

Is this a conveyance of a mineral interest or a royalty interest?[30]

When the word "royalty" is used in a document, courts will be most likely to hold the contested interest to be royalty. If this statement seems simplistic, read the majority opinion by the Court of Appeals, the dissent and the opinion of the Texas Supreme Court in *Temple-Inland Forest Products Corp. v. Henderson Family Partnership Ltd.*[31] Here are the excerpts from the deed in that case.

"Grantor[s] grant, bargain, sell, convey an undivided fifteen-sixteenths (15/16ths) interest in, to and of all oil, gas and other minerals that may be produced from the following described land."

Later the deed provides:

> "In respect to the undivided one-sixteenth (1/16th) part of and interest in the oil, gas and other minerals retained and reserved by the Grantor in said land, it is understood and agreed that said one-sixteenth (1/16th) interest is and shall always be a royalty interest, and shall not be charged with any of the costs which the Grantee may incur in exploring, drilling, mining, developing and operating wells or mines for the production of oil, gas and other minerals ... ." The clause went on to disclaim the executive right (the right to execute oil and gas leases).

So, was the reservation one of minerals or royalty?[32] The Court of Appeals held that a mineral interest was reserved. In reversing that decision, the Texas Supreme Court said: "We have never required that any particular word or phrase be used." That statement contradicts the holdings of *Miller v. Speed* and *Bank One, Texas, National Association v. Alexander*[33] but those cases are court of appeals cases. In holding that the reserved interest was royalty, the Supreme Court said, "The interest conveyed or reserved is to be determined from all the provisions of the instrument.[34] The deeds at issue in this case leave no room for doubt that a royalty interest was reserved. The word 'royalty' is used no less than six times in each deed, and the interest retained is free of the costs of drilling and production. A royalty interest is by definition free of production costs."[35] In conclusion, the grantors conveyed 15/16ths of the minerals, and reserved a 1/15th royalty.

Is that construction of the deed the same conclusion that you reached upon a first reading of the excerpted portions of the instrument included in this paper? One other question for you: Where did the other 1/16th of the minerals go? The Texas Supreme Court doesn't say.

Three cases, three instruments with confusing language and three results

that you may or may not agree with — so, where is all this going? Anytime there is a question about the nature of the interest you can (1) try to interpret the deed or other instrument containing the ambiguous wording from its four corners[36] paying particular attention to the use of the term "royalty" or a disclaimer of the bundle of rights associated with minerals that may lead to the conclusion that the interest is a royalty interest or (2) hand the problem off to an attorney. The real lesson here is that a landman should hand off an ambiguous instrument to an attorney for a title opinion, ratification requirements or litigation. The landman is not a court. Calculating royalty decimals from unambiguous instruments is easy (most of the time). Trying to make an intelligent — neutral — decision as to what is meant by ambiguous wording is a reasonable thing to do, and it is a trap. If the wording can be subject to more than one interpretation, beware of making that judgment call.

It is noted that the distinction between minerals and royalty is in one sense an issue of dollars. Here is the proof. Assume that you are offering to lease a 640-acre section of land for a 1/5th royalty and a bonus of $1,000 per acre, and there is a question whether Joe Jones owns a 1/16th nonparticipating royalty or a 1/16th mineral interest. A 1/16th mineral interest would entitle Joe Jones to $40,000, and he would receive a royalty decimal of 0.0125 (1/16 x 1/5). But if the 1/16th is a nonparticipating royalty, he receives no bonus. Of course, his royalty decimal is 0.0625, or five times as much. Do you, as a landman, want to be responsible for making a decision of that nature? Refer the matter to the principal, who will refer it to counsel, who will refer it back to the landman, who will be requested to obtain a stipulation and cross conveyance. Of course, one or both of the two landowners in the equation will see that it is to his or her benefit to claim the greater interest and refuse to sign the stipulation and cross conveyance, and at that point the matter will enter that noble edifice where a granite lintel above the door should proclaim the

admonishment from Dante's Inferno,[37] "Abandon Hope, All Ye Who Enter Herein." The courthouse is the last place a party to a deed wants to be, but better parties to the deed should be there than the landman.

There is another specie of ambiguity that plagues landmen, and it demonstrates that not all of the problems with deeds can be laid at the foot of lawyers or their lesser cousins, scriveners. In *Caruthers v. Leonard*[38] the Texas Commission of Appeals (the highest court of appeals in 1923) held that a deed to minerals currently under lease did not carry with it any royalty. This decision, a refusal to apply the apportionment doctrine, resounded in oil and gas practice by causing scriveners who were drafting commercial deed forms and attorneys who were writing custom conveyancing documents to create clauses in deeds that expressly apportioned royalty and other lease benefits under an existing lease and then go further by attempting to set out in writing in the deed the royalty outcome of future leases. Aside from all kinds of ambiguities created by complicated language to express these results, the most common mistake was based on the assumption that 1/8th would remain the standard royalty fraction for all time. Here is an example of a deed that encapsulates both types of problem — the mineral-royalty distinction and the attempt to assure royalty apportionment in lands being conveyed that were under lease.[39] The court had before it a 1938 mineral deed that conveyed "an undivided fifteen-thirty-seconds (15/32) interest in and to all of the oil, gas and other minerals in and under the [Property] ... together with the rights of ingress and egress at all times for the purpose of taking said minerals." The mineral deed contained future lease provisions that, no doubt, harked back to *Caruthers v. Leonard*[40]:

> "It is distinctly understood and herein stipulated that said land is under an Oil and Gas Lease made by Grantor providing for a royalty of 1/8th of the oil and certain royalties or rentals for gas and other minerals, and that Grantee herein shall receive 15/32nds of the royalties and rentals provided for in said lease; insofar as it covers the above described land; but he shall have no part of the annual rentals paid to keep said lease in force until drilling is begun.
>
> "It is further agreed that Grantee shall have no interest in any bonus money received by the Grantor in any future lease or leases given on said land, and that it shall not be necessary for the Grantee to join in any such lease or leases so made. Nevertheless, neither the Grantor, nor the heirs, administrators, executors and assigns of the Grantor shall make or enter into any lease or contract for the development of said land, or any part of same, for oil, gas or other minerals, unless each and every such

lease, contract, leases, or contracts, shall provide for at least royalty of the usual one-eighth to be delivered free of cost in the pipe line, and a royalty on natural gas of one-eighth of the value of same when sold or used off the premises, or one-eighth of the net proceeds of such gas; and one-eighth of the net amount of gasoline manufactured from natural or casing-head gas. That Grantee shall receive under such lease or leases 15/32 of 1/8 part of all oil, gas and other minerals taken and saved under any such lease or leases, and he shall receive the same out of the royalty provided for in such lease or leases, but Grantee shall have no part in the annual rentals paid to keep such lease or leases in force until drilling is begun."

The court noted that there were dual issues presented in the appeal: (1) determining whether an interest conveyed in a mineral deed is a mineral ownership interest or a royalty interest and (2) reconciling deeds containing different fractional interests in the granting clause and the future lease clause. The first issue seems rather easy — a mineral interest was conveyed. The second issue is the more difficult issue: whether the grantee would receive 15/32nds of 1/8th royalty under future leases or 15/32nds of whatever the future lease royalty decimal was stated to be. Stop reading here and put yourself in the courthouse reading the deed from the book of the OPR. What are you going to put down on your run sheet for the grantee's royalty? [41]

The court said that the clause in the mineral deed that restricted the ability of the grantor to enter into a future lease that provided for less than a 1/8th royalty controlled the outcome:

> "This language contemplates the possibility of a future lease containing a larger royalty. The Mineral Deed then states that the grantee shall receive 'under such leases' referring to the future leases containing the 'usual one-eighth' royalty, 15/32nds of 1/8th. It therefore follows that if the grantor enters into a future lease with a royalty that is larger than the 'usual one-eighth,' the grantee would be entitled to 15/32nds of the larger royalty interest."

This is only the latest in a line of cases that have sometimes seen the court splinter into a number of justices each writing a separate opinion reflecting his or her differing view of how the case should be decided.[42] If the courts can't agree on how the deed should be construed, does the landman have any business interpreting the ambiguity?

The problems caused by these deeds gave rise to construction rules such as the "future lease clause" and "express agreements" and the "two-grant" theory that became the basis of some very erudite law review articles.[43] Even when the usual 1/8th royalty is not at issue, the deed's references to future royalty can present an ambiguity. In *Luckel v. White*[44] these clauses were construed:

The granting clause:

> I, Mary Etta Mayes, ... [convey to] L.C. Luckel Jr. an undivided 1/32nd royalty interest in and to the following described property, ... ["habendum" and "warranty" clauses] TO HAVE AND TO HOLD the above described 1/32nd royalty interest ... unto the said L.C. Luckel Jr., his heirs and assigns forever ... to warrant and forever defend ... the said 1/32nd royalty interest ...

The subject-to clause:

> It is understood that said premises are now under lease originally executed to one Coe and that the grantee herein shall receive

no part of the rentals as provided for under said lease, but shall receive 1/4th of any and all royalties paid under the terms of said lease.

The future lease clause:

It is expressly understood and agreed that the grantor herein reserved [sic] the right upon expiration of the present term of the lease on said premises to make other and additional leases ... and the grantee shall be bound by the terms of any such leases ... [and] shall be entitled to 1/4th of any and all royalties reserved under said leases.

Final clause:

It is understood and agreed that Mary Etta Mayes is the owner of one-half of the royalties to be paid under the terms of the present existing lease, the other one-half having been transferred by her to her children and by the execution of this instrument, Mary Etta Mayes conveyed one-half of the 1/16th royalty now reserved by her.

The Texas Supreme Court summarized the issue: "This suit concerns the construction of a royalty deed in which the 'granting,' 'habendum' and 'warranty' clauses recite that a 1/32nd royalty interest is conveyed, but the 'subject to' and 'future lease' clauses state that the grantee shall be entitled to receive one-fourth of any and all royalties ... ." The trial court construed the deed as conveying a fixed 1/32nd royalty interest, giving controlling effect to the "granting" clause and holding the "future lease" clause ineffective to convey 1/4th of future royalties under future leases and the trial court's decision was affirmed by the Court of Appeals. As a landman, look back over the provisions of the deed set out above and decide whether the Court of Appeals was correct. [45]

The Texas Supreme Court had to reverse a previous ruling in order to hold that the future lease clause in this case conveyed 1/4th of royalties embedded in

all future leases. Now, if a trial court and an intermediate appellate court construe a deed based on established precedent, and they are overruled by a Texas Supreme Court that changes that precedent, where does that leave the landman with a deed containing such ambiguous clauses? The lesson to be learned is "don't try to interpret the deed." Calculate ownership. Calculate royalty. Present a report. But do it from instruments in the OPR that are clear and unambiguous.

Caruthers v. Leonard[46] was finally overturned 20 years later in *Harris v. Currie*.[47] So we are past that stage in the development of oil and gas law requiring an explanation in the deed of the royalty consequences of a mineral grant. The decision refusing to acknowledge implied apportionment of appurtenant rights in minerals subject to existing leases was reversed.[48] A deed that conveys or reserves 1/2 of the minerals conveys or reserves 1/2 of everything that go with the minerals. One-eighth royalties are no longer thought to be standard or usual (they are now the exception). Nevertheless, some scriveners retain an uncomfortable sense that they should continue to use explanations and double grants and future lease clauses. Today, most attorneys who draft mineral conveyances are comfortable with the greatest estate doctrine and the concept of automatic apportionment. There is no need to create a follow-up clause attempting to describe or explain what future bonus, rental or royalty will flow from the grant or reservation.[49] But 20 years of bad law created a vast number of mineral deeds that still await you at the courthouse.[50]

Pitfall 3 – Understand the distinction between "lands herein described" and "lands herein conveyed" and how the phrases can be traps

This is the most difficult concept to articulate — and understand — but it is critical to any transaction. In a deed a grantor who owns less than 100 percent of the minerals may link a grant or reservation of minerals or royalty to the phrase "the lands herein described" or

the phrase "the lands herein conveyed." Two different results may flow from the choice of these phrases, and one of them may be wrong. Any landman reading documents that contain either of these phrases should memorize this rule:

> "Where a fraction granted or reserved in a deed is stated to be an interest in land described in the deed, the fraction is to be calculated upon the entire mineral interest in the lands described; conversely, where a fraction granted or reserved in a deed is stated to be an interest in land conveyed by the deed, the fraction is to be calculated upon the grantor's fractional mineral interest."[51]

This is an absolute, fixed rule of mineral and royalty conveyancing. It is important for anyone interpreting a deed to understand the rationale underlying the rule, and that means understanding the trilogy of cases that created the rule.

In *Hooks v. Neill*[52] the grantors owned an undivided 1/2 interest in land that they sold, reserving 1/32nd "of all oil on and under the said land and premises herein described and conveyed." A lawsuit arose over the quantum of oil rights they reserved. They argued that they had reserved a full 1/32nd of oil produced from the entire tract. The court disagreed. Focusing on the phrase "land and premises herein conveyed," the Court of Appeals held that use of the word "conveyed" as it applied to the oil estate engendered a mathematical equation of 1/32 x 1/2 = 1/64. The court ignored the word "described."[53] So the grantor had 1/2 of the oil in the lands "conveyed" and reserved 1/32nd of the oil in the lands "conveyed" to reach the 1/64th oil reservation.

In *King v. First National Bank*[54] the grantor owned an undivided 1/2 interest in land that he sold, reserving "an undivided one-eighth of the usual and customary one-eighth royalty[55] in oil and gas and other minerals that may be produced from the hereinabove described land." The deed, of course, described the tract of land being transferred. The court seized on the word "described" in holding that the grantor retained a 1/64th royalty under the entire tract as "described" in the deed.[56]

The last case in the trilogy dealt with grants rather than reservations. In *Middleton v. Broussard*[57] the rule was expanded to apply to grants as well as reservations.[58] The deed under construction by the court described several tracts of land and then contained a conveyance of royalty followed by a reservation of minerals. The conveyance of royalty paragraph read:

> An undivided one-sixty-fourth (1/64) royalty interest in and to all of the oil, gas and other minerals in and under and that may be produced and saved from all of the above described land and premises ... .[59]
>
> ... It is, however, expressly agreed and understood ... that the grantors save and except out of this conveyance and retain and reserve unto and for themselves, their successors, heirs and assigns, forever, all of the oil, gas and other minerals in and under and that may be produced from all of the above described land ... but it is further expressly agreed and understood that such retention and reservation is subject to the one-sixty-fourth (1/64) royalty interest in and to all of the said oil, gas and other minerals which is hereby conveyed to the grantee as above stated.

This trilogy of cases has been cited many times in subsequent cases and the rule is now fixed in law. The effects of the Hooks+King+Middleton rule can be exemplified by hypothetical cases.

Hypothetical Case 1: Grantor owns the surface and an undivided 1/2 of the minerals in Section 100, Block 1, AB&C Survey. He agrees to sell the land to grantee, negotiating a reservation of 1/2 of his minerals, with the intention that he will be left with a full 1/4th of the minerals in Section 100 after the sale. How should the deed be drawn?

(Continued on page 74)

(Continued from page 49)

Choice 1: Grantee retains a lawyer, who draws a deed with a granting clause that uses the description "Section 100, Block 1, AB&C Survey" and that contains a proper subject-to clause,[60] and the lawyer adds a clause that reads, "save and except, and there is reserved unto grantor an undivided 1/4th of the oil, gas and other minerals in and under and that may be produced from the lands herein conveyed."

Result: Grantor is left with 1/8th of the minerals after the sale. Reserving 1/4th of minerals in "lands herein conveyed" means reserving 1/4th of 1/2 of the minerals.[61] This is a pure Hooks outcome.

Choice 2: Grantor retains a lawyer, who draws a deed with a granting clause that uses the description "Section 100, Block 1, AB&C Survey" and that contains a proper subject-to clause, and the lawyer inserts a clause which reads, "save and except, and there is reserved unto Grantor an undivided 1/4th of the oil, gas and other minerals in and under and that may be produced from the lands herein described."

Result: Grantor correctly reserves an undivided 1/4th of the minerals in Section 100, Block 1, AB&C Survey. The "lands herein described" are Section 100, Block 1, AB&C Survey, which would be all of the surface and minerals. Out of Section 100, the lands described, the grantor has reserved 1/4th of all the minerals.[62]

Choice 3: Grantor retains an attorney who draws a deed with a granting clause that conveys Section 100, Block 1, AB&C Survey, inserts a subject-to clause and uses a reservation clause that reads, "save and except, and there is reserved unto Grantor, an undivided 1/4th of 8/8ths of the oil, gas and other minerals in and under and that may be produced from Section 100, Block 1, AB&C Survey."

Result: That is a brilliant oil and gas attorney. The attorney has abandoned the archaic phrases "lands herein described" and "lands herein conveyed" in favor of a precise reference to what is being reserved.

Hypothetical Case 2: Grantor owns 1/2 of the surface and 1/2 of the minerals in Section 100, Block 1, AB&C Survey. Grantor agrees to sell the surface to grantee, but wishes to reserve all minerals. Grantor will, however, convey an undivided 1/64th royalty to the grantee.[63]

Choice 1: The granting clause conveys "an undivided 1/2 of the surface of Section 100, Block 1, AB&C Survey," followed by a reservation of all minerals, followed by a separate grant of "an undivided 1/64th royalty in oil, gas and other minerals produced and saved or sold from the lands hereby conveyed." The deed contains a subject-to clause.

Result: Grantee receives surface and 1/2 x 1/64 royalty in Section 100. This outcome is mandated by Hooks.

Choice 2: The deed conveys "an undivided 1/2 of the surface of Section 100, Block 1, AB&C Survey," reserves all minerals in and under and that may be produced from Section 100, Block 1, AB&C Survey, and contains a clause that conveys "an undivided 1/64th royalty in the oil, gas and other minerals produced and saved or sold from the lands herein described."

Result: Grantee receives 1/2 of the surface and the expected 1/64th royalty in Section 100. The "lands herein described" are Section 100, Block 1, AB&C Survey.

Choice 3: The deed conveys "an undivided 1/2 of the surface," reserves the minerals and contains a separate granting clause that conveys "an undivided 1/64th of 8/8ths royalty in the oil, gas and other minerals produced and saved or sold from Section 100, Block 1, AB&C Survey."

Result: The best case. Once again the result is precise and correct. Grantee receives 1/2 of the surface and a 1/64th royalty in Section 100 as the parties agreed. This clear language conveys a full 1/64th royalty in all of the minerals in the lands described as Section 100.

Comment: It is not necessary to use the phrases "lands herein described" and "lands herein conveyed." The use of those phrases arose simply because someone didn't want to retype the entire legal description down in the body of the deed. That was understandable in the era of manual typewriters, and even when we had IBM Selectrics, there being one original and three onion skins involved and lots of white mark-out to apply. But in an era of word processing — with cutting and pasting — there is no reason why a repeat of the entire legal can't be done, especially where disparate parts of a deed operate to accomplish different results.

Pitfall 4 – Understand the difference between fractions of royalty and royalty fractions

Keeping in mind the rule of Hooks+King+Middleton, the distinction between a "royalty fraction" and a "fraction of royalty" must also be understood.[64] In other words, choosing words is not just limited to lands "described" or "conveyed," but an understanding of the mathematical effect of the word "of." When dealing with the quantum of royalty to be conveyed or reserved, the word "of" has the same mathematical effect that fractions multiplied against each other have. The interest is reduced. We all know that a fraction of royalty is expressed as "1/2 of 1/8th royalty" which equals a 1/16th royalty. A royalty fraction, on the other hand, is expressed in terms such as "an undivided 1/32nd royalty" or "a 1/32nd royalty interest." A 1/64th royalty is just that — one-sixty-fourth of production. But 1/64th of royalty is a fraction reduced by the base royalty; i.e., 1/64th of 1/8th.[65] The same rule applies to minerals, of course, so that an undivided 1/8th of the minerals is 12.5 percent of the minerals; whereas, for example, an undivided 1/8th of grantor's undivided 1/2 interest in the minerals is 6.25 percent. A royalty fraction is also referred to sometimes as a fractional royalty.[66] Returning to hypothetical cases, here is how the Hooks+King+Middleton rules operate in conjunction with royalty fractions and fractions of royalty.

Hypothetical Case 3: Assume that grantor owns 1/2 of the surface and 1/2 of the minerals in Section 100, Block 1, AB&C Survey, which is subject to a producing oil and gas lease paying a 3/16ths royalty. Grantor agrees to sell

the 1/2 surface to grantee, but wishes to reserve all minerals. grantor will, however, convey a full 1/64th royalty interest to the grantee.

Choice 1: The deed conveys an undivided 1/2 of the surface, describing Section 100, reserves all minerals, and contains a clause that conveys "an undivided 1/64th of the royalty in the oil, gas and other minerals produced and saved or sold from the lands herein described."

Result: This is bad. Grantee receives surface and 1/64 x 3/16 royalty in Section 100. Reference to lands "described" prevents a Hooks result, but use of a fraction of royalty rather than a royalty fraction causes the grantee to receive a 3/1,024th royalty rather than a 1/64th royalty.

Choice 2: The deed conveys an undivided 1/2 of the surface, describing Section 100, reserves all minerals and contains a clause that conveys "an undivided 1/64th of the royalty in the oil, gas and other minerals produced and saved or sold from the lands hereby conveyed."

Result: This is worse for the grantee. Grantee receives surface and 1/2 x 1/64 x 3/16 royalty in Section 100. The reference to "lands hereby conveyed" triggers one multiplier effect (1/2 x 1/64) and the term "of" is a second multiplier. The scrivener has incorrectly used both a fraction of royalty and the phrase "lands hereby conveyed." The grantee receives a 3/2,048th royalty.

Choice 3: The deed conveys an undivided 1/2 of the surface of Section 100, reserves all minerals and contains a clause that conveys "an undivided 1/64th royalty in the oil, gas and other minerals produced and saved or sold from the lands herein described."[67]

Result: Is this a correct result? The use of the term "1/64th royalty" rather than "1/64th of royalty" is correct. But what of the reference to lands "conveyed" when the lands conveyed is an undivided 1/2 of the surface of Section 100? There is no case that construes this language. The better approach would have been for the lawyer to use choice 4.

Choice 4: The deed conveys an undivided 1/2 of the surface of Section 100, reserves all minerals and contains a clause that conveys "an undivided 1/64th royalty out of grantor's royalty in the oil, gas and other minerals produced and saved or sold from Section 100, Block 1, AB&C Survey.

These are the types of issues that landmen need to be aware of when encountering a fraction of royalty or a royalty fraction mixed with the use of such terms as "lands herein conveyed" or "lands above described." So what happens if a landman encounters one of the hypothecs; that is, a deed worded with language from one of the examples above? The language in each deed choice is not ambiguous. The Pitfall 2 warning against attempting to interpret or construe a deed should not apply because the choice of language results in a concrete outcome under the Hooks+King+Middleton trilogy of cases. Nevertheless, it is comforting to have someone else agree with you in this situation. Send it to a lawyer. Avoid the risk. By now you understand that the choices of "lands described" or "lands conveyed" and "royalty fraction" or "fraction of royalty" produce profound differences in the fractional interest at stake, but also understand the consequence to the revenue generated by royalty. Let's return to Hypothetical Case 3 and compare radically different revenue outcomes from two choices — choices 2 and 3.

Hypothetical Case 3: Assume that grantor owns 1/2 of the surface and 1/2 of the minerals in Section 100, Block 1, AB&C Survey, which is subject to a producing oil and gas lease having a 3/16ths royalty clause. Grantor agrees to sell the 1/2 surface to grantee, but wishes to reserve all minerals. Grantor will, however, convey a full 1/64th royalty to the grantee.

In Choice 2 grantee received surface and 1/2 x 1/64 x 3/16 royalty in Section 100. In Choice 3 (the correct choice) the grantee received a full 1/64th royalty in Section 100. Now, compare these two outcomes in real-world terms — dollars. Assume that Section 100 now has a gas well that produces 500 mcfpd of 1,200 btu gas sold for a wellhead price averaged over one year at $2.92 per mmbtu,[68] subject to the Texas 7.5 percent severance tax. Here are the revenue generated under choices 2 and 3 of Hypothetical Case 3:

Choice 2: 1/2 x 1/64 x 3/16 x 500 x 1.2 x $2.92 x .925 x 365 = $866.48 annual royalty net of severance tax.

Choice 3: 1/64 x 500 x 1.2 x $2.92 x .925 x 365 = $9,242.48 annual royalty net of severance tax.

The choice of wording results in radically different financial outcomes. If a

mistake is made in drafting a deed, the person who is going to be blamed is the lawyer. If a mistake is made in calculating royalty due under the deed and the oil and gas lease, the landman will get the blame. Better the lawyer in the soup than the lawyer and the landman.

Pitfall 5 – Beware the general disclaimer of warranty

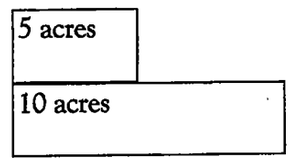
A grantor who disclaims warranty of title seeks to put the grantee under the doctrine of caveat emptor. The grantor may believe that there can be no breach of warranty of title by reason of such a disclaimer, but the title examiner should know that there can be a breach of covenant against encumbrances. A disclaimer of warranty of title will not operate to insulate the grantor form the reach the implied covenant against encumbrance provided by Tex.Prop.Code Ann. § 5.023(a)(2). The statutory implied covenant against encumbrances is distinct from a warranty of title and protects the grantee against interests in third persons which, though consistent with the fee being in the grantor, will diminish the value of the estate conveyed.[69] The covenant is implied from the use of the words "grant" or "convey" in a transfer of a fee simple estate, unless the express terms of the conveyance negate that implication.[70] For example, a mineral interest was burdened by the city's use of the surface of the land as an airport. This burden gave rise to liability despite a disclaimer of warranty of title. Burdens that must be disclaimed by a disclaimer of the covenant against encumbrances include options, rights of first refusal and easements.[71] Such a covenant is automatically breached upon the execution and delivery of the deed if there are encumbrances that affect title to the land. City of Beaumont, 146 Tex. at 53, 202 S.W.2d at 453; Texas & Pac. Ry. Co., 156 S.W. at 565. Thus, a disclaimer should be worded broadly enough to disclaim both the warranty of title and the covenant against encumbrances.

Pitfall 6 – Understand *Japhet v. McRae* and the effect of the entirety clause

The entirety clause, apportioning royalty among owners of multiple tracts of land under one lease, was promulgated by some unknown oil and gas attorney or landman to address the holding in articulated in *Japhet v. McRae*:[72]

> "Where the lessor of land for oil and gas, subsequently to the execution of the lease but prior to the development of the land and the production of oil or gas under the lease, sells a portion or portions of the land to others, and oil and gas are thereafter produced under the lease from some portion of the leased premises, the royalties therefrom belong to the owner of the particular tract upon which the well is located, and the owner or owners of other portions of the leased premises have no interest therein."

In *Japhet*, the owner of a 15-acre tract of land executed an oil, gas and mineral lease covering the entire 15 acres, and then conveyed the south 10 acres to one party and the north 5 acres to another party. A producing oil well was completed on the 10-acre tract and the owner of the 5-acre tract contended that he was entitled to participate in the royalties payable under the lease.



The court applied a nonapportionment rule based on the law of capture and held that each owner was entitled to all of the royalties on the oil produced from his particular tract. Thus, the owner of the north tract did not share in production from the south tract. To come under *Japhet*, the subdivision of ownership must occur after the lease is granted, and if the subdivision occurs before the lease is granted, the Japhet Rule does not apply.[73]

The nonapportionment rule is also applied to lands subject to a community lease which are partitioned after leasing. Those owners of subdivided tracts without production do not share in royalty from tracts with production and the lessee may continue to produce from

one or more of the tracts under the lease.[74] Whether subdivided by sale or partitioned, lands subject to a lease with an entirety clause generate royalty apportioned to the entire lease.

If an entirety clause is placed in the lease, however, the nonapportionment rule articulated in *Japhet* and *Garza* will not apply. Here is an example of an entirety clause:

> "If the leased premises are now or shall hereafter be owned in severally or in separate tracts, the premises, nevertheless, shall be developed and operated as one lease, and all royalties accruing hereunder shall be treated as an entirety and shall be divided among and paid to such separate owners in the proportion that the acreage owned by each such separate owner bears to the entire leased acreage."[75]

Moreover, an entirety clause may reach out to a foreign tract through the pooling clause of a lease.[76] *Montgomery v. Rittersbacher* can best be summarized by using the plat above and adding a third tract:

Tract 1	Tract 2
Tract 3 producing well	

Montgomery sold Tract 1, retaining a nonparticipating royalty. The holder of his executive right then leased Tracts 1 and 2 under a lease with an entirety clause that read very much like that in *Thomas Gilcrease Foundation v. Stanolind Oil & Gas Co.* quotedearlier. The lessee placed both tracts in a pooled unit and completed a well on Tract 3 of the unit. Because the reservation of a nonparticipating royalty interest under a tract does not show that the royalty owner intended to give to the holder of the executive rights the power to diminish the royalty owner's interest under that tract, pooling on the part of the holder of the executive rights cannot be binding upon the nonparticipating royalty owner in the absence of his consent.[77] The court held that the filing of Montgomery's lawsuit constituted a ratification of the pooling and that he was entitled to a proportionate share of royalty pursuant to the entirety clause.

These rules become complicated when the lessee releases a part of the acreage subject to a community lease without a pooling clause or an entirety clause.[78] And with horizontal drilling now so prevalent, the question becomes whether the doctrine would apply to horizontal wells. *Japhet v. McRae* deals with the Rule of Capture under vertical wells — that is the entire philosophical basis of the decision. When parties subdivide or partition lands subject to one lease that has no pooling or entirety clause, it is a property rule now that royalty will not be apportioned to them based on production from tracts in which they have no interest. To the extent that a vertical well will reach out and capture all of the hydrocarbons that migrate across lease lines or property lines, the parties are subject to the rule of capture as opposed to the rule of apportionment of royalty with others outside those lines. However, where the well is a horizontal well, the courts may well hold that the apportionment rule does apply and that the *Japhet* and *Garza* line of cases do not apply because the rule of capture is negated by the horizontal nature of the wellbore. In other words, the wellbore does not simply reach out and capture migrating hydrocarbons into a vertical hole — the groundwork for the rule of capture — rather, the hole itself deviates onto others' land. For example, if the producing well is a vertical well, the only way that royalty may be apportioned to Tracts 1 and 2 is through pooling or an entirety clause in a lease covering all three tracts. But what if the well produces from a lateral crossing Tract 1, or 2 or both?

Tract 1	Tract 2
Tract 3 producing well	

To complicate the question, what if the location is on Tract 1, the wellbore kicks off and crosses under Tract 2, and the point of penetration is on Tract 3?[79] Will the owners of Tract 1 and 2 share in production when the perforations in the drainhole are all in Tract 3? No court has addressed this question, but dicta from one court states that when a wellbore extends across several acres and several leased tracts, increasing the likelihood of recovery of minerals, "[E]ach tract traversed by the horizontal wellbore is a drillsite tract, and each production point on the wellbore is a drillsite.[80] The court does not explain what it means by the term "horizontal wellbore." The owners of Tracts 1 and 2 might very well argue that if they do not share in production, their leases terminate and the presence of a location or wellbore that is not productive of natural gas must be removed. Keep in mind that field rules generally require that no point on a drainhole can be closer than 330 or 467 feet to any property line, lease line or subdivision line, and engineering generally dictates that the first perforation is placed in the wellbore after a 90-degree turn has been accomplished. Completion of this 90-degree turn typically requires some distance from the point the well is kicked off from vertical depending on what maxi-

mum inclination angle allows installation of production casing for the well. The point is this; all three tracts are necessary for production: therefore, the rule of capture should have no application and should provide no basis for application of the nonapportionment rule triggered by subdivision or partition of land subject to a community lease or lease with no pooling or entirety clause.[81]

Pitfall 7 – Beware the reservation in favor of a stranger as it is void

There can be no other recipient of a reservation than the grantor. We sometimes word the reservation to "Grantor, and Grantor's heirs or assigns," and that is fine, but a reservation of minerals or royalty may not be made in favor of third parties who are strangers to the transaction.[82] Here are some examples of reservations that simply will not work:

- There is reserved unto grantors and their seven children.[83]
- There is reserved unto the children of the grantor.
- There is reserved unto my brother, John Jones.
- Save and except, and there is reserved unto grantor and his wife, Janey Doe.

If any stranger is to have an interest in the premises, that must be accomplished by a separate instrument as an independent conveyance.[84] The rule that a recital will not establish title in a stranger to the conveyance applies to a spouse. For example, where a wife conveys separate property, reserving an interest in minerals to herself and her husband, the reservation vests no interest in the husband.[85] Of course, if the property is community property, the reservation may be for the life of the husband and wife grantors, and the survivor of them, with remainder to vest in the grantee.[86] The corollary to the rule that a reservation in a deed cannot be made in favor of a stranger is that a recital within a reservation will convey nothing to a stranger. Here is an example of a remainder reservation that will not work:

- Save and except, and there is reserved unto the grantor for life an undivided 1/3rd of the minerals in and under and that may be produced from the premises, with remainder to grantor's brother, John Jones.

All landmen are familiar with the basic testamentary clause that leaves Blackacre to John Doe for life, with remainder to Richard Roe. The life estate and remainder are established by a granting clause in the will, and the same effect may be accomplished by a granting clause in a deed. But a deed requires words of grant[87] and a reservation of a life estate in a deed does not contain words of grant and is not sufficient to vest a present, executory or remainder interest in a remainderman. It cannot act as a conveyance. The solution is to either reserve the interest in the deed, and then grant the reserved interest to a party in the deed,[88] or deed the property by one deed reserving the mineral interest rather than a life estate in the mineral interest, and by separate instrument deed the reserved interest to the third party reserving a life estate in the grantor.[89]

Pitfall 8 – Don't confuse a reservation with a "subject to clause" and understand the Duhig Rule

A reservation clause may avoid the Duhig[90] Rule, but at a price. The subject-to clause is necessary to protect a reservation. You have to have both. The phrase "subject to" in a mineral deed means "subordinate to," "subservient to" or "limited by,"[91] and it constitutes an

exception or exclusion from the grant with a principal function of protecting the grantor against a claimed breach of warranty.[92] It neither conveys nor reserves an interest; rather, it addresses prior severances and encumbrances.[93] It limits the estate granted but does not retain anything in favor of the grantor.[94] The reservation clause, on the other hand, reserves an interest in addition to prior severed interests covered by the subject-to clause. Failure to include a subject-to clause after the reservation clause will trigger the Duhig Rule.[95] In Duhig, grantor conveyed land to W.J. Duhig reserving 1/2 of the minerals. Duhig later conveyed the land, and his deed reserved an undivided 1/2 of the minerals in the land and had no subject-to clause. It was held that the warranty in the Duhig deed was breached at the very time of the execution and delivery of the deed and that Duhig held the very interest required to remedy the breach — 1/2 of the minerals — and therefore Duhig would be estopped to claim title to the reserved minerals as against his grantee and their successors in title to the land. The estoppel principle in Duhig was adopted from after-acquired title cases.[96] If a party attempts to claim an interest that he purported to convey, he is in effect denying a fact represented by his warranty.[97]

A simple example of the distinction between the subject-to clause and the reservation clause can be drawn from Hypothetical Case 1:

Hypothetical Case 1: Grantor owns the surface and an undivided 1/2 of the minerals in Section 100, Block 1, AB&C Survey. He agrees to sell the land to grantee, negotiating a reservation of 1/2 of his minerals, with the intention that he will be left with a full 1/4th of the minerals in Section 100 after the sale. How should the deed be drawn?

In choice 3 for this hypothec the attorney drew a deed with a granting clause that conveyed Section 100, Block 1, AB&C Survey, and used a reservation clause that read, "save and except, and there is reserved unto grantor, an undivided 1/4th of 8/8ths of the oil, gas and other minerals in and under and that may be produced from Section 100, Block 1, AB&C Survey." Without a proper subject-to clause,[98] that reservation would be nullified by the Duhig Rule. Grantor conveyed Section 100 and the use of this legal description by law included all the minerals. Grantor could convey but 1/2 of the minerals. Without a subject-to clause, grantor would have breached his warranty as to 1/2 of the minerals. This breach would have caused failure of the reservation of 1/4th of minerals, and grantor would be liable for the market value of the other 1/4th of the minerals not conveyed.[99]

Pitfall 9 – Beware landlocked tracts

Ingress and egress rights are usually omitted from most forms and many custom drafts because the scrivener rightly assumes that the reserved minerals will include the appurtenant rights. But what happens if the tract is "landlocked?" The deed should affirmatively set out the right of ingress and egress

across all the lands subject to the deed at the time the conveyance was made as well as an express agreement or grant of an easement across adjacent lands to reach the landlocked tract being conveyed, and the lands subject to the easement should be described in a manner that satisfies the statute of frauds. Otherwise, the owner of landlocked minerals may not be able to make an oil and gas lease or the lessee of such a lease may not be able to access the property. Easements appurtenant to separate tracts cannot be cobbled together as a bridge to serve all the tracts or a landlocked tract.[100] In other words, a right of ingress and egress over a specific tract cannot be used to reach contiguous lands.[101] This is a rule not commonly understood, but it is well documented in the case law. For example, in *Bickler v. Bickler*,[102] the Texas Supreme Court said:

> "Rights of way granted or reserved are appurtenant to the dominant tenement, and can be used only for the purposes of that tenement. ... One having a right of way appurtenant to specified land cannot lawfully use the way to reach another tract owned by him to which the way is not appurtenant. ... The way is granted for the benefit of the particular land, and its use is limited to such land. Its use cannot be extended to other land, nor can the way be converted into a public way without the consent of the owner of the servient estate."

Here are some examples, using a plat of sections of land. Sections 1 through 15 constitute the Rafter T Ranch owned by John Wright. The County Road travels along the north line of Sections 1 through 5. Deep Reef has leased Sections 3, 4 and 9 under one lease. Later, Deep Reef leased Section 8 under another lease. Global Oil Company has separate leases covering Sections 2 and 7. The oil companies have been using ranch trails without written easements. John Wright becomes very angry at the treatment of the land and locks the gates to Section 7 and 8. Under the case law, here is the predicament faced by Deep Reef and Global in trying to reach their leases from the county road:

County Road running east west

1	2 Global Lease 1	3 Deep Reef Lease 1	4 Deep Reef Lease 1	5
6	7 Global Lease 2	8 Deep Reef Lease 2	9 Deep Reef Lease 1	10
11	12	13	14	15

- Deep Reef cannot access Section 8 (Lease 2) through Section 3, 4 or 9, despite the sections being adjacent or contiguous.
- Reef can access Section 9 through Section 3 or 4 because the land is subject to Lease 1.
- Global cannot grant Deep Reef an easement across Section 2 or 7 to reach Section 8.
- Global cannot access Section 7 through Section 2.

The landman reviewing title should be aware of these potential lockouts in advance, and he might want to advise on them so easements can be acquired before relationships sour.

Pitfall 10 – Be aware that a life estate-remainder situation may require a court-administered receivership to lease minerals

When a client consults with an attorney about granting or reserving a life estate in minerals in a will or a deed, the issues are usually (a) whether the remainder interest should be distributed on a per stirpes or per capita basis, (b) if the remainder is to be distributed per stirpes, where will the executive right be placed during the life tenancy to avoid problems leasing the minerals, (c) may the life tenant consume all or any part of the bonus and royalty appurtenant to minerals and (d) if the life tenant must preserve bonus and royalty for the remaindermen, what accounting standards, if any, will be applied to the life tenant? These may present issues that the landman must recognize and deal with. But there is one issue that may remain more or less unrecognized at first glance, until the landman begins to analyze who must sign the oil and gas lease that he has been assigned. That issue has to do with unknown or contingent heirs. To understand the problem one must first understand the meaning of the terms that lead to trouble. The word "heirs" now includes adopted children.[103] The term "per stirpes" means a lineal succession of interest in property.[104] Both terms refer to future unknown people. A remainder interest left to future unknown persons such as "heirs per stirpes" or "children" or "heirs of the body" or "issue" or "my brother's children" will create a class of vested but contingent and unascertainable remaindermen and leasing under this circumstance will be possible only through a receivership.[105] Let me repeat that in terms that highlight the problematic language:

- I devise and bequeath to my brother for life, ...
- ... with remainder to his children ...
- ... with remainder to my nieces and nephews ...
- I grant, sell and convey to John Jones, for life, with remainder to his issue ...
- I grant, sell and convey to John Jones, for life, to the heirs of Mary Smith

In each instance there is a class of remaindermen created that may increase or change during the life tenancy. In other words, until the life tenant dies, there may be more children born or a child may die leaving heirs. The landman knows that, unless the instrument creating the tenancy so provides, an oil and gas lease cannot be executed by only the life tenant. No lessee wants to see its lease terminate upon the death of a life tenant. But joinder or ratification of the oil and gas lease by existing remaindermen will not solve the problem of contingent remaindermen. Because they are contingent or unknown, because they may be born in the future, they are unavailable to ratify a lease. This state of affairs will require a receivership. Even where the life tenant is elderly and the remaindermen are children who no longer expect additional siblings to enter the class, the contention that the life tenant is no longer capable of bearing more children does not resolve the problem for the common law allows no such presumption; to the contrary, it entertains the presumption of the "fertile octogenarian."[106]

Surprisingly, this was and continues to be a rather common problem, created in no small measure by wills (some of them holographic) as well as by deeds. The solution to the problem, as stated above, is a receivership. In 1949 the Texas Legislature enacted Article 2320c, Texas Revised Civil Statutes, which provided that upon application of a person with a vested, contingent or possible interest in land subject to a contingent future interest, a district court of the county in which all or a part of the land is located may appoint a receiver responsible for development of minerals through leasing with the obligation to report to and account to the court in connection with development of the mineral estate.[107] The receiver appointed under this law may make leases, receive and hold bonus and royalty, and invest these funds to provide income to the life tenant and preserve the corpus until the remaindermen are entitled to possession of their vested interest. It is good law, but it involves attorney's fees, receiver fees, accountings, applications to lease and, worst of all, the landman may have to explain all of this to the person he or she seeks to lease.

About the Author: *Ronald D. Nickum is an attorney in private practice in Amarillo, Texas. He is a member of the Texas Bar Association, Federal Energy Bar Association, Bar Association of the Fifth Federal Circuit, Panhandle Producers and Royalty Owners Association, and the Panhandle Association of Petroleum Landmen. After earning his B.S. from Trinity University in San Antonio and his J.D. from Texas Tech University School of Law, Nickum was admitted to the State Bar of Texas in 1971; the United States Supreme Court in 1977; the U.S. Courts of Appeals, 5th Circuit, 9th Circuit, 10th Circuit in 1977; and the U.S. Tax Court in 1979.*

End Notes

[1] *Attorney at Law, Amarillo, Texas. Copies of this article are available upon e-mail request to ron@nickumlaw.com.*

[2] *Because oil and gas laws of Texas differ sometimes from its surrounding states, this article does not attempt to provide forms and commentary for other jurisdictions than Texas.*

[3] *Nickum, Mineral and Royalty Conveyances - A Set Of Forms With Commentary, 22nd Annual Oil, Gas & Energy Resources Law Course, State Bar of Texas, 2004.*

[4] *Available upon e-mail request to ron@nickumlaw.com.*

[5] *It might be just as easy to have a research firm in Austin do a UCC search.*

[6] *For information on UCC filings, see www.sos.state.tx.us/ucc/instructions.shtml.*

[7] *See Act of July 31, 1919, 36th Leg., 2d C.S., ch. 81, § 1, 1919 Tex. Gen. Laws 249 (current version at Tex. Nat. Res. Code Ann. §§ 52.171-.190 (West 2001))*

[8] *Walker, The Texas Relinquishment Act, 1 Inst. on Oil & Gas L. & Tax'n 245, 259 (1949).*

[9] *Id. at 259-260.*

[10] *117 Tex. 516, 8 S.W.2d 655 (1928).*

[11] *Cross v. Shell Oil Co., 144 Tex. 78, 188 S.W.2d 375 (1945); Greene v. Robison, 117 Tex. 516, 8 S.W.2d 655 (1928).*

[12] *State v. Durham, 860 S.W.2d 63, at 66 (Tex. 1993); Shannon v. Marmaduke, 14 Tex. 218 (1855).*

[13] *Durham, 860 S.W.2d at 66; State v. Standard, 414 S.W.2d 148, 152 (Tex.1967).*

[14] *Id. at 153.*

[15] *The language of the habendum. In deeds, the word "premises" refers only to the lands actually conveyed. In that regard, these forms depart from the older common law concept of "premises," which included the naming of the grantor and grantee, the expression of consideration, as well as a description of the land conveyed. Harris v. Strawbridge, 330 S.W.2d 911 (Tex.Civ.App.-Houston 1960, writ ref'd n.r.e.).*

[16] *712 S.W.2d 117, 118 (Tex. 1986); first articulated as such in Schlittler v. Smith, 128 Tex. 628, 630-31, 101 S.W.2d 543, 544 (1937).*

[17] *Cockrell v. Texas Gulf Sulphur Co., 157 Tex. 10, 15, 299 S.W.2d 672, 675 (1956) ("A warranty deed will pass all of the estate owned by the Grantor at the time of the conveyance unless there are reservations or exceptions which reduce the estate conveyed.").*

[18] *Harris v. Currie, 142 Tex. 93, 176 S.W.2d 302, 306 (1943). See also French v. Chevron U.S.A. Inc., 896 S.W.2d 795, at 798 (Tex. 1995) in which the Texas Supreme Court quoted the rule in Altman that a mineral estate consists of five interests, naming them, and then the court said: "A conveyance of a mineral estate need not dispose of all interests; individual interests can be held back, or reserved, in the grantor."*

[19] *Arnold v. Ashbel Smith Land Co., 307 S.W.2d 818 (Tex.Civ.App.-Houston 1957, writ ref'd n.r.e.); Bank One, Texas, National Association v. Alexander, 910 S.W.2d 530, 534 (Tex.App.-Austin 1995, writ den'd)("A 'royalty interest' consists of the right to a fractional share of the mineral production, the owner of which typically has no share in the development and executive rights relative to the mineral estate; he may not explore for the minerals himself and is not a necessary party to a lease of the mineral estate. In the ordinary case, he simply possesses the right to his specified proportionate share of production once the minerals are produced. His interest is in 'land,' but since he may not enter the premises for the purposes of exploration and development, his interest is viewed as an incorporeal interest in the land.").*

[20] *Elick v. Champlin Petroleum Co., 697 S.W.2d 1 (Tex.App.-Houston [14th Dist.] 1985, writ ref'd n.r.e.); Campbell v. Dreier, 382 S.W.2d 179, 183 (Tex.Civ.App.-San Antonio 1964, writ ref'd n.r.e.).*

[21] *Martin v. Schneider, 622 S.W.2d 620, 622 (Tex.App.-Corpus Christi 1981, writ ref'd n.r.e.); Luckel v. White, 792 S.W.2d 485, 489 (Tex.App.-Houston [14th Dist.] 1990)("A royalty interest is a subset of a mineral interest and a royalty deed conveys the royalty interest as a fee. (Albeit a fee which is far less than a fee simple absolute.) Under a royalty deed the grantee obtains possessory rights only when and if the minerals are produced and readied for market. Unlike the holder of the mineral fee who owns the minerals in place, the royalty owner may not enter the property to explore, develop or produce the minerals, nor may he allow anyone else to do so. As a further logical practice, the royalty interest owner normally takes no part*

in leasing to others and does not share in rentals or bonus payments. Consistent with his lack of mineral ownership (until brought to the surface and made marketable), the royalty interest owner enjoys 'nonparticipation' in the costs of exploration, development, production, saving, and making ready for sale."). This law is correct notwithstanding overall reversal of the case by the Supreme Court at 819 S.W.2d 459 (Tex. 1991).

[22] For a compendium of mistakes, ambiguities and errors in deeds, and how the courts resolved them, see Bruce M. Kramer, The Sisyphean Task of Interpreting Mineral Deeds and Leases: An Encyclopedia of Canons of Construction, 24 Tex. Tech L.R. 1 (1993). This is a masterful and oft-cited encyclopedia of canons of deed construction, which are the end-use tools to construe the imperfectly finished products of scriveners who didn't quite get it right.

[23] Miller v. Speed, 248 S.W.2d 250, 252 (Tex.Civ.App.-Eastland 1952, no writ); Bank One, Texas, National Association v. Alexander, 910 S.W.2d 530 (Tex.App.-Austin 1995, writ den'd), Citing 1 Howard R. Williams & Charles J. Meyers, Oil and Gas Law § 304.4, at 475 (1994 ed.) ("An instrument that grants or reserves 'the oil, gas and other minerals in, on and under' or 'in and under' described land, without further provisions relating to the minerals, creates a mineral interest.").

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

[25] Luckel v. White, 819 S.W.2d 459, 491 (Tex. 1991): "We also hold as a matter of law the interest conveyed by the Mayes-Luckel deed is singularly a royalty interest, evidenced by, (1) the repeated use of the words 'royalty interest'; (2) the lack of any reference whatsoever in the deed to 'minerals'; and, more importantly, (3) the lack of any words to indicate the interest is of anything 'in and under' the land."

[26] Watkins v. Slaughter, 144 Tex. 179, 189 S.W.2d 699 (1945)

[27] The Texas Supreme Court concluded that a royalty interest had been retained because the grantor's reservation referred to "the royalty retained herein" to be paid from production while the grantee received all delay rentals, the executive rights and all bonuses, which are the hallmarks of a mineral interest.

[28] From French v. Chevron U.S.A. Inc., 896 S.W.2d 795 (Tex. 1995).

[29] These words are commonly thought to connote minerals rather than royalty. See footnote 16 supra.

[30] The Texas Supreme Count said this was a conveyance of a mineral interest.

[31] 911 S.W.2d 531, 534 (Tex.App.-Beaumont 1995), rev'd 958 S.W.2d 183 (Tex. 1997).

[32] The Texas Supreme Court held that a royalty interest was reserved.

[33] See footnote 16, supra.

[34] Citing Altman, 712 S.W.2d at 118; Watkins, 189 S.W.2d at 700. These cases established the "four corners" rule of deed construction.

[35] Citing 1 Eugene Kuntz, A Treatise on the Law of Oil and GAs § 16.2, at 482 (1987); 1 Ernest E. Smith & Jacqueline Lang Weaver, Texas Law of Oil and GAs § 2.4(A), at 51 (1991); see Wagner Supply Co. v. Bateman, 118 Tex. 498, 18 S.W.2d 1052, 1055 (1929); see also Delta Drilling Co. v. Simmons, 161 Tex. 122, 338 S.W.2d 143, 147 (1960).

[36] Luckel v. White, 819 S.W.2d 459 (Tex. 1991) (The four corners doctrine is meant to replace all previous disparate rules of construction such as the two-grant rule and the dominance of the granting clause over other clauses, and other rules that courts used to construe deeds. Under this doctrine, the court attempts to find the intention of the parties.).

[37] Dante Alighieri, Divine Comedy, circa 1306-1321.

[38] See Caruthers v. Leonard, 254 S.W. 779 (Tex.Com.App. 1923).

[39] Garza v. Prolithic Energy Co. L.P., 2006 S.W.3rd (LWC-0592)(Tex.App.—2006)

[40] 254 S.W. 779 (Tex.Com.App. 1923).

[41] The court said that the grantees would receive their decimal of interest in any future royalty in any amount.

[42] The same type of issues were addressed by the Texas Supreme Court in Concord Oil Co. v. Pennzoil Exploration & Production Co., 966 S.W.2d 451 (Tex. 1998). The opinion was by Justice Owens, joined by Justices Phillips, Hecht and Abbot. There was a concurring opinion by Justice Enoch and a dissenting opinion by Justice Gonzalez, joined by Justices Spector, Baker and Hankinson).

[43] A sampling of commentary includes fine articles such as Richard W. Hemingway, The Law of Oil and Gas §§ 9.1-.2 (3d ed. 1991); Laura H. Burney, The Regrettable Rebirth of the Two-Grant Doctrine in Texas Deed Construction, 34 S. Tex. L.J. 73 (1993); Tevis Herd, Deed Construction and the "Repugnant to the Grant" Doctrine, 21 Tex. Tech L.Rev. 635 (1990); Stuart C. Hollimon & Robert E. Vinson, Jr., Oil, Gas, and Mineral Law, Annual Survey of Texas Law, 45 SW. L.J. 1965 (1992); Bruce M. Kramer, The Sisyphean Task of Interpreting Mineral Deeds and Leases: An Encyclopedia of Canons of Construction, 24 Tex.Tech L.R. 1 (1993); Phillip E. Norvell, Pitfalls in Developing Lands Burdened by Non-Participating Royalty: Calculating the Royalty Share and Coexisting with the Duty Owed to the Non-Participating Royalty Owner by the Executive Interest, 48 Ark. L.Rev. 933 (1995); Joseph Shade, Petroleum Land Titles: Title Examination & Title Opinions, 46 Baylor L.Rev. 1007 (1994).

[44] Luckel v. White, 819 S.W.2d 459 (Tex. 1991)

[45] The Texas Supreme Court reversed the Court of Appeals and held that the "so-called 'future lease' clause was effective to convey a one-fourth interest in all royalties as to future leases."

[46] 254 S.W. 779 (Tex.Com.App. 1923).

[47] Harris v. Currie, 142 Tex. 93, 176 S.W.2d 302, 305-06 (1943).

[48] Id.

[49] A very bad outcome from explaining a fraction of royalty reservation can be found in Remuda Oil Co. v. Wilson, 264 S.W.2d 192 (Tex.Civ.App.-Galveston 1954, writ ref'd n.r.e.).

[50] The bad law in Caruthers v. Leonard was handed down in 1923. It wasn't until 1943 that Harris v. Currie recognized implied apportionment.

[51] This rule now "well entrenched" in Texas oil and gas case law is stated in Middleton v. Broussard, 504 S.W.2d 839, 842 (Tex. 1974) thusly: "Where a fraction designated in a deed is stated to be a mineral interest in land described in the deed, the fraction is to be calculated upon the entire mineral interest"; conversely, "Where a fraction designated in a reservation clause is stated to be a mineral interest in land conveyed by the deed, the fraction is to be calculated upon the grantor's fractional mineral interest." Emphasis added by italics and bolding of words.

[52] Hooks v. Neill, 21 S.W.2d 532 (Tex.Civ.App.-Galveston 1929, writ ref'd).

[53] In reaching this result, the court ignored the words "described" and "premises" in the granting clause. To understand the point made in this part of this paper, the reader

will have to ignore that anomaly also and focus on the rules as they are now developed and explained in the hypothetical cases to follow.

[54] King v. First National Bank, 144 Tex. 583, 192 S.W.2d 260 (Tex. 1946).

[55] There's that bedeviling phrase again. In this case there is no mention of any ambiguity caused by the term. The sole issue in the case is the use of the word "conveyed."

[56] Id at 262.

[57] 504 S.W.2d 839 (Tex. 1974).

[58] "We are concerned with a royalty fraction designated in a granting clause rather than one designated in a reservation clause as was the case in Hooks, but this fact does not prevent application of the "conveyed" rule. In logic, the rule operates whether the deed grants or reserves a fractional part of an interest identified as "the land conveyed." Id at 842.

[59] Emphasis added by italics.

[60] The deed is correctly made "subject to" prior severances of mineral interests. This prevents operation of the Duhig Rule. For a full explanation of the Duhig Rule and forms to avoid its effect, see Nickum, Mineral and Royalty Conveyances — A Set Of Forms With Commentary, 22nd Annual Oil, Gas & Energy Resources Law Course, State Bar of Texas, 2004, available upon e-mail request to ron@nickumlaw.com.

[61] This outcome is explained in Ayert v. Grande Inc., 717 S.W.2d 891, 893 (Tex. 1986): "Specific rules of construction apply to cases in which a grantor owns an undivided mineral interest and reserves a fraction of the minerals under the land in the deed. If the deed reserves a fraction of the minerals under the land conveyed, then the deed reserves a fraction of the part of the mineral estate actually owned by the grantor and conveyed in the deed. Hooks v. Neill, 21 S.W.2d 532 (Tex.Civ.App.-Galveston 1929, writ ref'd). In Hooks, the grantor conveyed all of his undivided 1/2 interest in a tract of land. He then reserved "a one-thirty-second part of all oil on and under the said land and premises herein described and conveyed." The Hooks court focused on the word "conveyed" to hold that the reservation clause applied "only to the interest which [grantors] have in the land and ore which they conveyed." Hooks, 21 S.W.2d at 538."

[62] Again, this assumes a proper "subject to" clause is contained in the deed.

[63] This is the type of fact situation dealt with in Middleton v. Broussard, 504 S.W.2d 839 (Tex. 1974).

[64] See Brown v. Havard, 593 S.W.2d 939, 942, 946 (Tex. 1980) (distinguishing between conveyance of fraction of production as royalty and fraction of royalty). See also White v. White, 830 S.W.2d 767 (Tex.App.-Houston [1st Dist.] 1992, writ den'd) (deed granting "A non-participating mineral royalty equal to three-eighths (3/8) of all the oil and gas and other minerals that may be on or under and produced and saved ..." conveyed a royalty fraction rather than a fraction of royalty).

[65] Assuming, of course, that the oil and gas lease provides for a 1/8th royalty. If the royalty were 3/16ths, a 1/64th of royalty would be 1/64 x 3/16.

[66] See for example White v. White, 830 S.W.2d 767, 768 (Tex.App.-Houston 1st Dist] 1992) (A nonparticipating royalty interest equal to 3/8ths of all the oil and gas and other minerals produced and saved is a fractional royalty), citing Watkins v. Slaughter, 189 S.W.2d 699, 700 (Tex.1945); Elick v. Champlin Petroleum Co., 697 S.W.2d 1, 4 (Tex.App.-Houston [14th Dist.] 1985, writ ref'd n.r.e.).

[67] The dollar difference in royalty generated by Solutions 1 and 3 is calculated at Paragraph I.H infra.

[68] When are these low gas prices going to bottom out and climb back to early 2008 levels? One can only wait and wish. A free source of current gas prices can be found at http://tonto.eia.doe.gov/oog/info/ngw/ngupdate.asp. See also the commercial publication Inside FERC -www.platts.com/ Natural% 20Gas/Newsletters%20&%20Reports/Inside %20FERC/.

[69] City of Beaumont v. Moore, 146 Tex. 46, 202 S.W.2d 448, 453 (1947).

[70] Id.

[71] Texas & Pac. Ry. Co. v. El Paso & N. E. R.R. Co., 156 S.W. 561, 565 (Tex.Civ.App.-El Paso 1913, writ ref'd).

[72] 276 S.W. 669, at 670 (Tex.Com. App.1925).

[73] Ruiz v. Martin, 559 S.W.2d 839, 842 (Tex.Civ.App.-San Antonio 1977, nwh), citing Montgomery v. Rittersbacher, 424 S.W.2d 210 (Tex.1968); Southland Royalty Co. v. Humble Oil & Refining Co., 151 Tex. 324, 249 S.W.2d 914, 916 (1952); May v. Cities Service Oil Co., 444 S.W.2d 822 (Tex.Civ.App.-Beaumont 1969, writ ref'd n.r.e.); Guaranty Nat. Bank & Trust of Corpus Christi v. May, 395 S.W.2d 80 (Tex.Civ.App.-Waco 1965, writ ref'd n.r.e.); Standard Oil Co. of Texas v. Donald, 321 S.W.2d 602 (Tex.Civ.App.-Fort Worth 1959, writ ref'd n.r.e.); French v. George, 159 S.W.2d 566 (Tex.Civ.App.-Amarillo 1942, writ ref'd); Parker v. Parker, 144 S.W.2d 303 (Tex.Civ.App.-Galveston 1940, writ ref'd).

[74] Garza v. De Montalvo, 147 Tex. 525, 217 S.W.2d 988 (Tex. 1949).

[75] From Thomas Gilcrease Foundation v. Stanolind Oil & Gas Co., 153 Tex. 197, 266 S.W.2d 850 (1954) (emphasis in italics by the court).

[76] Montgomery v. Rittersbacher,424 S.W.2d at 212.

[77] Citing Minchen v. Fields, 162 Tex. 73, 345 S.W.2d 282 (1961); Brown v. Smith, 141 Tex. 425, 174 S.W.2d 43 (1943).

[78] See Charles B. Harris, Community Leases: Risks and Rewards, Landman, p. 20 (July/August 2009).

[79] In connection with horizontal wells, the term "kickoff point" means that point at which the wellbore is intentionally deviated from vertical. The term "penetration point" means that point where the deviated wellbore penetrates the objective formation. By the term "lateral" is meant any portion of a wellbore past the penetration point. The term "horizontal drainhole" is sometimes used interchangeably with the term "lateral." By the term "terminus" is meant the farthest point of a lateral from wellhead. See Railroad Commission of Texas Statewide Rule 86 (a)(2)-(6). Statewide Rule 86 can be found at the Texas Railroad Commission Website under Rule 3.86 or 16 Tex.Admin.Code § 3.86(a)(2000).

[80] Browning Oil Inc. v. Luecke, 38 S.W.3d 625, 634 (Tex.App.-Austin 2000).

[81] This is just an argument and a landman faced with this factual scenario must understand that no court has ruled on this particular issue.

[82] "[I]t is elementary law, stated in every textbook on the subject that a reservation or exception in favor of a stranger to a conveyance is inoperative." Joiner v. Sullivan, 260 S.W.2d 439, 440 (Tex.Civ.App.-Texarkana, 1953, writ ref'd). See also Jackson v. McKenney, 602 S.W.2d 124, 126 (Tex.Civ.App.-Eastland 1980, writ ref'd n.r.e.).

[83] This is basically the language dealt with in Joiner v. Sullivan, supra: at 439 (holding that reservation in deed that "It is understood and

agreed that all oil, gas and mineral rights in and to the within described tract of land is herein retained to grantors and their seven children, share and share alike, together with the right of ingress and egress" was ineffective to vest any title in children.).

[84] *The corollary rule is that strangers to the deed have no right to set up its recitals as estoppel. Woldert v. Skelly Oil Co., 202 S.W.2d 706 (Tex.Civ.App.-Texarkana 1947, writ ref'd n. r. e.).*

[85] *Canter v. Lindsey, 575 S.W.2d 331, 335 (Tex.Civ.App.-El Paso 1978, writ ref'd n.r.e.); Woldert v. Skelly Oil Co., 202 S.W.2d 706, 709 (Tex.Civ.App.-Texarkana 1947, writ ref'd n.r.e.).*

[86] *Deviney v. NationsBank, 993 S.W.2d 443, 451 (Tex. App.- Waco 1999, pet. denied); Reagan v Marathon Oil Co., 50 S.W.3d 70 (Tex.App.-Waco 2001).*

[87] *Harris v. Strawbridge, 330 S.W.2d 911 (Tex.Civ.App.-Houston 1960, writ ref'd n.r.e.).*

[88] *See the typical warranty deed with vendor's lien, in which the grantor first reserves a vendor's lien, and then assigns it to the financing company, which is expressly named in the instrument. Thus, one has two grants and two grantees in the deed.*

[89] *Forms for such an instrument, as well as the other situations invoked in this paper, are available in Nickum, Mineral and Royalty Conveyances — A Set Of Forms With Commentary, 22nd Annual Oil, Gas & Energy Resources Law Course, State Bar of Texas, 2004, available upon e-mail request to ron@nickumlaw.com.*

[90] *Duhig v. Peavy-Moore Lumber Co. Inc., 135 Tex. 503, 144 S.W.2d 878 (1940).*

[91] *Rosse v. Northern Pump Co., 353 S.W.2d 287, 293 (Tex.Civ.App.-Austin 1962, writ ref'd n.r.e.).*

[92] *Walker v. Foss, 930 S.W.2d 701, 707 (Tex.App.-San Antonio 1996 no writ), Citing Ernest E. Smith, The "Subject To" Clause, 30 ROCKY MTN.MIN.L.INST. 15-1, 15-2 (1985).*

[93] *Klein v. Humble Oil & Refining Co., 67 S.W.2d 911 (Tex.Civ.App.-1934), reversed on other grounds, 126 Tex. 450, 86 S.W.2d 1077 (1935), but specifically approving the holdings of the Court of Civil Appeals on the meaning and effect of the reservations and exceptions; Pich v. Lankford, 157 Tex. 335, 302 S.W.2d 645 (Tex. 1957).*

[94] *Averyt v. Grande Inc., 717 S.W.2d 891, 894 (Tex. 1986).*

[95] *The rule stated in Duhig is equally applicable to reservations as it is to grants.*

[96] *Clark v. Gauntt, 138 Tex. 558, 161 S.W.2d 270, 272 (1942)(estoppel in after-acquired title cases arises from a representation of title made by grantor in the covenant of warranty and having represented the fact of ownership, the grantor is estopped to deny that fact).*

[97] *Miles v. Martin, 159 Tex. 336, 321 S.W.2d 62, 65 (Tex. 1959).*

[98] *For a broad form subject to clause that meets the requirements of the Duhig Rule and addresses other types of title defects, see Nickum, Mineral and Royalty Conveyances — A Set Of Forms With Commentary, 22nd Annual Oil, Gas & Energy Resources Law Course, State Bar of Texas, 2004, available by e-mail request from ron@nickumlaw.com.*

[99] *Scarmardo v. Potter, 613 S.W.2d 756 (Tex.Civ.App.-Houston [14 Dist.]1981, writ ref'd n.r.e.). In this case the court held that since Potter, in his deed to Scarmardo, failed to mention a previously reserved 1/2 interest, and only reserved a 1/8th mineral interest in himself, Potter breached his warranty to Scarmardo at the very time of the execution and delivery of the deed "for the deed warrants the title to the surface estate and to an undivided 7/8ths interest in the minerals." Potter thereby purported to convey to Scarmardo an undivided 7/8ths interest at a time when he only owned 1/2. Under Duhig, Scarmardo is entitled to all of Potter's reserved interest. Since the reserved interest of Potter is insufficient to make Scarmardo whole, Scarmardo would have a cause of action in money damages for breach of warranty for an additional undivided 3/8ths of the mineral interest.*

[100] *Jordan v. Rash, 745 S.W.2d 549, 553 (Tex. App.-Waco 1988, no writ). See also Holmstrom v. Lee, 26 S.W.3d 526, at 533 (Tex. App.-Austin 2000).*

[101] *Bains v. Parker, 143 Tex. 57, 182 S.W.2d 397, 399 (1944).*

[102] *403 S.W.2d 354, 359 (Tex.1966).*

[103] *Tex. Fam. Code § 162.017 provides that an order of adoption creates the parent-child relationship between the adoptive parent and the child for all purposes and that an adopted child is entitled to inherit from and through the child's adoptive parents as though the child were the biological child of the parents. Subsection (c) states that "The terms 'child,' 'descendant,' 'issue,' and other terms indicating the relationship of parent and child include an adopted child unless the context or express language clearly indicates otherwise." Likewise, Tex. Prob. Code § 40 provides that "... for purposes of inheritance under the laws of descent and distribution, an adopted child shall be regarded as the child of the parent or parents by adoption, such adopted child and its descendants inheriting from and through the parent or parents by adoption and their kin the same as if such child were the natural child of such parent or parents by adoption, and such parent or parents by adoption and their kin inheriting from and through such adopted child the same as if such child were the natural child of such parent or parents by adoption." While this statutory language applies to wills and inheritance, the same results are reached through equity and rules of construction employed by courts addressing the same issue.*

[104] *"The term 'per stirpes' denotes the type of distribution required by the common law of descent, each generation representing its parent and taking only what its parent would have taken if living.'" Kritser v. First National Bank of Amarillo, 463 S.W.2d 751, 757 (Tex.Civ.App.-Amarillo 1971).*

[105] *Kemp v. Hughes, supra.*

[106] *Frost National Bank of San Antonio v. Newton, 554 S.W.2d 149 (Tex. 1977) (holding that under the common law "fertile octogenarian rule," that is, that a person is conclusively presumed to be able to have issue as long as he or she is alive, is now experiencing a trend toward relaxing the doctrine so as to allow rebuttal of the presumption, Citing Restatement of Property § 274 (1940) which recognizes the presumption of fertility but recognizes that this presumption can be rebutted by relevant evidence as to such person and by past experience concerning births to persons of like age and physical condition. But it must again be pointed out, the forms are meant to keep people out of court, not guide them through a declaratory judgment action.*

[107] *That statute is now codified as Section 64.092, Texas Civil Practice and Remedies Code.*