PITFALLS IN TITLE EXAMINATION: THE INTRICATE RELATIONSHIPS BETWEEN REAL PROPERTY RIGHTS AND OWNERSHIP

By Celia C. Flowers and
Melanie S. Reyes-Bruce

In Texas, the surface and minerals, coexisting on a particular tract of land, are not inextricably bound and may therefore be severed into separate estates.[1] When the owner of a real-property estate conveys the property without exceptions or reservations, the grantee of the conveyance acquires the same real-property title that the grantor had, which necessarily includes the rights to all minerals.[2] However, the owner of a real-property estate may at any time convey, or reserve in a conveyance, all or any part of the owner's interest in the minerals.[3] When such a severance of the surface and minerals estates occurs, the mineral estate becomes the dominant estate and the surface estate becomes the subservient estate.[4]

The separate mineral and surface estates created by grant or reservation are considered fee simple absolutes and thus each may be freely conveyed, transferred, and/or assigned.[5] The general principles of real property law apply equally to each of these estates.[6] Thus, the mineral estates possess all the incidents and attributes of an estate in land.[7] As such, the mineral estate,

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1 *Moser v. U.S. Steel Corp*., 676 S.W.2d 99 (Tex. 1984).

2 *Robles v. Robles*, 965 S.W.2d 605 (Tex. App.---Houston [1st Dist.] 1998 pet. denied).

3 *Altman v. Blake*, 712 S.W.2d 117 (Tex. 1986).

4 *Id.; see also Property Owners of Leisure Land, Inc. v. Woolf & Magee, Inc*., 786 S.W.2d 757 (Tex. App.---Tyler 1990, no writ).

5 *Barfield v. Holland*, 844 S.W.2d 759 (Tex. App. Tyler 1992, writ denied).

6 *Id.*

7 *Acker v. Guinn*, 464 S.W.2d 348 (Tex. 1971); *Hill v. Heritage Resources, Inc*., 964 S.W.2d 89

like the surface estate, can be severed into various rights amongst various owners. These severances of various real property rights create a landmine of issues for title examiners, landmen, right-of-way agents, and attorney's alike. This paper will address some of this pitfalls as arise in specific relationships between owners of distinct interests, pooling and unitization, seismic permitting, and protecting the surface estate.

I. REAL PROPERTY ESTATES

A. Specific Components of the Surface Estate

A severance of "minerals" includes: "all substances within the ordinary and natural meaning of that word, whether their presence or value is known at the time of severance."[8] Certain substances, however, belong to the surface estate as a matter of law.[9] These include building stone, limestone, caliche, surface shale, water, sand, gravel, and near-surface lignite, iron, and coal.[10] With respect to lignite specifically, lignite within 200 feet of the surface is part of the surface estate, and a reservation or conveyance covering any interest in the "oil, gas, and other minerals" will therefore not include near-surface lignite unless the instrument creating such interest expressly provides otherwise.[11]

(Tex. App. ---El Paso 1997, review denied); *Mapco, Inc. v. Carter*, 808 S.W.2d 262 (Tex. App.---Beaumont 1991*) judgment rev'd in part on other grounds*, 817 S.W.2d 686 (Tex. 1991*); see also Ely v. Briley*, 959 S.W.2d 723 (Tex. App.---Austin 1998, no pet.).

8 *Moser*, 676 S.W.2d at 102.

9 *Id.; see also Reed v. Wylie*, 597 S.W.2d 743 (Tex. 1980).

10 *Moser*, 676 S.W.2d at 102, *Reed*, 597 S.W.2d at 746; *Gifford-Hill & Co., Inc. v. Wise County Appraisal Dist.*, 827 S.W.2d 811 (Tex. 1991).

11 *Farm Credit Bank of Texas v. Colley*, 849 S.W.2d 825 (Tex. App. ---Texarkana 1993, writ denied); *Hobbs v. Hutson*, 733 S.W.2d 269 (Tex. App. ---Texarkana 1987, writ denied).

This same analysis, however, is not necessarily applicable to conveyances between the State of Texas and private parties.[12] Specifically, conveyances by the State of Texas to a private party must be construed according to the intent of the Legislature.[13] Thus, if the Legislature intended to convey the surface estate and retain minerals, the mining of which would destroy the surface, then the court must give effect to that intention.[14]

B. Specific Components of the Mineral Estate

The mineral estate consists of five component parts: 1) the right to delay rentals; 2) the right to bonus payments; 3) the right to royalty payments; 4) the right to lease (the executive right); and 5) the right to develop.[15] The specific mineral interest(s) conveyed or reserved in a particular grant is to be determined from all the provisions of the conveyance instrument.[16]

II. DETERMINING OWNERSHIP OF PARTICULAR MINERAL INTERESTS

Each of the five component parts of the mineral estate is a separate, distinct property interest that may be conveyed or may be reserved in connection with a conveyance of a mineral interest.[17] An unqualified reservation of the mineral estate reserves the entire bundle of property rights accorded to the estate.[18] The separate conveyance, however, of the mineral estate's various component parts has led to significant problems in the real estate and oil and gas

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

13 *Id.*

14 *Id.*

15 *Altman v. Blake*, 712 S.W.2d 117, 118 (Tex.. 1986).

16 *Temple-Inland Forest Products Corp. v. Henderson Family Partnership, Ltd*., 958 S.W.2d 183 (Tex. 1997).

17 *Id.; see also Briley*, 959 S.W.2d 723.

18 *Briley*, 959 S.W.2d 723.

industries.[19] This is partially due to antiquated and/or poorly drafted conveyance instruments, which do not clearly reflect and define the components being transferred, and partially due to problems arising from the practical application of case law construing mineral conveyances.

A. Distinguishing Mineral Interests and Royalty Interests

A "royalty interest" is generally defined as the landowner's share of production, free of the expenses of production, but usually subject to postproduction costs, including taxes, treatment costs to render it marketable, and transportation costs.[20] As opposed to the broader "mineral estate," a royalty interest is considered a "non-possessory" interest in the larger mineral estate, and thus, the owner of a royalty interest has no legal right to use and possess the property.[21] In addition, the same instrument may convey an undivided portion of the mineral estate and a separate royalty interest, and the royalty interest conveyed may be larger or smaller than the interest conveyed in the minerals in place.[22]

It is important to note that like the royalty interest, a reservation other specific mineral component parts, such as a reservation of the right to delay rentals and/or the right to bonus, is not inconsistent with the conveyance of a mineral interest and therefore does not relegate the interest conveyed to a mere royalty interest.[23] In fact, the granting of the other rights and the

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19 *See* Kuntz, Law of Oil and Gas, Chapter 16 "Construction of Instruments Creating Interests in Oil and Gas, § 16.2 (2007); *see also* The Law of Pooling and Unitization, Chapter 7 "Methods of Pooling," § 7.05, (2006 3rd Edition); *See also* Williams, "Stare Decisis and the Pooling of Nonexecutive Interests in Oil and Gas," 46TEX. L. REV. 1013 (1968).

20 *Heritage Resources, Inc. v. NationsBank*, 939 S.W.2d 118 (Tex. 1996); *Temple-Inland Forest Products Corp*., 958 S.W.2d 183; *Enron Oil & Gas Co. v. Joffrion*, 116 S.W.3d 215 (Tex. App.Tyler 2003).

21 *Concord Oil Co. v. Pennzoil Exploration and Production Co*., 966 S.W.2d 451 (Tex. 1998); *Luckel v. White*, 819 S.W.2d 459 (Tex. 1991).

22 *White*, 819 S.W.2d 459.

23 *French v. Chevron USA, Inc*., 871 S.W.2d 276 (Tex. App.---El Paso 1994), *judgment aff'd*, 896 S.W.2d 795 (Tex. 1995); *Prairie Producing Co. v. Schlachter*, 786 S.W.2d 409 (Tex. App. ---Texarkana 1990, writ denied).

reservation of these rights would be inconsistent with the conveyance of a mere royalty interest.[24] Conversely, a grant of a royalty interest, without any further grant, would not convey an interest in delay or other rentals, bonus payments, or the executive right.[25] Thus a royalty interest is simply a mineral interest stripped of appurtenant rights other than the right to receive royalties.[26]

B. Pooling, Unitization, Ratification, and Duties owed

One of the most complex areas that has arisen with respect to the severance of the mineral estate relates to the ability of a mineral owner to create royalty interests in one party while giving the power to lease to another.[27] When the executive right to lease is severed from the rest of the mineral estate, a fiduciary duty arises between the executive owner and the non-executive owner.[28] The executive owes a duty of "utmost good faith" to the non-executive in dealing with leasing the mineral interests.

In addition, a prevailing practice in the oil and gas industry is the practice of pooling and unitization. Pooling is the joining together of small tracts or portions of tracts for the purposes of: 1) having sufficient acreage to receive a well-drilling permit, and 2) sharing production by interest owners in such a pooled unit.[29] Similarly, unitization is the consolidation of mineral or

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24 *Schlachter*, 786 S.W.2d 409.

25 *Altman v. Blake*, 712 S.W.2d 117 (Tex. 1986); *Concord Oil Co. v. Pennzoil Exploration and Production Co*., 966 S.W.2d 451 (Tex. 1998); *French*., 896 S.W.2d 795.

26 *French*., 896 S.W.2d 795.

27 *See id.*

28 *Manges v. Guerra*, 673 S.W.2d 180, 183-84 (Tex. 1984); *Mims v. Beall*, 810 S.W.2d 876, 878 (Tex. App.---Texarkana 1991, no writ).

29 *see* Williams & Meyers Oil and Gas Law 203 (2006 Matthew Bender); R. Sullivan, Handbook of Oil & Gas Law 308 (1955); *See also Whelan v. Manziel*, 314 S.W.2d 126 (Tex. Civ. App.---Texarkana,1958, writ ref'd n.r.e.).

leasehold interests, covering all or part of a common source of supply, in an effort to maximize production by efficiently draining the reservoir and utilizing the best engineering techniques that are economically feasible.[30] Thus, because it is often more economically feasible to pool/unitize, oil and gas companies typically include pooling and/or unitization clauses in oil and gas leases when leasing from the mineral estate owner.

Texas law, however, complicates a lessee's ability to make use of the pooling/unitization clause when the components of the mineral estate are divided amongst executive owners and non-executive owners. Specifically, Texas law holds that when one party owns the executive right to grant a lease to an oil and gas company for the development of a particular tract of land, the executive's power does not extend to the right to pool/unitize the non-executive's interest.[31] Stated another way, the holder of executive mineral rights cannot pool, and thereby bind, the interests of a royalty owner without the royalty owner's consent.[32]

Unfortunately, Texas courts often confuse terminology and interchange the phrases "non-participating mineral interest" and "non-participating royalty interest." In such cases, it becomes necessary to look at the conveyance language of the instrument creating the interest to determine what is actually owned. For instance, if a court opinion discusses a "non-participating royalty interest," but the interest owned includes rights to bonuses and/or rentals, the interest owned, in reality, is a "non-participating mineral interest." The erroneous use of terminology is important to consider when dealing with the rights and obligations of a non-participating interest owner (as demonstrated below).

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30 Williams & Meyers Oil and Gas Law 2-3; R. Sullivan, Handbook of Oil and Gas Law 368 (1955).

31 *Montgomery v. Rittersbacher*, 424 S.W.2d 210, 213 (Tex. 1968).

32 *See id; see also MCZ, Inc. v. Triolo*, 708 S.W.2d 49, 53 (Tex. App.---Houston [1st Dist.] 1986, writ ref'd n.r.e.).

As noted, Texas law is well-established that a "non-participating royalty interest" owner must ratify a pooling clause in an oil and gas lease in order for the pooling clause to bind the non-participating royalty owner's interest.[33] Based upon a reading of the relevant case law, the same rule appears to apply to a "non-participating mineral interest" owner. Specifically, in the case of *Michen v. Fields*, the Texas Supreme Court reasserted its prior holding that a "non-participating royalty interest" could not be pooled or unitized without the "non-participating royalty interest" owner's consent.[34] The facts in *Michen*, however, involved a "non-participating mineral interest" --- not solely a "non-participating royalty interest."[35]

Thus, in the context of whether an executive mineral interest owner can bind a non-executive owner's interest with a pooling clause, the Texas Supreme Court does not make a distinction between "non-participating royalty interests" and "non-participating mineral interests." Regardless of what non-participating component(s) of the mineral estate are owned, the non-participating owner must consent, or otherwise ratify, a pooling clause of a lease in order for that clause to bind the non-participating owner's interest. The rational behind this rule is that pooling constitutes a cross-conveyance of the respective interests. The essence of the cross-conveyance theory is that the holder of the non-executive interest (be it non-participating royalty or non-participating mineral) does not intend to give the executive the right to convey his or her interest to another through a communitized lease or pooling clause. Accordingly, the creation of a non-executive interest, under Texas law, does not ipso facto create a power to pool or unitize

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33 *Michen v. Fields*, 345 S.W.2d 282, 284 (Tex. 1961); *Archer Co. v. Webb*, 338 S.W.2d 435 (Tex. 1960); *Brown v. Smith*, 174 S.W.2d 43 (Tex. 1943); *MCZ, Inc. v. Triolo*, 708 S.W.2d 49, 53 (Tex. App.---Houston [1st Dist.] 1986, writ ref'd n.r.e.).; *Nugent v. Freeman*, 306 S.W.2d 167, 170 (Tex. Civ. App.---Eastland 1957, writ ref'd n.r.e.)

34 *Michen*, 345 S.W.2d at 284 (although the Court refers to the interest at issue as a "non-participating royalty interest," upon closer inspection of the facts, the interest also include the right to bonuses and delay rentals, and thus, in actuality, was a "non-participating mineral interest.")

35 *See id.*

that interest. Accordingly, consent or ratification is necessary before the non-participating owner is bound by the pooling and/or unitization.

The practical problems associated with Texas law on ratification and pooling arise, if a lessee, under an existing lease, determines that it is more economical to pool/unitize the lease, but the executive mineral owner's consent is not enough. The lessee must get individual ratifications from the non-executive interest owners prior to pooling/unitization. Likewise, if the lessee is seeking to acquire a lease on un-leased property, it generally attempts to obtain stipulations on pooling/unitization from the non-executive interest owners prior to leasing. This is so because the lessee will not want to enter into a lease in a situation where a non-executive interest owner has the ability to prevent future pooling.

The failure of a non-executive interest owner to consent to pooling/unitization, therefore, effectively discourages oil and gas companies from leasing.[36] The balkanization of the mineral estate into executive and non-executive interests creates a situation where non-executive owners can "'hold out' for 'extortion'-type payments in order for them to sign a pooling agreement."[37] The transaction costs increase, in extreme cases, sufficiently prevents the development of the property, but even in ordinary cases, the transaction costs will invariably increase the development costs.[38]

A similar problem arises if a particular lease within a unit, or potential unit, contains limitations, such as after a specified number a years, the lessee must obtain consent from the

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36 *See* Kuntz, Law of Oil and Gas, Chapter 16 "Construction of Instruments Creating Interests in Oil and Gas, § 16.2 (2007); *see also* The Law of Pooling and Unitization, Chapter 7 "Methods of Pooling," § 7.05, (2006 3rd Edition); *See also* Williams, "Stare Decisis and the Pooling of Nonexecutive Interests in Oil and Gas," 46TEX. L. REV. 1013 (1968).

37 The Law of Pooling and Unitization, Chapter 7 "Methods of Pooling," § 7.05, (2006 3rd Edition).

38 The Law of Pooling and Unitization, Chapter 7 "Methods of Pooling," § 7.05, (2006 3rd Edition).

lessor to create a new unit or modify/amend an existing unit. The lessee is then faced with the same "hold-out" problem described above. A lease taken 30 years ago, during an economic downturn in the oil and gas industry for minimal consideration, might contain a 25-year pooling limitation. In the height of a current industry boom or the discovery of another lucrative zone 25 years later, the lessee is married to the pooling limitation and therefore cannot pool without the lessee's consent/ratification. The lessee may now demand current market lease terms, higher royalty payments, and the like in exchange for his consent. The lessee is once again subject to extortion-type deals in order to produce the estate.

Hence, the interpretation of a particular mineral conveyance could potentially render a the mineral estate unusable due to competing and conflicting interests amongst owners that will deter oil and gas companies from leasing and/or pooling. These consequences must be considered in light of Texas contract construction law. Specifically, Texas courts construe agreements between parties "from a utilitarian standpoint bearing in mind the particular business activity sought to be served and will avoid when possible and proper a construction which is unreasonable, inequitable, and oppressive."[39] In other words, Texas courts will not construe agreements to achieve absurd results.[40]

C. Horizontal and Vertical Severances

Another particularly gruesome area of property right severances exists with respect to ownership of the different mineral zones or horizons underlying the surface. Like other real property interests, mineral estates can be severed and divided by horizons. This type of severance gives further rise to its own set of quirky problems. One such problem lies in

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39 *Frost Nat. Bank v. L & F Distributors, Ltd*., 165 S.W.3d 310, 311-12 (Tex. 2005) (citing *Reilly v. Rangers Mgmt., Inc.,* 727 S.W.2d 527, 530 (Tex.1987).

40 *Illinois Tool Works, Inc. v. Harris*, 194 S.W.3d 529, 533 (Tex. App.---Houston [14th Dist.] 2006, no pet.).

terminology itself. Legal professionals and oil and gas industry professionals do not always use the terms "vertical severance" and "horizontal severance" to mean the same things, and hence, there is often some confusion when this issue is discussed.

For purposes of this discussion, "vertical severance" is defined as: "A conveyance of all, or some portion, of the minerals in a portion of a tract subject to unified ownership or lease, e.g., a conveyance of minerals or of the leasehold in the SE ¼ of a section of land subject to unified ownership or lease."[41] A "horizontal severance" is defined as: "A conveyance of all, or some portion, of the minerals above or below or between specified depths, or in a given stratum or horizon, e.g., a conveyance of the minerals in the Ellenberger formation, or a conveyance of all minerals at a depth greater (or less) than 4000 feet beneath the surface."[42] A Pugh clause is a type of pooling provision that provides that drilling operations on or production from a pooled unit shall maintain the lease in force only as to lands included within such units.[43] Whether a Pugh clause effectuates a vertical severance, horizontal severance, or both is a question of great significance when evaluating mineral leasehold estates.

Unfortunately, Texas law has not completely flushed out this area; thus, it is necessary to refer to law from other jurisdictions, and how Texas has treated this persuasive authority, in order to evaluate the associated problems. Oklahoma law holds that a traditional Pugh clause works only as a vertical severance.[44] Thus, after the expiration of a lease's primary term, a producing well in one horizon holds production as to all horizons within the pooled acreage. The estate is severed vertically, but not horizontally. Conversely, Kansas law and the 10th Circuit

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41 Williams & Meyes, "Manual of Oil and Gas Terms," p. (11th Edition 2000).

42 Williams & Meyes, "Manual of Oil and Gas Terms," p. 500 (11th Edition 2000).

43 Williams & Meyes, "Manual of Oil and Gas Terms," p. 885 (11th Edition 2000).

44 *Rist v. Westhoma Oil Company*, 385 P.2d 791 (Okla.1963).

take the opposite approach. According to Kansas and 10th Circuit case law, a Pugh clause severs both vertically and horizontally. Thus, after the primary term, a producing well holds production only in the producing horizon w/in the pooled acreage.[45]

Texas law analyzing these two mutually exclusive positions has taken the position that the existence of a horizontal severance is wholly dependant upon the specific language of the lease. Generally:

> After reviewing the subject lease in its entirety, we . . . find no language to indicate that the provisions of the Pugh clause in terms of "land" and "number of acres covered hereby and included in such unit or units" was to apply or even recognize other than the customary application of vertical severance. We also note that the parties could have made reference to partial consolidation or pooling of separate horizontal structures, stratas or depths by appropriate terms in the lease, but they failed to do so.[46]

Thus, Texas courts have refused to create a bright-line rule. Instead, Texas courts look to the individual lease(s) involved on a case-by-case basis.

Specifically, In *Gibson Drilling Co. v. B & N Petroleum Inc*., the court, after review of the lease language involved, held that the language in a particular lease effectuated a horizontal severance.[47] The majority of the *Gibson* leases contained various references to depth limitations, such as through: 1) explicit reservations within the lease, 2) the granting clauses and primary terms, and 3) the pooling clause's express allowance to unitize certain depths. The *Gibson* lessee attempted to rely on Oklahoma law and the Corpus Christi appellate case, *Friedrich v. Amoco Production Company*, arguing these cases applied to the disputed lease language because the Pugh clause in *Gibson* did not, in and of itself, reference horizontal severances. The court, in

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45 *Rogers v. Westhoma Oil Company*, 291 F.2d 726 (10th Cir.1961).

46 *Friedrich v. Amoco Production Co.*, 698 S.W.2d 748, 754 (Tex. App.--Corpus Christi 1985, no writ) *(citing: Rist v. Westhoma Oil Company*, 385 P.2d at 795; *See Southland Royalty Company v. Humble Oil & Refining Company*, 249 S.W.2d 914 (1952).

47 703 S.W.2d 822 (Tex. App.-Tyler 1986, writ refused n.r.e.).

reading the entire lease and unit declaration disagreed:

> These cases are clearly distinguishable on their facts. In both *Friedrich* and *Rist*, the original lease made no horizontal severances of the oil and gas in place. The lessees did so by assignments, severing the oil and gas estate into two horizons: in *Rist*, one above sea level and the other below sea level, and in *Friedrich*, one from the surface to a depth of 1298 feet, and one at all depths below 1298 feet. In both cases, the courts held that production of the leased substances from one horizon kept the lease in force as to all horizons. Such is not the case before us. The leases here involved each made horizontal divisions of the oil and gas estate underlying the common tracts.[48]

Clearly the difference between *Friedrich* and *Gibson* is the numerous references within the *Gibson's* leases to horizontal division and the total lack of reference to horizontal division in *Friedrich*. Unfortunately, many leases fall somewhere between the leases in *Friedrich* and *Rist* and the leases in *Gibson*.

For example, a lease, like that in *Friedrich* and *Rist*, contains a granting clause, primary term, and Pugh clause that are not limited to horizons, depths, or stratums. However, this same lease's pooling clause expressly provides that any lands can be pooled to any depths on the leased premises. The lease further specifies how royalties will be divided *in the event a unit is limited to certain depths and horizons*. Would such a lease fall within the *Rist/Friedrich* evaluation and solely effectuate a vertical severance?

The answer to this question is unclear. *Friedrich* states: "The parties could have made reference to partial consolidation or pooling of separate horizontal structures, stratas or depths by appropriate terms in the lease, but they failed to do so." Although not to the extent of that language presented in Gibson, the above-described hypothetical lease does make reference to the parties' ability to partially consolidate. Does this partial consolidation reference place the hypothetical lease outside the *Friedrich* analysis and into the *Gibson* analysis? If not, would the partial consolidation reference, coupled with depth limitation language in the corresponding unit

48 *See id.*

declaration, increase the likelihood of a *Gibson* application?

Herein lies the problem with a "case-by-case" analysis. The actual "Pugh clause" in the hypothetical does not effectuate a horizontal severance, in and of itself, but read together with the pooling clause and unit declaration, the hypothetical lessor has a good argument for a horizontal severance. The lessee's argument against same would be that 1) there is no express reservation of depths to the lessors, 2) the granting clause and primary term make no reference to horizons, depths, or stratas, and 3) the Pugh clause makes no reference to horizontal severance. Nevertheless, the parties are in unchartered territory because of the "gray area" between Texas cases.

III. USE OF THE SURFACE ESTATE BY THE MINERAL ESTATE OWNER

As previously stated, the rights of the mineral estate to explore and develop are said to be dominant over the rights of the surface estate. In the absence of express contractual language to the contrary, the mineral estate owner and/or lessee has the right to use so much of the surface that is reasonably necessary for mineral exploration and development purposes, including geophysical operations.[49] However, those rights must be exercised with due regard for the rights of the surface owner.[50]

A. Limitations on Surface Use

Typically the granting clause of the oil and gas lease contains a broad grant of specific activities that the mineral lessee is authorized to conduct. Limitations may be placed on the mineral lessee's right to use the surface of the leased premises by specific contractual terms, often attached to the lease as a rider. In addition to any contractual limitations that may be

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49 *Ball v. Dillard*, 602 S.W.2d 521 (Tex. 1980); *Phillips Petroleum Co. v. Cowden*, 241 F.2d 586 (5th Cir. 1957).

50 *Gulf Production Co. v. Continental Oil Co.*, 139 Tex. 183, 132 S.W.2d 553 (Tex. 1971).

placed on the lessee's activities, case law requires that the lessee must not use more land than is reasonably necessary to conduct its exploration and production activities, and the lessee must not be negligent in its use of the surface.[51]

Reasonable use includes the right to ingress and egress upon the land for exploration and production of oil and gas.[52] Reasonable use further includes the right for the mineral estate owner to select the timing of drilling operations.[53] As stated earlier, the mineral lessee must exercise its rights to use the surface of the land with due regard to the rights and uses of the surface owner.[54] The concept of due regard has been articulated by the Texas courts as the "accommodation doctrine."

i. Contractual Provisions

The language of the contractual provisions of the oil and gas lease must always be reviewed for any specific damage provisions or other limitations on the use of the surface of the property. The contractual provisions are controlling and dictate the mineral lessee's rights and obligations. The granting clause of the oil and gas lease contains the required words of grant to create an interest in the lessee.[55] A typical granting clause will set forth broad rights of the lessee to conduct exploration and development. The following clause is a typical granting clause taken from the Pound Printing & Stationery Company, Producers 88 (4/76) Revised Form:

> Lessor in consideration of ____Dollars ($_____), in hand paid, of the royalties herein provided, and of the agreements of Lessee herein contained, hereby grants, leases and lets exclusively unto Lessee for the purpose of investigating, exploring,

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51 *Harris v. Currie*, 176 S.W.2d 302, 305 (Tex. 1943).

52 *Ball v. Dillard*, 602 S.W.2d 521, 523 (Tex. 1980).

53 *Robinson Drilling Co. v. Moses*, 256 S.W.2d 650, 652 (Tex. Civ. App.—Eastland 1953, no writ).

54 *Gen. Crude Oil Co. v. Akien*, 344 S.W.2d 668, 669 (Tex. 1961).

55 Williams & Meyers, Manual of Oil and Gas Terms, 8th Ed. 1991.

> prospecting, drilling and mining for and producing oil, gas and all other minerals, conducting exploration, geologic and geophysical surveys by seismograph, core test, gravity and magnetic methods, injecting gas, water and other fluids, and air into subsurface strata, laying pipe lines, building roads, tanks, power stations, telephone lines and other structures thereon and on, over and across lands owned or claimed by Lessor adjacent and contiguous thereto, to produce, save, take care of, treat, transport and own said products, and housing its employees, the following described land in _____ County, Texas, to-wit:...

Such broad language of the granting clause has been the industry's attempt to describe all uses which may be likely made by the lessee. Case law cited herein further supports all reasonable uses necessary for the lessee to explore and produce the property.[56]

The mineral owner may include special provisions or "riders" when the oil and gas lease is executed that provide for certain surface damages or otherwise enlarge the rights of the surface owner. A surface use agreement may also be included in a conveyance or reservation of oil and gas interests. Many of these riders and surface use agreements place restrictions on how the surface is to be used for oil and gas operations. Like the lease itself, the riders and any ancillary agreements are construed according to the written provisions. For example, riders and ancillary agreements may require that pipelines laid pursuant to the lease are to be buried below plow depth, that a well cannot be drilled within a specified distance of buildings, or even totally prohibit the use of the surface for drilling.

Other typical riders may require that operations not be conducted until certain conditions are met, such as giving notice to or obtaining permission from the current surface owner. Likewise, many riders set out certain obligations that must be met once operations are completed such as the obligation to restore the land or remove the equipment. In addition, some older oil

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56 *Harris*, 176 S.W.2d 302, 305 (Tex. 1943); *Ball v. Dillard*, 602 S.W.2d 521, 523 (Tex. 1980); *Robinson Drilling Co. v. Moses*, 256 S.W.2d 650, 652 (Tex. Civ. App.—Eastland 1953, no writ); *Gen. Crude Oil Co. v. Akien*, 344 S.W.2d 668, 669 (Tex. 1961).

and gas lease forms and many special riders require that the surface owner be compensated for specific surface damages caused by the lessees's operations such as damage to growing crops, fences and/or timber. Sometimes these specific damage clauses require payments for "damage to improvements." This broad reference does not appear to specifically require that the improvements be physically damaged and thus gives rise to the opportunity for the surface owner to argue that it includes any reduction in market value the improvements may suffer as a result of the lessee's operations on the property. Other clauses are so specific that they set out schedules for the payment of certain amounts for damages for certain types of activities conducted by the lessee.

ii. Case Law on Surface Use Limitations

In addition to the above contractual limitations, case law requires the mineral lessee must use only so much of the surface as is reasonably necessary for the exploration and production of the minerals. Further, the mineral owner must no be negligent in its use of the surface. Absent some express contractual provision, the surface owner has no right to recover from the mineral lessee for surface damage unless the surface owner can prove either specific acts of negligence or that more of the land was used by the lessee than was reasonably necessary.[57]

The law appears to be in the lessee's favor. However, in practice, every attorney who represents surface owners in disputes over surface damages knows he must claim the lessee was negligent or used more land than was necessary. Excessive use and negligence are questions of fact for a jury and is not determined by the court.[58] Therefore, it is sufficient that the owners

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

58 *Humble Oil & Refining Co. v. Whitten*, 427 S.W.2d 313 (Tex. 1968); *Brown v. Lundell*, 344 S.W.2d 863 (Tex. 1961).*Elliff v. Texon Drilling Co*., 210 S.W.2d 558 (Tex. 1948); *Lone Star Gas Co. v. McGuire*, 570 S.W.2d 229 (Tex. Civ. App.---Waco 1978, no writ); *Willey v. Vincik*, 458 S.W.2d 236 (Tex. Civ. App. ---Corpus Christi 1970, no writ); *Robinson Drilling Co. v. Thomas*, 385 S.W.2d 725 (Tex. Civ. App. ---Eastland 1964, no writ); *Hudson v. West Central* Drilling Co., 195 S.W.2d 387 (Tex. Civ. App. ---Eastland

simply claim that the lessee violated these duties to enable the owner to file a lawsuit. Lawsuits such as these result in a loss of money by the lessee to defend himself, and the lessee has no summary legal proceeding in which to resort. Much to the landowner's ultimate dismay, thus far, the courts have found negligence in relatively few cases.[59] Most of the instances where negligence was found involved saltwater pollution of either the surface or of fresh water. The courts have taken a very liberal view of what actions are "reasonable" on the part of lessees.

iii. Due Regard and the Accommodation Doctrine

The mineral estate owner's right to use the surface is further limited by the rule of "due regard." Specifically, the mineral estate owner must conduct his activities with due regard for the surface estate.[60] Out of the concept of "due regard," Texas courts have developed what is presently referred to as "the accommodation" doctrine and/or "the alternative means" doctrine. The accommodation doctrine was first articulated by the Texas Supreme Court in the case of *Getty Oil Co. v. Jones*.[61]

In *Getty*, the surface-estate owner had installed a self-propelled irrigation system that could only clear surface obstructions up to 7-feet tall. Getty Oil later drilled two wells with pumping units over 17-feet tall. The pumping units' height interfered with and precluded the surface-estate owner from using the irrigation system. The court found that other oil and gas companies in similar situations were placing pumping units in cellars or utilizing hydraulic

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1946, writ refused n.r.e.); Sinclair Prairie Oil Co. v. Perry, 191 S.W.2d 484 (Tex. Civ. App. ---Texarkana 1945, no writ);

59 *See id*; see also *Oryx Energy Co. v. Shelton*, 942 S.W.2d 637 (Tex. App. ---Tyler 1996, no pet.); *Currey v. Ingram*, 397 S.W.2d 484 (Tex. Civ. App. Eastland 1965, writ refused n.r.e.); *Texaco, Inc. v. Spires*, 435 S.W.2d 550 (Tex. Civ. App. Eastland 1968, writ refused n.r.e.).

60 *Gen. Crude Oil Co. v. Akien*, 344 S.W.2d 668, 669 (Tex. 1961).

61 470 S.W.2d 618, 622 (Tex. 1971).

pumping units.[62]

In balancing the equities, the Texas Supreme Court formulated the accommodation doctrine, which holds:

> [w]here there is an existing use by the surface owner which would otherwise be precluded or impaired, and where under the established practices in the industry there are alternatives available to the lessee whereby the minerals can be recovered, the rules of reasonable usage of the surface may require adoption of an alternative by the lessee.[63]

The accommodation doctrine recognizes a greater duty on the mineral lessee than previously imposed. The doctrine does not, however, stand for the proposition that the surface estate is now the dominant estate, nor that the mineral lessee must, at all costs, avoid interference with the surface owner's use.[64] In fact, if there is no reasonable alternative to the one complained of by the surface owner and the activity is consistent with industry standards, the mineral estate owner is entitled to proceed.[65] Moreover, the burden of satisfying an accommodation doctrine claim is on the surface estate owner.

Since *Getty*, case law further defining the accommodation doctrine has been scarce. However, the few courts that have addressed the doctrine appear to have interpreted it narrowly, rather than broader. In *Landreth v. Melendez*, the Amarillo Court of Appeals held that the accommodation doctrine can be contracted away, and thus, waived.[66] The surface owner in *Landreth* purchased a deed to the surface estate, but the deed was subject to a mineral-deed

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62 *Id.* at 622.

63 *Id.* at 622.

64 *Id.* at 628; *see also Sun Oil Co. v. Whitaker*, 483 S.W.2d 808 (Tex. 1972).

65 *Tarrant County Water Control and Improvement Dist. Number One v. Haupt, Inc*., 854 S.W.2d 909, 911-12 (Tex. 1993).

66 948 S.W.2d 76, 81 (Tex. App.— Amarillo 1997, no writ).

reservation. The deed reservation language clearly and unambiguously reserved to the mineral owner the right "to take all usual, necessary and convenient means" to survey, explore, and produce oil and gas from the mineral estate.[67] Based on that specific reservation, the court held that the common law accommodation doctrine was contracted away, and thus, inapplicable:

> Given the rights reserved to the mineral owners by the reservation, it follows that this is not a situation where the usual rights implied from a standard lease in favor of the mineral estate are to be exercised with due regard to the rights of the surface owners to be accommodated in the existing use being made of the surface . . . Instead, it is a situation where the mineral owners are under no obligation to accommodate the surface owners in the existing use made of the surface so long as the mineral owners use all usual, necessary and convenient means in conducting their operations.[68]

Another significant limitation on the accommodation doctrine arose in *Ottis v. Haas*, when a surface owner sought an injunction against a mineral lessee.[69] The surface owner sought an order from the court requiring the lessee to move its tank batteries, at a minimal cost, to a location, which the surface-estate owner considered more conveniently placed.[70] The court, in rejecting the accommodation doctrine, held that a showing of mere inconvenience does not satisfy the elements of the doctrine.[71]

B. Miscellaneous Rights of Lessees Supported by Case Law

The following rights of the mineral lessee have been recognized by the courts:

Courts clearly have held that the mineral lessee may build roads where necessary for the

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67 *Id.* at 78-79.

68 *Id.* at 81.

69 569 S.W.2d 508, 514 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.).

70 *Id.*

71 *Id.*

transportation of heavy machinery and the servicing of well sites.[72] Construction of roads by the mineral lessee has always been a source of aggravation to the surface owner. Additionally, the mineral lessee may construct roads from the caliche excavated form the leased premises.[73] In East Texas, iron ore and clay would be the likely substance. Similarly, subject to any state or federal statutes, the mineral lessee has the right the use fresh water and salt water produced from the land for its operations and the right to dispose of salt water produced in the course of operations.[74]

Furthermore, Courts have allowed wide latitude to mineral lessees when selecting the surface location for drill sites. A surface owner cannot compel the lessee to use abandoned well bores or abandoned surface locations rather than drilling new wells.[75] Likewise, the mineral lessee generally has been unrestricted in determining when the well is to be drilled. For example, one Texas court has held that the mineral lessee was not liable for damage to a mature crop by beginning operations before the crop could be harvested.[76] Moreover, no advance notice is due to the surface owner advising the drilling operations will begin.[77] However, as a matter of policy, most companies find a better "spirit of cooperation" if they make it their practice to notify the surface owner prior to entering the property.

The courts have also recognized the right of the mineral lessee to use the surface for

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

73 *Davis v. Devon Energy Production Co., L.P.*, 136 S.W.3d 419 (Tex. App.---Amarillo 2004, no pet.).

74 *TDC Engineering, Inc. v. Dunlap*, 686 S.W.2d 346 (Tex. App. ---Eastlan 1985, writ ref'd n.r.e.).

75 *Walton*, 317 S.W.2d 260.

76 *Moses*, 256 S.W.2d 650.

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

geophysical exploration operations.[78] And, absent a specific contractual provision, the mineral lessee has been held not liable to the surface owner for damage to standing timber or growing crops unless it is shown that more of the land was used than was reasonably necessary.[79] Similarly, in cases involving livestock, the only duty imposed upon the mineral lessee is not to intentionally, willfully or wantonly injure the cattle as long as the operator is within his area of operations and not using more land than is reasonably necessary.[80] Further, absent an express provision requiring a mineral lessee to restore the surface of the land to its prior condition, the oil and gas lesseee has no duty to make such restoration.[81] And, a purchaser of a surface estate burdened by a lease is in no position to complain about customary drilling operations.[82]

C. Geophysical Operations Specifically

As stated above, implicit in the right to explore is the right to conduct geophysical operations on the surface of the property. However, with the change in technology, it is likely the courts will revisit the current law regarding surface use and access issues. In a 1957 case, the court decided that the mineral owner has the exclusive right to use the surface to conduct seismographic exploration and also has the exclusive power to permit or deny the right to others.[83] Also, because the right to explore is an attribute of the mineral estate rather than the surface estate, it makes sense that the consent of the surface owner is not sufficient to conduct

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78 *Wilson v. Texas Co*., 237 S.W.2d 649 (Tex. Civ.. App.--Fort Worth 1951, writ ref'd n.r.e.); *Phillilps Petroleum Co. v.. Cowden*, 241 F.2d 586 (5th Cir. 1957); Yates v. Gulf Oil Corporation, 182 F.2d 286 (5th Cir. 1950).

79 *Williams,* 20 S.W.2d 133.

80 *See, generally*, note 47 *supra*.

81 *Warren Petoleum Corp. v.. Monzingo*, 304 S.W.2d 362 (Tex. 1947).

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

83 *Cowden*, 241 F.2d 586.

seismic operations on the land where the purpose of the seismic survey is to evaluate the land upon which the seismic operations are being conducted.[84]

Unless the grant or reservation provides otherwise, the mineral owner has the implied right to enter upon and make reasonable use of the surface of the land to conduct exploration activities including geophysical operations. A mineral owner or mineral lessee has the right to use as much of the surface as is reasonably necessary for the mineral exploration and development. Absent a contractual provision to the contrary, if the use of the surface is reasonable, the surface owner has no right to recover for surface damages and or require the surface be restored.[85]

The consent of the mineral owner is necessary to conduct seismic operations upon lands burdened by the owner's mineral interest. It further appears from a reading of the *Cowden* case that the consent of the mineral owner may be necessary whether the lands upon which the surface operations are being conducted are the lands upon which information is being sought or not. The burden of showing that little or no information was obtained concerning these non-prospective lands may be very difficult. The court in *Cowden* held that at least somewhat informative data was being obtained about the land upon which the surface operations were being conducted and thus, the permission of the mineral owner was necessary.[86]

In this context, excessive use of the surface may include the use of the surface estate to explore other lands. The owner of the surface estate is entitled to protection from uses thereof without his consent for the benefit of owners outside of and beyond premises and terms of the

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84 *Id.*

85 *Cowden*, 241 F.2d 586.

86 *Id.*

lease covering his property.[87] The mineral owner or lessee does not have the right to use the surface of its tract for the purpose of conducting seismic operations that will only yield information about an adjoining tract. It should also be noted that while no cases have directly addressed the issues, a strong argument can be made that because a mineral lessee has the right to conduct seismic operations on a tract, it is not necessary that such operations be undertaken to acquire information ONLY about the tract. Typically seismic operations must be conducted on a large area in order to be effective. Thus, the courts could analogize this situation in much the same way as unitized acreage and find that the operations make use of the entire area and confers a benefit on each tract within this large area.

It does not appear that excessive use of the surface will come into play as long as each tract benefits from the information obtained by the seismic operations.[88] It is only when the surface of a tract is used for operations that have no reasonable possibility of benefiting the mineral estate of that tract that the issue of excessive use would arise. The holding of the *Cowden* case and the opinions of commentators on that case strongly suggest that the one circumstance where the permission of the surface owner will be necessary is when the information sought by the operations is solely from lands other than where the surface operations are being conducted and no information is sought on the property where the surface operations are physically being conducted.[89] If the courts were to find that the evaluation of the neighboring lands confers a benefit on those lands and thus constitutes excessive use of the land where the surface operations are being conducted, then 3-D seismic surveys would be subject to

87 *Robinson v. Robbins Petroleum Corporation*, 501 S.W.2d 865 (Tex. 1973).

88 *Id.*; *Cowden*, 241 F.2d 586.

89 *Id.*

virtually universal attack by non-consenting surface owners. Mineral owners and lessees would be severely limited in their ability to explore for minerals.

If the primary purpose of the geophysical survey is to explore neighboring property, it appears that it would be the safest to require consent to the activities from both the mineral owner and the surface owner of the tract on which the physical entry is made.[90] As stated above, it would appear to be virtually impossible to prove that no information significant to the mineral estate was gained on the property on which the surface activities were being conducted. In the situation where the surface operations are conducted on one tract with the intent to gain information from the neighboring tract, the surface owner may have a concurrent right with the mineral owner to bar surface operations so that if either the surface owner or mineral owner objects, the operations cannot be conducted.

For example:

> the lessee with a lease on Blackacre who wants to conduct geophysical operations from neighboring Whiteacre must obtain the consent of the surface owner of Whiteacre to conduct operations from Whiteacre. If the lessee could possibly obtain any information as to the mineral estate on Whiteacre, it would be wise to secure the consent of the mineral owner. The prudent lessee using Whiteacre for seismic activities designed to obtain information about Blackacre will obtain permits from both the surface owner and the mineral owner on Whiteacre if the activities were also reasonably expected to reveal geophysical information as to Whiteacre.[91]

Hypothetically speaking, such a scenario could present issues of trespass and wrongful possession. For instance:

> If the lessee has a lease on Whiteacre and no permits on Blackacre and wishes to conduct seismic activities designed to obtain information regarding Blackacre or

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90 *Id.*

91 *Robinson*, 501 S.W.2d 865 (Tex. 1973) (the owner of the surface estate is entitled to protection from uses thereof without his consent for the benefit of owners outside of and beyond premises and terms of the lease covering his property operations on the property).

> if the seismic activities necessary affords the lessee information on Blackacre, can the lessee safely proceed without any permits from the mineral owner or lessee on Blackacre? Texas courts have consistently required that there be an actual surface entry onto Blackacre before a complaining party on Blackacre is entitled to recover for trespass.

There are no Texas cases on undershooting to date. The Texas cases which have allowed recovery for trespass for geophysical operations all involved a physical entry on the land and concern a surface trespass done with the intent to obtain knowledge of the subsurface conditions. There are no reported cases in Texas that allow damage recovery where there is no entry upon the surface. The last case on seismic trespass remains *Kennedy v. General Geophysical Company*, which the court held that a seismic shot solely across adjacent property is not a trespass because seismic vibrations do not create a trespass.[92] However, much speculation centers around the courts' possible reaction to the change in the technology available to obtain information regarding subsurface stratas without the necessity for physical entry on the property. Many commentators discuss the possibilities of the courts creating a new tort in Texas for the appropriation for a property right for obtaining the information without consent of the rightful owner. Other commentators believe that ultimately the courts will recognize the value of technology, such as the 3-D seismic, and refuse to impede its use. Virtually all agree the courts will see more cases in this area.

It is well settled law in Texas that an undivided interest owner in minerals may lease his interest without the joinder of the remaining cotenants.[93] However, on the issue of permitting

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92 213 S.W.2d 707 (Tex. Civ. App --Galveston 1948, writ ref'd n.r.e.)

93 *Whenlan v. Placid Oil Co.*, 274 S.W.2d 125, 128 (Tex. Civ. App.—Texarkana 1954, writ ref'd n.r.e.) (a tenant in common has the right to execute a lease on his undivided interest in the common property, notwithstanding the nonjoinder of his cotenant); *Lake v. Reid*, 252 S.W.2d 978, 982-83 (Tex. Civ. App.—Texarkana 1952, no writ) (each cotenant may freely assign or convey his interest in the common property, and his assignee or vendee at once becomes owner of interest conveyed, and as such, as matter of law, a cotenant with former cotenants of his vendor, entitled to all rights of any cotenant, including rights of possession and re-sale); *Hays v. Marble*, 213 S.W.2d 329, 334-35 (Tex. Civ. App.— Amarillo 1948, writ

cotenants, the right obtained may be more kin to an easement. It is also settled law in Texas that if surface use by one cotenant is deemed to be waste, and it is enjoin able by the other cotenants.[94] A cotenant has a right to enter upon the property and explore for oil and gas without the consent or approval of the other cotenants and a cotenant can drill well on the common property without the concurrence of the other cotenants subject to the duty to account for profits.[95]

However, in the case of seismic permitting, the competing line of cases support a conclusion that one cotenant cannot grant an easement across the common estate without the consent of the other cotenants.[96] To reconcile this competing authority, it appears a leasehold position would be superior to a mere permit. If permitting without a leasehold position, it would be safer to permit all cotenants. A geophysical permit does not give the operator a property right, only a right to conduct seismic tests or operations and is therefore similar to a license or easement. The lessee of a mineral interest, at the least, steps into shoes of the mineral owner.

IV. CONCLUSION

The severance of differing real property interests between various owners and various rights presents unique problems for the oil and gas practitioner. Texas law at once provides guidance and confusion. Awareness of the how the rights and relationship between various

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dism'd) (heirs taking undivided interests in land were tenants in common, each of whom could sell his interest without regard to whether the other tenant in common wished to do so); *see also unpublished opinion City of Plano v. Hale*, 1993 WL 175208 *4 (Tex. App.—Dallas 1993, no writ) (*relying on Whelan*, 274 S.W.2d at 128) ("As a matter of right, each cotenant may sell, encumber, lease, or otherwise convey his undivided interest in the common property without the consent of his cotenants"); see generally, *Stradt v. First United Methodist Church of Huntington*, 573 S.W.2d 186, 190 (Tex. 1978); *Thomas v. Southwestern Settlement & Development Co.*, 123 S.W.2d 290, 297 (Tex. 1939); *Trevino v. Trevino*, 64 S.W.3d 166, 174 (Tex. App.— San Antonio 2001, no pet); *Willson v. Superior Oil Co.*, 274 S.W.2d 947, 950 (Tex. Civ. App.— Texarkana 1954, writ ref'd n.r.e.).

94 *Id.*

95 *Id.*

96 *Texas Mortgage Co. v. Phillips Petroleum Co.*, 470 F.2d 197 (5th Cir 1972).

interest owners and interests play out is the practitioner's best defense for weeding through the quagmire of Texas law.