Everything You Wanted to Know About Oil & Gas Interests
(But Were Afraid to Ask)

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I. INTRODUCTION

In the past, many practitioners have become involved in mineral transactions that frequently were simply a part of a probate/estate property or a land "real estate" transaction. Typically, the mineral estate of the land was not the focus of the deal, or even a known factor in the transaction. However, in the last decade, due to the increasing demand for energy and the escalating prices of oil, gas and mineral commodities, some knowledge of mineral ownerships and methods of conveyance is essential in drafting documents for a real estate transaction.

Oil and gas law is very complex and has evolved over the years as a separate body of law in all of the states. This paper is not intended to be an in depth study of oil and gas law, but should provide a foundation for the general principles of oil and gas law. I hope to provide enough basics so there is recognition of a transaction involving a mineral interest or royalty interest and to properly structure the conveyance as to the intent of the parties regarding the mineral estate.

II. TERMS AND TYPES OF INTERESTS IN OIL AND GAS

At first glance, the method of conveyance of a fee mineral interest does not seem that different from a conveyance of a fee interest. Under common law principles it is considered a real property interest, and therefore should be conveyed and/or reserved in the same method and filed in the same real property records. The problems arise when the fee mineral estate is not recognized as an interest in land, or begins to be split into the various rights and components, being the separate "bundle of sticks" which make up the mineral estate.

In the area of oil and gas law, there are specific words or terms that define the particular legal property estate or interest. Therefore, the best place to start is with the various words and terms that define the rights and characteristics of mineral interests. Unless footnoted, the definitions listed below are those found in Williams and Meyers, *Manual of Oil & Gas Terms*.[1] In addition, I have included supplemental language and definitions to further illustrate the meaning of the terms.

Fee Interest – "An estate limited absolutely to a person and his or her heirs and assigns forever without limitation or condition."[2] The fee interest is essentially all of the surface and mineral rights; the entire "bundle of sticks." At any time, a fee owner may sever any of the rights (sticks) as desired from the fee.

Mineral Fee Estate / Interest – "The property interest created in oil and gas after a severance by mineral deed or reservation. The duration is like that of common law estates,

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[1] 8 H. WILLIAMS & C. MEYERS, MANUAL OF OIL AND GAS TERMS ANNOTATED (13th ed. 2006) cited hereafter as "Manual of Oil and Gas Terms".
[2] BLACK'S LAW DICTIONARY (8th ed. 2004).

namely, in fee simple, in fee simple determinable, for life or for a fixed term of years. The prime characteristic is the right to enter the land to explore, drill, produce, and otherwise carry on mining activities." Similarly described as the "term applied to the rights, privileges, powers, and immunities with regard to minerals held by the owner of the minerals which by grant or reservation have been severed from the surface estate."

A mineral fee estate is the most complete ownership of minerals recognized in law, the owner of the mineral estate has the same rights, powers and privileges in the mineral estate as the surface owner has in the surface estate. Additionally, the mineral interest includes the right to use the land for exploration, development and production of minerals, which includes an implied easement to use the surface in such ways and to such extent as is "reasonably necessary"[3] to obtain the minerals under the property.

Surface Estate / Interest - The surface estate is what remains after the mineral interest has been severed. It describes all rights that are not included in the mineral interest. The surface interest includes the non-mineral interest of the subsurface of the land, (e.g., right to potable water, and in most jurisdictions sand and gravel). The surface estate is encumbered by and servient to the easement of the mineral interest owner or lessee.

Oil and Gas Lease – "The instrument by which a leasehold or working interest is created in minerals." The principle interests arising from an oil and gas lease are the working or leasehold interest of the lessee, and the royalty, delay rental, bonus, and possibility of reverter or power of termination interests of the lessor.[4]

Leasehold – "The interest one holds as a grantee or lessee under an oil and gas lease." The oil and gas lease transfers the mineral owners' right (exclusive) to the lessee to use the land for exploration, development and production of minerals. This leasehold interest is sometimes called a working or operating interest because it is usually the leasehold owner that works/operates the well.

In the simple situation of a lessor who executes a lease, reserving 1/8th royalty, (12.5%) to a lessee who creates no additional burdens on the leasehold estate, the working interest consists of 7/8ths (87.5%) of production subject to all costs of exploration and development, and the lessor receives his 1/8th of production free of such costs. In this instance, it is said that the lessee owns a 100% working interest with an 87.5% net revenue interest, and the lessor owns a 12.5% royalty interest.

Royalty Interest – "The landowner's share of production, free of expenses of production." This share of production is expressed in the oil and gas lease as a percentage or a fraction of production. The term "royalty" in the strict sense is held to mean a share of the

[3] This term "reasonable" has been litigated often in all the oil and gas producing states. A discussion of the term and the various litigated established meanings is beyond the scope of this paper.
[4] Masterson, *A Survey of Basic Oil and Gas Law*, 4 SW. LEGAL FND. OIL & GAS INST. 219, 258-277 (1953).

product or the proceeds therefrom, reserved to the owner for permitting another to use the property.[5] The royalty owner has the right to receive a share of production, or the value of proceeds of production, as, if and when produced, free of costs of production, but he no longer has any right to develop or lease. The duration of this landowner royalty interest is for the life of that particular oil and gas lease.

The term "royalty" has been widely used to depict the numerous types of royalty interests (some are further described below), in addition to the landowner royalty which is inherent in the mineral ownership. Because of the differing rights of these other interests, much confusion has arisen by the labeling of these other interests as simply a royalty interest. It is best when dealing with the differing interests to distinguish between them with their full term.

Bonus – "The consideration paid by the Lessee to the Lessor (landowner/mineral owner) to execute the oil and gas lease." The bonus is usually paid on a per net mineral acre basis. One form of bonus, the cash bonus, has been defined as "a premium paid to a grantor or vendor' and strictly is the cash consideration or down payment, paid or agreed to be paid, for the execution of an oil and gas lease."[6]

A second form of bonus, sometimes called an oil bonus or a royalty bonus,[7] is payable out of production. An oil or royalty bonus usually takes the form of a production payment. Production payments reserved by a lessor in the lease could be classified as a distinct interest in the minerals or as landowner's royalty, but the cases that have considered the nature of these interests have treated them as bonus, payable to the owner thereof rather than the royalty owner where the ownership differs.[8]

Rental – "The term 'rental' as used in oil and gas leases refers to the consideration paid to the lessor for the privilege of delaying drilling operations."[9] There are two common forms, the "unless" form provision or the "or" form provision, but essentially in both, the lessee must drill or pay to keep the lease.

Production Payment – "A right to a certain sum of money or a fixed number of units out of an agreed fraction of any oil or gas produced." While instruments creating production payments vary considerably in terminology, two characteristics predominate in all: (1) the sums to be paid or the units to be delivered are fixed in amount, and (2) they are to be derived from the production of the minerals. In other words, the payment is to be made only when the minerals are produced and no personal liability exists except to pay out of production.[10]

Non Participation Royalty – "An expense-free interest in oil or gas as, if, and when

[5] 1 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW § 301 (13th ed. 2006).
[6] Carroll v. Bowen, 68 P.2d 773, 775 (Okla. 1937).
[7] Sheppard v. Stanolind Oil & Gas Co., 125 S.W.2d 643, 647-48 (Tex. Civ. App. 1939, error ref'd).
[8] Wright v. Brush, 115 F.2d 265 (10th Cir. 1940).
[9] Carroll v. Bowen, 68 P.2d 773 (Okla. 1937).
[10] 1 H. WILLIAMS & C. MEYERS, *supra* note 5, § 301. *See* id., §§ 422-423.13.

produced. The prefix 'non-participating' indicates the interest does not share in bonus or rental, nor in the right to execute leases or to explore and develop." In this royalty, the ownership has been separated from the mineral ownership and could have a duration as long as a mineral ownership, or as short as the deed specifies. This type of interest ***can*** be created prior to an oil and gas lease.[11]

Overriding Royalty – "An interest in oil and gas produced at the surface, free of the expense of production, and in addition to the usual landowner's royalty reserved to the lessor in an oil and gas lease." Before 1960, if a landowner royalty were greater than the "standard" 1/8th royalty this excess amount was considered an overriding royalty for the landowner. Typically, since 1960 an overriding royalty interest is an "interest carved out of the lessees' share of the oil and gas…as distinguished from the owners' reserved royalty. It is generally held that an overriding royalty is an interest in real property."[12]

Generally, an overriding royalty is a cost free royalty carved out of the lessee's leasehold interest. Because it is carved out of the working interest or leasehold interest, it will terminate when the lease terminates. This type of royalty interest is often used to compensate parties who have helped to structure or develop the drilling venture.

Primary term – "The period of time during which a lease may be kept alive by a lessee even though there is no[13] production in 'paying quantities.'"

Executive Right – "The power to execute an oil and gas lease on an interest in land from which the lessor will not derive some or all of the usual lease benefits, *viz.*, bonus, rental, and royalty." The executive right is generally understood to include the power to grant a lease with respect to the mineral interest of another person and the executive right is a term taken to include the power to grant leases with respect to the royalty or another, described "the exclusive right to make and execute any and all future oil and gas leases."[14]

Non-executive mineral interest – "A mineral interest created by grant or by reservation in a deed with specific language that governs the sharing of bonus, rental and royalty and excludes the owner from participation in execution of leases." The owner of such non-executive mineral interest has rights as spelled out in the creating instrument; but has no right to develop or execute leases.

[11] Care needs to be taken in creating a non-participating royalty prior to the execution of the oil and gas lease, see conveyancing below.

[12] Meeker v. Ambassador Oil Co., 375 U.S. 160 (1963).

[13] Usually production has to be in "paying quantities" which is another often litigated term and therefore beyond the scope of this paper.

[14] Lloyd Lockridge, *Abuse of Executive Rights*, 36 SW. LEGAL FDN. OIL & GAS INST. 2-1 at 202 (1985).

III. EARLY HISTORY OF OIL AND GAS LAW

Ad Coelum Doctrine

In 1859 when the first well was drilled in Titusville, Pennsylvania, mineral ownership was governed by the common law principle that the owner of property owned everything under the surface of his lands up to the heavens. This doctrine worked well for hard rock minerals. However, disputes arose about landowner's rights to oil and gas beneath their land because landowners, drilling on their own property, could extract oil and gas from beneath adjacent lands due to the fugacious and fungible nature of petroleum. Courts soon realized that because of these characteristics, the strict application of that hard rock mineral doctrine to oil and gas would discourage mineral owners from drilling for fear of liability for drainage from their neighbor's properties. This doctrine was soon modified by the rule of capture, which many describe as a "rule of convenience."

Rule of Capture Doctrine

The rule of capture provides that the owner of a tract of land acquires title to the oil and gas that he produces from wells drilled on his land, though it may be proved that part of such oil and gas migrated from adjoining lands, and there is no liability for capturing oil and gas that drains from another's lands.[15] It encouraged development of oil and gas resources by recognizing the migratory character of oil and gas and the impossibility of determining liability for drainage where a landowner lawfully produces from wells located on his land.[16] Courts reasoned that oil and gas was like wild animals in that both were able to "wander" from one owner's tract to adjacent tracts and held that once oil or gas was "captured" through production, absolute title vested in the landowner.[17] The neighboring landowner whose property is being drained may only protect himself by producing from wells drilled on his own land.[18]

Because the rule of capture required each landowner to drill his own well to protect himself from drainage, the rule often resulted in wasteful and unnecessary drilling. Although the rule of capture is a rule of non-liability, a landowner could be liable for negligence of waste of oil and gas. In *Elliff v. Texon Drilling Co.*[19], due to Texon's negligence, a well blew out and burned on property adjacent to Elliff. This well lost large quantities of oil and gas which Elliff claimed was drained from under his property. The Texas Supreme court rejected Texon's

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15 38 AM. JUR. 2D *Gas and Oil* §10 (2007).

16 Robert E. Sullivan, *Oil and Gas Conservation Law and Practice, Chapter 1: The History and Purpose of Conservation Law*, 18A ROCKY MTN. MIN. L. SPEC. INST. ON OIL AND GAS CONSERVATION LAW AND PRACTICE 1-1, 1-1 to1-2 (1985).

17 Rance L. Craft, *Comment: Of Reservoir Hogs and Pelt Fiction: Defending the Ferae Naturae Analogy Between Petroleum and Wildlife*, 44 Emory L.J. 697, 698 (1995). At the time, the physical characteristics of oil and gas and of the formations containing them were not understood; it was believed that oil and gas flowed beneath the surface in unpredictable and sporadic movements. Sullivan, *supra* note 16, at 1-1.

18 Sullivan, *supra* note 16, at 1-2.

19 Elliff v. Texon Drilling Co., 210 S.W.2d 588 (Tex. 1948).

defense of non-liability under the rule of capture stating that each owner had a right to a fair and equitable share of the oil and gas under his land and to be protected against negligent drainage and damage to the formation. Eventually, the rule of capture began to be limited by this concept of each owner's right to a fair and equitable share, which in essence is the correlative rights doctrine.

Correlative Rights Doctrine

Correlative rights are the rights and duties that exist between owners of land over a common source of supply and include the right against waste of extracted substances, against spoilage of the source of supply, against malicious depletion of the source of supply, and the right to a fair opportunity to extract oil or gas.[20] A single reservoir often underlies the land of many different landowners. The rule of capture entitled each owner of land overlying a common source of supply to extract oil and gas without accounting to others for a share of the production. The correlative rights doctrine emphasizes that this right must be exercised with due regard for other owners who have the same rights to extract oil and gas from the same source.[21] The doctrine of correlative rights provides a legal framework in which each owner of oil and gas in a reservoir can produce its fair share of the total oil and gas in the reservoir, measured with reference to its proportionate ownership of the reservoir.[22]

Prevention of Economic and Physical Waste

The rule of capture, particularly in combination with private and fragmented mineral rights, resulted in both physical and economic waste. Excessive drilling occurred as each owner attempted to capture the oil and gas underneath his land and prevent it from migrating to an adjoining land owner. Owners had no incentive to conserve oil and gas for future production because any unit it conserved would be produced and sold by one of its neighbors.[23] The disastrous consequences of unrestrained application of the rule of capture are exemplified by the development of the Spindletop oil field in eastern Texas around Beaumont. In 1901, the discovery well at Spindletop struck oil and produced more than 800,000 barrels of oil in its first nine days, setting a world record. Oil prospectors rushed to East Texas to make their fortune. By the end of 1901, 440 wells had been drilled on the 125-acre hill where Spindletop was located.[24]

The overabundance of wells resulted in a rapid decrease in reservoir pressure, water seeped into the reservoir, and production quickly declined. After yielding 17,500,000 barrels of oil in 1902, production of the Spindletop wells was down to 10,000 barrels a day in 1904.[25]

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[20] 4 EUGENE KUNTZ, LAW OF OIL AND GAS §4.3 (1967).
[21] Id.
[22] Richard J. Pierce, Jr., *State Regulation of Natural Gas in a Federally Deregulated Market: The Tragedy of the Commons Revisited*, 73 Cornell L. Rev. 15, 22-23 (1987).
[23] Id. at 22.
[24] Craft, *supra* note 17, at 701.
[25] Handbook of Texas Online, http://www.tshaonline.org/handbook/online/articles/SS/dos3.html (last visited March 6, 2008).

Overproduction caused the price of oil to plummet from one dollar to 3 cents a barrel, the lowest price in the history of U.S. oil. In fact, drinking water, which had to be carted out to Spindletop for workers in the oil field, was more expensive than the oil which was being produced.

Fewer wells at Spindletop would have preserved reservoir pressure, supplied oil more in response to actual demand, caused less physical waste of oil at the surface, and returned more oil for each dollar invested in drilling.[26] Drilling many wells as fast as possible to take advantage of the rule of capture and protect against drainage was prudent and necessary for each landowner to protect his correlative right to a fair share of the oil and gas under his lands.[27] Without some incentive to restrain production, each owner's efforts to protect his own correlative rights results in waste.[28]

Federal and state governments took notice of the adverse consequences of excessive drilling. States responded by enacting oil and gas conservation laws through a valid exercise of their police power to prevent waste and protect correlative rights.[29] Conservation laws limit the protection of the rule of capture, transforming it into a "fair share" doctrine.[30] Today, conservation statutes are the foundation of the legal structure governing oil and gas development.[31] Typical conservation statutes regulate oil and gas production through the following provisions: (1) well-spacing rules which prevent overdrilling by limiting the number of wells that can be drilled; (2) well-spacing exceptions which protect correlative rights and prevent "takings"; (3) production allowables which prevent overproduction; (4) gas/oil and gas/water ratios which help to maintain reservoir pressure and make production possible; and (5) pooling and unitization provisions which help to define correlative rights.[32]

Because of the evolution of oil and gas law in each state, there are two basic ownership theories for many of the oil and gas producing states. However, it is not always clear in all jurisdictions which theory is adhered to by the courts.[33]

Ownership in Place Theory - Jurisdictions

Under the ownership in place theory, a landowner owns the oil and gas which was originally in place beneath his surface acreage.[34] In this theory, the mineral interest is considered a corporeal or possessory estate in real property and is subject to the same real property laws and rules.[35] This theory appears to have been applied and adopted in Arkansas, Colorado, Kansas,

[26] Owen L. Anderson, *David v. Goliath: Negotiating the 'Lessor's 88' and Representing Lessors and Surface Owners in Oil and Gas Lease Plays*, 27 Rocky Mtn. Min. L. Inst. 1029, 1204 (1982).
[27] JOHN S. LOWE, OIL AND GAS LAW IN A NUTSHELL 17-18 (4th ed. 2003).
[28] Anderson, *supra* note 26 at n. 352.
[29] *See* Sullivan, *supra* note 16, 1-07 to 1-17.
[30] Lowe, *supra* note 27 at 18.
[31] Id.
[32] *See* Lowe, *supra* note 27 at 19-29.
[33] 1 H. WILLIAMS & C. MEYERS, *supra* note 5, § 201.
[34] MANUAL OF OIL AND GAS TERMS, *supra* note 1, O.
[35] RICHARD W. HEMINGWAY, THE LAW OF OIL & GAS, §1.3. at 27 (3rd ed. 1991).

Maryland, Michigan, Mississippi, Montana, New Mexico, North Dakota, Pennsylvania, Tennessee, Texas, Washington, and West Virginia.[36] In these states, the mineral interest is determined to be a corporeal interest in the lands.

Non-Ownership Theory - Jurisdictions

The non-ownership theory is the theory that no person owns the minerals until produced, but that the right to produce is limited to those persons who own land upon which a well may be drilled.[37] This theory appears to have been applied and adopted in Alabama, California, Illinois, Indiana, Kentucky, Louisiana, New York, Ohio and Wyoming.[38] In these states, the mineral interest is determined to be an incorporeal interest in the land with the right to use the lands to access the ownership.

The current version of this theory appears to be applied and adopted in Oklahoma, but in Oklahoma it is considered the qualified ownership theory.[39] The qualified ownership theory is closely identified with the correlative rights doctrine. Over the years, all of the non-ownership jurisdictions have adopted some of the concepts of correlative rights so that the qualified ownership theory and the non-ownership theory are almost identical.[40]

Real Property

At this point it is important to stop and clarify that a mineral fee interest under common law is considered to be a real property interest, regardless of whether it is classified as a corporeal interest or as an incorporeal interest. The common law distinguishing factor was duration of the estate, if it had the duration of a freehold estate it was an interest in real property, but if it had a lesser duration it was considered a personal property interest in land.

Accordingly, the ownership theories which relate to corporeal or incorporeal do not necessarily correspond to whether or not a specific jurisdiction classifies the mineral interest as real or personal property. The ownership theories basically determine whether or not the mineral interest is considered to be corporeal or incorporeal, which signify the possessory nature of the interest. This classification as corporeal or incorporeal has legal consequences in regards to abandonment, remedies (trespass, ejectment, partition), and taxation, among other issues.

Oil and gas rights may be treated as an interest in real estate, or an interest in personal property, or both.[41] Whether property is real or personal is determined by the law of the state where it is situated. The construction of a will that purports to devise realty is governed by the

[36] 1 H. WILLIAMS & C. MEYERS, *supra* note 5, § 301.
[37] MANUAL OF OIL AND GAS TERMS, *supra* note 1, N.
[38] 1 H. WILLIAMS & C. MEYERS, *supra* note 5, § 301.
[39] Id.
[40] Id.
[41] *See* 1 H. WILLIAMS & C. MEYERS, *supra* note 5, §214 and cases cited therein.

law of the state in which the realty is situated.[42] The classification of mineral, leasehold, and royalty interests vary among the states and even within states, depending on the context.[43] Generally, mineral and leasehold interests are considered to be real property.[44] Courts' treatment of royalty interests typically depends on whether the royalty is accrued or unaccrued. In most states, rights to unaccrued royalties relating to future production of minerals are interests in real property,[45] but unaccrued royalties are treated as personal property in some states.[46] Accrued royalties in minerals that have been produced and severed from the land are always treated as personal property.[47]

IV. ABANDONMENT OF MINERALS / DORMANT MINERAL STATUTES

The issue of unknown mineral owners or abandoned minerals only arises when the mineral estate has been severed from the surface estate. Typically the problem arises when there are reserved fractional mineral rights from real estate conveyances. The severed rights are often further fractionalized through residuary clauses of wills and intestacy laws. Consequently, severed fractional mineral rights are often owned by persons that are not aware that the right exists.

For years jurisdictions have struggled with the problem of missing/unknown mineral owners which was often thought to be an obstacle or restraint to mineral development. Jurisdictions often found that the traditional remedies available to alleviate this issue did not easily diminish the problem. Some of these traditional remedies, abandonment, adverse possession, tax sales, and their inherent limitations are discussed below. Accordingly, many jurisdictions have passed the so called dormant mineral statutes to attempt to unify title. Some of these for the western states are also identified below.

Abandonment

Under the common law theory of abandonment, there are two required events, nonuse of

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[42] *See* Martin J. McMahon, Annotation, *Oil and Gas Royalty as Real or Personal Property*, 56 A.L.R. 4th 439 (1987).

[43] Id., at § 214.

[44] Id. Professors Williams and Meyers submit that Oklahoma courts have been consistent in treating interests in oil and gas, whether a severed mineral or royalty interest or an interest arising from an oil and gas lease as personal property, rather than real property, despite the fact that some federal cases construing Oklahoma law have indicated that the decisions in that state are in utter conflict as to the classification of interests in minerals as realty or personalty. Id., at §214.2. *See* Phillips Petroleum Co. v. Jones, 1950-2 C.B. 135, 176 F.2d 737 (10th Cir. 1949) , *cert. denied,* 339 U.S. 904, 70 S. Ct. 518, 94 L. Ed. 1333 (1950); Continental Supply Co. v. Marshall, 152 F2d. 300 (10th Cir. 1945), *cert. denied sub nom.* Federal National Bank v. Continental Supply Co., 327 U.S. 803, 66 S. Ct. 962, 90 L. Ed. 1028 (1946). For an overview of the conflict in Oklahoma courts, see 1 H. WILLIAMS & C. MEYERS, *supra* note 5, §214.2.

[45] *See* Annotation, *supra* note 42; 1 H. WILLIAMS & C. MEYERS, *supra* note 5, §214.

[46] *See* Annotation, *supra* note 42, for an overview of the treatment of royalties in the various states.

[47] Id.

the property by the owner and the intent by the owner to abandon it.[48] Upon abandonment, the ownership rights terminate. Typically, incorporeal hereditaments have always been held to be subject to abandonment. However, under common law, corporeal interests cannot be abandoned.[49] Use of the abandonment theory without specific statutory authority has been very limited when dealing with a severed mineral fee interest. In these cases, the non use criteria must be accompanied by clear evidence of actual intent to abandon prior to abandonment.[50] Abandonment requires a high burden of proof of intent to abandon, the simple nonuse of the mineral interest is not sufficient intent of abandonment.

An exception to this limited use of abandonment for a severed mineral fee interest is *Gerhard v. Stephens*,[51] in which the California Supreme Court held that a severed oil and gas interest can be abandoned. It is noted that in the non ownership theory jurisdictions, that abandonment has been used successfully as to lesser interests of the full fee mineral estates such as leasehold and royalty interests.

Adverse Possession

In an unsevered estate where the minerals and surface are of the same estate, adverse possession of the surface would also establish adverse possession of the mineral estate because it remains a part of the fee estate. However, for adverse possession of a mineral estate, the possessor would have to show possession of the mineral estate in an "open, notorious, exclusive continuous and hostile" nature. Essentially, the possessor must produce the minerals for the statutorily prescribed time for adverse possession.

Additionally, adverse possession cannot be applied between severed fractional mineral interests because these fractional mineral interests are usually held in cotenancy. Each cotenant has a right to the use and enjoyment of the entire estate, but must account to the other co-tenants. The basis for the accounting is typically the market value of the minerals less the costs of production.[52] Therefore, the possession of the full estate is not considered hostile between

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[48] Abandonment requires the simultaneous concurrence of these two elements, each of which must be clearly proved by competent evidence. Although nonuse of the property will not alone constitute abandonment absent the requisite intent, it may be considered some evidence of intent to abandon. Nonuse need not exist for any specified duration; abandonment may be immediate if relinquishment of possession is accompanied by the requisite intent. *See* 1 C.J.S. *Abandonment* §§ 3, 7 (1936).

[49] Ferris v. Coover, 10 Cal. 589 (1858); Cox v. Colossal Cavern Co., 276 S.W. 540 (Ky. 1925).

[50] Sparling Plastic Industries, Inc. v. Sparling, 232 N.W.2d 583, 238 (Mich. 1998); City of Minot v. Fisher, 212 N.W.2d 837, 839 (N.D. 1973).

[51] 68 Cal.2d 864, 442 P.2d 693 (1968).

[52] "The particular state...is most material....The attorney who assumes that the rules [permitting mining by cotenants] in another state are the same as his own may find himself with a very unhappy, former client." James K. Groves, *Coownership of Mining Property and Mining Partnerships*, 2 ROCKY MT. MIN. L. INST. 217, 235 (1956). *See also* Frank Erisman and Elizabeth Dalton, *Multi-party Ownership of Minerals--Real Property Consequences of Joint Mineral Development*, 25 ROCKY MT. MIN. L. INST. 7-1, 7-6 to 7-11 (1979). The cases describing a cotenant's accountability for mining are collected in an annotation at 5 A.L.R.2d 1368 (1949). Some states define by statute those costs that may be set off against the proceeds of production. *E.g.*, Colo. Rev. Stat. § 34-44-107 (2007).

cotenants and there must be an ouster before the possession will be considered hostile.[53]

Taxes

In some states, the severed mineral interests are subject to separate taxation. If the taxes are not paid, the interests can be sold for delinquent taxes. A tax sale will extinguish all prior titles, rights, interests and encumbrances. Some of the states[54] have express statutes for the taxation of severed minerals and some states[55] tax severed minerals under their general property taxes. In Colorado, if there is a tax sale, the surface owner has the right of first refusal to purchase the severed interest.[56]

Although many states provide for taxation of severed mineral estates, often the assessors fail to assess taxes on unproducing severed mineral interests. This is due to a variety of factors, including unknown values, unknown severances, and the expense and time involved. In Colorado, the statute permits the surface owner to require county officials to assess taxes on the severed mineral interests.[57] But under this statute, the surface owner must provide the proof of mineral severance. This proof must include the record of creation of the severance and must be in the form of a certificate prepared by an attorney, a title insurance company or a title insurance agent authorized in the state.

Marketable Title Statutes

Many states have marketable title statutes, which basically provide that a person who has an unbroken chain of title for a specified period of time shall be deemed at the end of the time to have a marketable record title to such interest.[58] However, many of the states' marketable title statutes have exceptions and requirements that prevent the exclusion of the claims of unknown or missing mineral owners. One limitation that is in numerous statutes is the provision that the record titleholder is subject to "such interests and defects as are inherent in the muniments of which such chain of record title is formed...."[59] Essentially if he has a mineral reservation or conveyance in his chain of title, he is subject to that interest. Furthermore, many western states with marketable title statutes expressly exclude mineral interests from the statute.[60] Accordingly,

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[53] *See* 1 H. WILLIAMS AND C. MEYERS, *supra* note 5, § 224.3; William B. Stoebuck, *Adverse Possession of Severed Minerals*, 68 W. VA. L. REV. 274, 290-91 (1966).

[54] Among them are Alabama, Arizona, Arkansas, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, New Hampshire, North Carolina, North Dakota, Ohio, Oregon, Tennessee, Utah, Vermont, Virginia and West Virginia.

[55] Among them are California, Iowa, New Mexico, Pennsylvania, Texas and Washington.

[56] COLO. REV. STAT. § 39-11-150 (2007).

[57] Id., § 39-1-104.5.

[58] MANUAL OF OIL AND GAS TERMS, *supra* note 1, M.

[59] Cheryl Outerbridge, "Missing and Unknown Mineral Owners," 25 ROCKY MTN. MIN. L. INST. 20-1, 20-22 (1979).

[60] Mineral interests are excluded under the statutes of Illinois, Kansas, North Carolina, Ohio, Oklahoma, Utah, and Wyoming. 735 ILL. COMP. STAT. 5/13-120 (2008); KAN. STAT. ANN. § 58-3408(d) (2006); N.C. GEN. STAT. § 47B-3 (2007); OHIO REV. CODE ANN. § 5301.53(E) (2008); Okla. Stat. Ann. tit. 16, § 76 (2007); UTAH CODE ANN. § 57-9-6 (2008); WYO. STAT. § 34-10-108(a)(iv) (2007. In addition, the Minnesota Act has been interpreted as not

these marketable title statutes can be ineffective as to mineral estates.

Dormant Mineral Statutes

Due to the issues with mineral estates and the requirements for abandonment, many states have enacted dormant mineral statutes. The 1986 Uniform Dormant Mineral Interest Act was adopted in its form by only one jurisdiction, Connecticut. However, many jurisdictions which have dormant mineral statutes have drafted and promulgated statutes that contain the same basic concepts as the Uniform Act. Essentially the statement of policy for the Uniform Act is as follows: "The public policy of this State is to enable and encourage marketability of real property and to mitigate the adverse effect of dormant mineral interests on the full use and development of both surface estate and mineral interests in real property." It is to "provide a means for termination of dormant mineral interests that impair marketability of real property."

The Act excludes Federal, Indian or state mineral interests and also excludes water. The Act allows the surface owner to initiate an action to terminate the severed mineral interest if unused for 20 years. Under the Act, the following constitutes use of the mineral interest: (1) Active mineral operations (includes lands pooled therewith), (2) Payment of any type of taxes on the separate minerals (3) Recordation of an instrument that creates, reserves, or otherwise evidences a claim to or the continued existence of the mineral interest. Additionally, the Act allows for the mineral owner to record a notice of intent to preserve the mineral interest in each unused time frame. The notice must be specific as to the legal descriptions or that owner must have had a prior recorded document which is specific as to his ownership tracts. The final court order, (when recorded) merges the terminated mineral interest with the surface estate.

Various Western States Dormant Mineral Acts

Generally the dormant mineral statutes from the below noted western states are either self executing or require a judicial determination in order for the mineral title to vest into a new owner. Although most of the statutes have the same determining factors for "use" of the minerals as the Uniform Statute, each statute should be carefully reviewed for the specific uses prior to any filings. Below I have listed some of these western dormant mineral acts and highlighted the specific terms for each:

**North Dakota - ** N.D. Cent Code. § 38-18.1-01 et seq. "Termination of Mineral Interest"

- Provides for a nonuse period of 20 years immediately preceding the first publication of the required "notice of lapse of the mineral interest."
- If the address of the mineral owner appears of record or can be determined "upon reasonable inquiry," actual notice must be given to the owner by mail within ten days after the last publication.
- Unless a claim of notice is recorded in that 20 year period or the 60 day grace period

affecting mineral interests. Wichelman v. Messner, 250 Minn. 88, 83 N.W.2d 800 (1957) (dictum). Note that some of these states have adopted some form of a dormant mineral statute.

after the notice, the mineral interest is deemed to be abandoned, (self-executing).

- Title to this abandoned mineral interest vests in the owner or owners of the surface estate in the land in or under which the mineral interest is located on the date of abandonment.
- On the date of abandonment, surface owner may record a statement of succession of interest indicating that they have succeeded to the mineral interest.

South Dakota - S.D. Codified Laws Ann. Ch. 43-30A-1 et seq. "Abandoned Mineral Interests"

The South Dakota statute is essentially the same as the North Dakota statute except that the nonuse period is 23 years immediately preceding the first publication of the required notice.

Washington - Wash. Rev. Code § 78.22.010 et seq. "Extinguishment of Unused Mineral Rights"

- Provides for a nonuse period of 20 years.
- Surface owner must provide sixty days notice of intention to file a "claim of abandonment and extinguishment of the mineral interest" upon the current mineral interest owner.
- Notice shall be served by personal service or by mailing the notice by registered mail to the last known address of the current mineral interest owner. Otherwise the notice may be published.
- A "statement of claim" must be filed in the county auditor's office in the county in which such land affected by the mineral interest is located in that 20 year period or the 60 day period after the notice by the mineral owner.
- If the surface owner files the claim of abandonment and extinguishment, together with a copy of the notice and the affidavit of publication in the county auditor's office for the county where such interest is located, then the mineral interest shall be conclusively presumed to be extinguished (self-executing).
- Upon receipt, the county auditor shall record a statement of claim or a notice and affidavit of publication in the dormant mineral interest index.

Kansas - Kan. Stat. Ann. § 55-1601 et seq. "Miscellaneous Provisions"

- Provides for a nonuse period of 20 years in which the mineral estate shall lapse and revert to the surface owner (self-executing).
- Surface owner who will succeed to the ownership of the interest shall give notice of the lapse of the mineral interest by publication and, if the address of the owner of the mineral interest is shown of record or can be determined upon reasonable inquiry, by mailing a copy by restricted mail.
- Mineral owner must file a "statement of claim" within 60 days after publication of

notice of lapse or 60 days after actual knowledge if no there is no publication.

- The statement of claim shall be filed in the office of the register of deeds of the county in which the land is located.
- Upon receipt, the register of deeds shall record a statement of claim or a notice and affidavit of publication in a book to be kept for that purpose.

Oregon - Or. Rev. Stat. § 517.170 et seq. "Extinguishing Dormant Mineral Interests"

- Provides for a nonuse period of 30 years in which the mineral estate shall lapse and revert to the surface owner (self-executing).
- "The owner of the land" shall publish notice of the lapse of the mineral interest.
- If the address of the mineral interest holder is known or can be determined by due diligence, the notice shall also be mailed by the owner of the land to the holder of the mineral interest before the first publication.
- Mineral owner must file a "statement of claim" to the county clerk within 60 days after last publication of the notice.
- Upon receipt, the clerk of the county shall record a statement of claim OR a notice and affidavit of publication of notice in the Mineral and Mining Record.

California - Cal Civ. Code § 883.210 et seq. "Termination of Dormant Mineral Right"

- Provides for a nonuse period of 20 years in which the owner of "real property" may bring an action to terminate the mineral right (judicial).
- An owner of a mineral right may at any time record a notice of intent to preserve the mineral right.
- The mineral interest will not be dormant:
    - If the notice of intent is filed any time in the 20 years immediately preceding commencement of the action.
    - Or if during the action a late notice of intent is filed as a condition of dismissal and upon payment to the court of litigation expenses for the benefit of the "real property owner."
- A mineral right terminated pursuant to this article is unenforceable and is deemed to have expired.
- A court order terminating a mineral right pursuant to this article is equivalent for all purposes to a conveyance of the mineral right to the owner of the "real property".

Nebraska Neb. Rev. Stat. § 57-228, et seq. "Mineral Interests, Severed"

- Provides for a nonuse period of 23 years in which the surface owner may bring an action to terminate the mineral interest (judicial).
- An owner of a mineral right must file a verified claim of interest in the county within the twenty-three years immediately prior to the filing of the action.
- If the court finds that the severed mineral interest has been abandoned, it shall enter

judgment terminating and extinguishing it, canceling it of record, and vesting the title thereto in the owner or owners of the interest in the surface from which it was originally severed.

One note that should be included in relation to Nebraska's statute, it has been declared unconstitutional insofar as the statutory provisions could be interpreted to be retroactive in their operation.[61]

Oklahoma - Okla. Stat. Ann. § 60-651 et seq. "Uniform Unclaimed Property Act" and in conjunction with Okla. Stat. Ann § 84-271.1 et seq. "Abandoned Mineral Interests"

The Oklahoma version of a dormant mineral act is actually included in its Unclaimed Property Act. This makes it very unique because the subsequent vesting of the mineral interest is in the state, subject to a judicial sale. Additionally, Unclaimed Property Acts typically only cover intangible personal property. The major provisions for Oklahoma's statutes are as follows:

- § 60-658.1 - Provides that any mineral interest in land in Oklahoma shall be subject to sale if it generates an intangible property interest which is presumed abandoned for a period of 15 years under the Uniform Unclaimed Property Act or under similar laws of another state.
- § 84-271.1 - If the proceeds or other intangible property interest from any mineral interests are abandoned for a period of fifteen (15) years, as provided for in the Uniform Unclaimed Property Act, then the mineral interest which generates the intangible property interest shall not be subject to escheat, but shall be subject to **judicial sale** by the state as provided for in Sections 273 through 277 of this title, (the escheat provisions under Oklahoma probate law).
- Requires judicial action, action may be brought by any party who has an interest in either the surface or the mineral rights.
- Escheated mineral estate does not stay with the state of Oklahoma, if a judgment of escheat is rendered, there is a mandatory judicial sale, with notice provided to the surface owner, so that the surface owner has an opportunity to acquire the mineral interest in the sale.
- This procedure is only available for mineral interests that have produced unclaimed proceeds, either in the form of unclaimed royalties or unclaimed bonus or rentals. Therefore, at a minimum, the interest must be leased.

It should be noted that under the Oklahoma Unclaimed Pooled Monies Act, mineral proceeds of unknown or unlocatable owners arising under producing units which have been force

[61] Monahan Cattle Co. v. Goodwin, 201 Neb. 845, 272 N.W.2d 774 (1978); Wheelock & Manning 00 Ranches, Inc. v. Heath, 201 Neb. 835, 272 N.W.2d 768 (1978).

pooled are placed in the custody of the Oklahoma Corporation Commission.[62] After these funds have been held for seven years or more from the date of pooling, they are transferred to the Oklahoma Tax Commission to be held in the Unclaimed Property Fund.

Based on the requirement that the escheated mineral interest be associated with unclaimed proceeds, the usefulness of Oklahoma's statute for the majority of "dormant" mineral interests is very limited. Typically, "abandoned/dormant" mineral interests are not under an oil and gas lease and are non-producing.

Constitutionality of Dormant Minerals Legislation

These dormant mineral statutes all seem to have several constitutional issues, the main issues being due process (lack of notice), and taking of private property. However, in the United States Supreme Court in the case of *Texaco, Inc. v. Short*,[63] the Court upheld the Indiana Dormant Mineral Interests Act against constitutional challenges. These challenges were based on due process and taking of private property without just compensation. Similar to the Uniform Act, the Indiana statute had a non use period of 20 years, and then the mineral estate automatically reverted to the surface owner. The Court stated that it was within the state's right to enact legislation which made the retention of a property right contingent on an affirmative act.

The Court's analysis was based on the concept that failure to exercise a statutorily prescribed right of ownership over property for a specified period of time amounts to abandonment as a matter of law. The court reasoned that since there was abandonment, there was no taking of private property. As to the constitutional issue of due process, since the statute was self-executing (automatic) as opposed to a judicial determination, there was no requirement of notice.[64]

Receivers or Trustees to Lease

Many oil producing states have statutes that permit probate/district courts to appoint receivers or trustees to lease on behalf of unknown and unlocateable mineral interest owners upon judicially approved terms. The person requesting the lease must own an interest in the minerals, leasehold or royalty on the lands. The proceeds from leases are held in escrow for the owners and eventually escheat to the state if not claimed. Colorado, Kansas, Oklahoma, Texas, and Montana are some of the oil and gas producing jurisdictions that include a receiver/trustee statute.[65]

Escheat Statutes / Unclaimed Property

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[62] OKLA. STAT. ANN. tit. 52, §§ 551-558 (2007).
[63] Texaco, Inc. v. Short, 454 U.S. 516 (1982).
[64] Id. at 533-34.
[65] COLO. REV. STAT. § 38-43-101 (2007); KAN. STAT. § 55-220 (2006); OKLA. STAT. ANN. tit. 52, § 522 (West 2007); TEX. CIV. PRAC. & REM. CODE ANN. § 64.091(2007); MONT. CODE ANN. §§ 82-1-301 to 82-1-306 (2007).

The unclaimed property statutes (commonly known as the "escheat" statutes) typically do not apply to real property and therefore would not apply to severed minerals in almost all of the states. Typically these statutes only apply to tangible and intangible personal property, except for Oklahoma, which as previously noted has included mineral interests as property that is subject to its Unclaimed Property Act. Mineral proceeds would be subject to most[66] of these statutes because they are intangible personal property. Examples of these mineral proceeds are the royalties on produced minerals, bonuses and delay rentals.

Essentially these statutes require an entity that has unclaimed property for a specific "dormancy period" to report and turn over this property to the state as custodian. The dormancy period is the period in which the property has remained unclaimed after it became payable or distributable. Many of the states have differing dormancy periods for the different types of unclaimed properties. For mineral proceeds, the majority of the dormancy periods range from 3 years to 7 years, but as noted earlier, Oklahoma's statute is for 15 years. For mineral proceeds, Texas, Wyoming and Utah[67] have a dormancy period of 3 years, and Colorado has a dormancy period of 5 years.

The Uniform Unclaimed Property Act from 1995 was the first uniform act to make a specific reference to mineral proceeds. Additionally, the definition of mineral proceeds included "all payments that become payable thereafter." Therefore, the recurring income to a royalty owner or working interest owner is deemed abandoned when the first payment has gone unclaimed for the dormancy period. This inclusion allowed companies to continue to turn over recurring mineral proceeds payments as accrued without having to file a new monthly report for that unknown owner.

There is a misconception that mineral proceeds payments should be escheated to the state where the production is located. In the 1965 case of *Texas v. New Jersey*,[68] the Supreme Court established that the state to which the unclaimed property is escheated is the state of residence of the last known address of the owner. If there is no last known address, then the holder is required to report the property to the holder's state of incorporation. As a caveat to the state of incorporation, if a different state could prove that the "no last known address" property actually belonged to an owner with an address in that state, the property could be reclaimed from the state of incorporation. This rule was reaffirmed by the Supreme Court in *Delaware v. New York.*[69]

For more information on the escheat laws and to find specific escheat laws for each state, visit the National Association of Unclaimed Property Administrators (NAUPA) website at http://unclaimed.org/.

[66] Kentucky specifically excludes mineral proceeds from its Unclaimed Property Act, but does accept voluntary payments.
[67] Utah's dormancy period for mineral proceeds was reduced in 2007 from 5 years to 3 years.
[68] Texas v. New Jersey, 379 U.S. 674 (1965).
[69] 507 U.S. 490 (1993).

V. ANCILLARY PROBATE

Inasmuch as the law of the situs controls the disposition of real property, an ancillary administration will have to be conducted in each state in which the testator has real property subject to disposition by the testator's will.[70] Thus, the need for ancillary probate is dependent upon the state classification of the mineral, royalty or leasehold interest that is subject to disposition. All jurisdictions seem to agree that a severed mineral estate and a lessee's interest under an oil and gas lease are interests in land.[71] For the most part, royalty interests and most interests carved out of the leasehold interest are also regarded as interests in land.[72] But, an interest in land may be classified as real property or personal property, and there is no uniform view on the treatment of the various interests in oil and gas.

As previously stated, at common law, the basis for the classification of an interest in land as real or personal was duration.[73] If the interest was for life or had the possibility of enduring perpetually, it was freehold in character and classified as real property.[74] Interests in land for less than a freehold estate, such as an estate for a term years, were labeled as chattel real, a personal property interest in land.[75] Some states, such as California, continue to apply this distinction to oil and gas rights to determine their classification.[76] However, today, whether a particular jurisdiction has classified oil and gas rights as real property or personal property is generally determined by statutory interpretation, rather than by common law principles.[77] The major significance of the distinction of interests in oil and gas as personal or real property is under statutes phrased in terms of real estate or personal property without specific mention of interests in oil and gas.[78]

Colorado, Texas, Wyoming, and Utah classify mineral, leasehold, and unaccrued royalty interests as real property.[79] Therefore, a will that devises such property of a nonresident decedent must be given effect through some form of proceeding in the jurisdiction where the

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70 Regis W. Campfield, ESTATE PLANNING AND DRAFTING, 86 (3rd ed. 2007).
71 1 H. WILLIAMS & C. MEYERS, *supra* note 5, § 212.
72 Id.
73 Id.
74 Id.
75 Id.
76 *E.g.,* Callahan v. Martin, 43 P.2d 788 (Cal. 1935); Dabney v. Edwards, 53 P.2d 962 (Cal. 1936). *See also* 1 H. WILLIAMS & C. MEYERS, *supra* note 5, § 212.
77 Lowe, *supra* note 27 at 36.
78 *See* 1 H. WILLIAMS & C. MEYERS, *supra* note 5, § 213.
79 *See* 1 H. WILLIAMS AND C. MEYERS, *supra* note 5, § 214. *See, e.g.,* Colo. Rev. Stat. §38-30-107.5 (2007) (any conveyance, reservation, or devise of a royalty interest in minerals after July 1, 1991, whether of perpetual or limited duration, creates a real property interest); UTAH CODE ANN. 57-1-1(3) (2007)(mineral interests included in statutory definition of real property); Simson v. Langholf, 293 P.2d 302 (Colo. 1956) (describing a severed mineral interest as an interest in real property); Sheffield v. Hogg, 77 S.W.2d 1021, 80 S.W.2d 741 (1934) (mineral, royalty and leasehold interests, if of the duration of a freehold estate, are treated as real property); Andalex Resources v. Myers, 871 P.2d 1041, 1045 (Utah Ct. App. 1994) (oil and gas leases are real estate)(citing Chase v. Morgan, 339 P.2d 1019, 1021(Utah 1959)); Denver Joint Stock Land Bank v. Dixon, 122 P.2d 842 (Wyo. 1942) (royalty interest is an interest in real property).

property is located. While a detailed review of the probate codes of these states is beyond the scope of this paper, the following overview highlights the procedures available to clear title to real estate when the formality or expense of an additional administration is not warranted.

Texas

The Texas Probate Code provides a flexible approach for handling real property of a nonresident decedent, which makes it possible to fit the degree of court action to the needs of the particular estate.[80] In addition to original probate in Texas, there are two simplified methods for clearing title to real property devised by a foreign will in Texas.[81] These are: (1) by a simple procedure for admitting to probate in Texas a will that has been admitted in another jurisdiction[82]; or (2) by filing a copy of the will along with proof of its probate in the deed records in each county in which property of the estate is located.[83]

The Texas Probate Code offers a simplified procedure for the probate of a will in Texas and for an individual to qualify as an ancillary personal representative, if the will has already been admitted to probate in the state where the decedent was domiciled.[84] A foreign will that has been admitted to probate in the testator's state of domicile is automatically admitted to probate in Texas when an authenticated copy of the foreign proceeding is filed and recorded in the minutes of the probate court.[85] The probated will is then effective to dispose of both real and personal property in Texas, whether or not executed in compliance with local requirements.[86] In fact, good faith purchasers for value retain good title even if the admission to probate in the foreign state is set aside in a subsequent contest of the will.[87] Upon proof that the executor named in the will has qualified in the foreign jurisdiction and is not disqualified to serve as executor in Texas, the court issues letters testamentary to the executor, who is then entitled to administer the will in Texas.[88]

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[80] Steven D. Lerner, *Need for Reform in Multistate Estate Administration*, 55 Tex. L. Rev. 303, 308 (1977).
[81] 17 M. WOODWARD & E. SMITH, TEX. PRAC. PROB. & DECEDENTS' ESTATES § 411 (2007).
[82] TEX. PROB. CODE ANN. § 95 (Vernon 2007).
[83] Id. § 96.
[84] Id. §§ 95, 105. Section 95 of the Probate Code provides for ancillary probate of foreign wills whether the original probate was in the state of domicile or some other jurisdiction. However, section 95 makes a distinction between wills admitted to probate in the state of the testator's domicile and those admitted in some other foreign state. Most foreign wills will be probated in the state of the decedent's domicile, and that is the focus of this paper. Note, however, that there is a difference in procedure if the will has been probated in a jurisdiction other than the decedent's domicile. *See* § 95(b)(2) (If the will has been probated in a state other than the decedent's domicile, the application for probate must include all of the information required for application for the probate of a domestic will and notice must be given to each devisee and heir by registered certified mail.)
[85] TEX. PROB. CODE ANN. § 95(b)(1). After the clerk performs the ministerial duty of recording the will in the minutes of the court, the will is deemed admitted to probate without the issuance of a formal court order. Id. § 95(d)(1).
[86] Id. § 95(e).
[87] Id. §95(f). *See* Lerner, *supra* note 80, at 306.
[88] TEX. PROB. CODE ANN. § 105. The executor must, however, appoint a registered agent for service in order to qualify. Id. § 78(c).

In addition, there is an inexpensive alternative to original or ancillary probate when all that is needed is transfer of title to Texas real estate to devisees named in the will.[89] The foreign estate may fix and preserve muniment of title by simply filing a copy of the duly probated foreign will, along with the proof of its authenticity of probate, in the deed records of each county in which real property is located.[90] The filed will has "the same effect as the record of deeds or other conveyances of land"[91] and constitutes constructive notice of ownership to all persons dealing with the property.[92] After recordation, the foreign executor or testamentary trustee may exercise a power of sale expressly conferred by the will without court authorization.[93] However, the executor's powers are limited to the sale or conveyance of property in accordance with authority given in the will.[94]

Colorado and Utah—Uniform Probate Code

Colorado and Utah have adopted the Uniform Probate Code, which attains a similar degree of flexibility and simplicity in dealing with foreign wills.[95] The Colorado Probate Code provides for a simplified proceeding for a foreign domiciliary estate that is actively pending if all that is needed is transfer of title to Colorado property.[96] Provided that no local administration is pending or in effect, the domiciliary personal representative need only file with the appropriate Colorado court a certified copy of his appointment to get broad non-court supervised authority to act.[97] The foreign personal representative then has all the powers of a local personal representative with respect to Colorado property, including the power to convey real estate.[98] Thus, with the exception of a few initial filings, the personal representative may effectively deal with the estate's property free of the expense and delay required by court supervision.

In addition, an informal procedure is available for a will that has been previously probated elsewhere. The will may be probated by filing an authenticated copy of the will along with a statement of its original admission to probate.[99] The domiciliary personal representative may then file a copy of his appointment by the domiciliary state, which will entitle him to the same powers that a local representative could exercise.[100]

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[89] Id.§ 96.
[90] 17 M. WOODWARD & E. SMITH, *supra* note 81, §§ 413, 435.
[91] TEX. PROB. CODE ANN.§ 98.
[92] Id. § 99.
[93] Id. § 107.
[94] 17 M. WOODWARD & E. SMITH, *supra* note 81, §411.
[95] Lerner, *supra* note 80, at 308.
[96] C. KRENDL & J. KRENDL, 3A COLO PRAC., METHODS OF PRACTICE §102.32 (4th ed.), cited hereafter as "3A COLO PRAC."
[97] COLO. REV. STAT. §§ 15-13-204, 15-13-205 (2007); UTAH CODE ANN. §75-4-204, 75-4-205 (2008). *See* 3A COLO. PRAC., *supra* note 96, §102.32.
[98] 3A COLO. PRAC., *supra* note 96, §102.32.
[99] UTAH CODE ANN. §§ 75-3-301, 75-3-302, 75-3-303 (2008).
[100] UTAH CODE ANN. § 75-3-205.

Wyoming

Although Wyoming has adopted portions of the UPC, there are some important differences in the procedures available. In Wyoming, as under the UPC, if a foreign domiciliary estate is actively pending, a foreign personal representative, upon filing a certified copy of his appointment, is granted authority to exercise all of the same powers of a local personal representative.[101] However, the foreign personal representative is limited to court-supervised procedures, unless the will expressly authorizes the sale of real estate without court supervision.[102] To make distributions of real property, a court order is necessary to transfer title.[103]

Wyoming has a summary procedure for the sale of Wyoming property when the probate court in another state has authorized the sale.[104] This procedure only applies when the estate in Wyoming has a value of $150,000 or less, and requires the district court judge to do notice by publication.[105] If the petition for sale is approved, the sale proceeds as other court-supervised sales in Wyoming probate.[106] The petition for sale must be denied if a creditor objects who did not file a claim in the proceeding in the other state.[107]

Wyoming also has a summary administration procedure for estates that have been completely settled in another jurisdiction.[108] The summary administration procedure allows the estate of nonresidents whose property in Wyoming does not exceed $150,000 to fully administer the Wyoming property by filing documents from the completed probate in another state and giving notice by publication that the proceedings will be admitted as the probate of the estate in Wyoming.[109] If no objection is made at the hearing on the petition, the estate will be considered fully administered.[110]

VI. CONVEYANCE OF MINERAL INTERESTS AND ITS CONSTITUENT PARTS

Severance of Minerals

In almost all mineral producing jurisdictions, including Colorado, minerals can be separated and severed from surface ownership.[111] The rights to receive bonus payments, royalty

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[101] WYO. STAT. ANN. § 2-11-302 (2007).
[102] WYO. STAT. ANN. §§ 2-7-614 to 2-7-626
[103] WYO. STAT. ANN. § 2-7-807.
[104] WYO. STAT. ANN. § 2-11-202(a).
[105] Id.
[106] Id.
[107] WYO. STAT. ANN. § 2-11-202(b).

[108] WYO. STAT. ANN. § 2-11-201.
[109] Id.
[110] Id.
[111] C. KRENDL & J. KRENDL, 1 B COLO. PRAC., METHODS OF PRACTICE §10.1 (5th ed.) cited hereafter as "West's Colorado Practice Series."

payments, and the reserved royalty are similarly alienable or severable, either in whole or in part, in the majority of jurisdictions.[112] Historically most courts have held that a general grant or reservation of "minerals" or of "all minerals" will be inclusive of oil and gas and all constituent hydrocarbons.[113] In the 2000 Colorado Supreme Court case of *McCormick et.al. v. Union Pacific Resources Company, et. al.*, the court stated that the inclusion of oil and gas in the term "other minerals" is well established as a matter of law, thereby excluding any need to review extrinsic evidence.[114]

However, because of the differences in extraction methods and the possibility of total destruction of the surface by certain methods of extraction, some states began to limit the terminology of "all minerals."[115] This shift away from the term "minerals" being all-inclusive is based in large part on whether the minerals contemplated can be extracted without destruction of the surface. Accordingly, when reserving/granting oil and gas and/or hard rock minerals, it is probably best to be specific.

Conveyance Requirements

Before we address the issues and problems created in conveying a mineral interest, there should be a quick review of the minimum requirements of a document that constitutes a conveyance in most jurisdictions.[116]

1. Must be a writing sufficient to satisfy the statute of frauds;
2. Must contain appropriate words of grant;
3. Must contain identification of parties, (grantor, grantee);
4. Must contain an adequate description;
5. Proper execution for delivery/acceptance and that the conveyance can be recorded or listed for taxes.

Reservation/Grant

As previously noted, because minerals are an interest in real property they must be specifically reserved in a conveyance. When an unsevered estate is conveyed without reference to a separate surface and mineral estate, the entire unsevered estate passes to the grantee.[117] West's Colorado Practice Series[118] suggests the following terminology when reserving or granting of minerals and oil and gas:

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[112] RICHARD W. HEMINGWAY, THE LAW OF OIL AND GAS §§ 2.1 to 2.8 (3d ed.1991).
[113] West's Colorado Practice Series, *supra* note 112, §10.1.
[114] 14 P.3d 346 (Colo. 2000).
[115] Acker v. Guinn, 464 S.W.2d 348 (Tex.1971); Christensen v. Chromalloy American Corp., 656 P.2d 844 (Nev. 1983); Moser v. United States Steel Corp., 676 S.W.2d 99 (Tex. 1984).
[116] Lowe, *supra* note 27 at 59; 1 H. WILLIAMS & C. MEYERS, *supra* note 5, § 220.
[117] 1 H. WILLIAMS & C. MEYERS, *supra* note 5, § 301.
[118] West's Colorado Practice Series, *supra* note 112, §10.1.

For a grant or reservation of all minerals, including oil and gas: [granting/reserving]—"all minerals of whatsoever kind or character in, under, and upon or that might be produced from the herein described lands …"

For grants or reservations of only oil and gas: [granting/reserving]—"all oil, gas and all constituents thereof in, under, and upon or that might be produced from the herein described lands …"

Although some authorities think that identifying specific minerals risks the danger of judicial limitation,[119] the author is of the opinion that you can identify the specific minerals without incurring a limitation. An example would be "all minerals of whatsoever kind or character, **including without being limited thereto**, oil, gas and their constituents thereof and coal, and …, in, under, and upon or that might be produced from the herein described lands …. "

Mineral /Royalty Distinction

The definitions of mineral interests and royalty interests have been previously defined in this paper. However, it is important to remember this distinction and particular terminology when conveying interests. The mineral fee estate has the executive right to grant to another the right to explore for minerals, (i.e. grant an oil and gas lease) and to receive bonus, delay rentals and a landowner royalty. They royalty interest is a right only to receive a share of production, or the value of proceeds of production, as, if and when produced, free of costs of production.

Needless to say there have been infinite numbers of cases over the years regarding whether a conveyance is a mineral interest or a royalty interest. In the majority of cases, when the term "royalty" was used to describe the interest, the courts typically deemed the conveyance a royalty interest.[120] When there was no "royalty" terminology utilized, the courts have used the characteristics associated with minerals (right to bonus and delay rentals, executive right, landowner royalty) or with royalty (right to production when, and **if** produced). The cases are too numerous to delve into given the scope of this paper, but the best practice is to include the term "royalty" when conveying a royalty interest only and to exclude the term "royalty" when conveying a mineral interest.

However, in a few jurisdictions, a conveyance of a perpetual royalty interest has been either invalidated or interpreted as a conveyance of a mineral interest. A perpetual royalty interest is one that is not term limited (i.e. not limited to a specific lease) and is of "perpetual"duration. The Kansas Supreme Court has held that a perpetual royalty violates the Rule Against Perpetuities. In *Lathrop v. Eyestone*[121] the lessor attempted to transfer a fractional share of royalty under an existing lease and a fractional share of royalty and bonus under any

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[119] Id. *E.g.*, Acker v. Guinn, 464 S.W.2d 348 (Tex.1971); Bulger v. McCourt, 138 N.W.2d 18 (Neb. 1965).
[120] Oklahoma being an exception. 1 H. WILLIAMS & C. MEYERS, *supra* note 5, § 307.1
[121] Lathrop v. Eyestone 170 Kan. 419, 227 P.2d 136 (1951) and was followed in Cosgrove v. Young 230 Kan. 705, 642 P.2d 75, (1982).

future leases. After the lease expired, the subsequent owner of the lessor's interest brought suit to terminate the grantee's interest as a violation of the Rule. The court held that a royalty interest does not vest until it is created by a lease. Thereby a transfer of a present possessory mineral estate is valid since it vests immediately, and the "ambiguous" instrument was construed to create a valid mineral interest rather than an invalid royalty interest.[122]

In Colorado, until the law was changed by statute[123] in 1991, a royalty conveyance prior to an existing oil and gas lease was held to be a mineral fee estate.[124] After July 1, 1991, non-participating royalty interests of perpetual duration can be created in Colorado. Although any conveyance prior to that time could be in danger of being interpreted as a mineral interest, there are several cases that allowed for the validity of a non-participating royalty to be created prior to the enactment of the statute.[125] The cases in Oklahoma have held that when there is no lease in existence at the time of the conveyance and the royalty is not stated as a specific percentage of production, (e.g. "1/2 of 1/8th royalty"), that a reference to royalty denotes a mineral interest.[126]

The State of Texas owns the minerals in certain lands that are subject to the Texas Relinquishment Act.[127] Under the Act, the owner of the soil acts as the agent of the state for the purpose of leasing the lands for oil and gas. Accordingly, the owner of the soil does not own any of the minerals and has no power to convey any minerals. Furthermore, the owner of the soil cannot convey any interest in royalty, delay rentals or bonus prior to the leasing of the minerals. If there is an attempt at conveyance of these rights prior to that time, the conveyance is considered void.

In oil and gas producing jurisdictions, there have been numerous cases regarding the "quantum of production" of royalty conveyances. This is especially true when there is not an existing lease at the time of conveyance, or the proportion of the royalty share is not subject to future leases or future royalty rates. Remember that a royalty interest is "a right only to receive a share of production." Accordingly, a conveyance of a "1/10th royalty interest" without further limitations would be 1/10th of the total production, NOT a 1/10th of the royalty rate on an existing or future lease.

In this instance, given a royalty rate of 1/8th, (12.5%) and without any further limitation on the "royalty interest" the grantor would have only reserved 2.5% of the production to himself and the grantee received a right to 10.0% of the production. If the grantor had stated a "1/10th of the 1/8th royalty in that lease dated…," then the grantor would have a royalty share of 11.25% of the production and the grantee would receive a royalty share of 1.125% (1/10th x 1/8th). In most jurisdictions, if there is not an existing lease, the grantor may still limit the conveyance to "1/10th

[122] Id..
[123] COLO. REV. STAT. § 38-30-107.5 (2007).
[124] Corlett v. Cox, 138 Colo. 325, 333 P.2d 619 (1958); Simson v. Langholf, 133 Colo. 208, 293 P.2d 302 (1956).
[125] Keller Cattle Co. v. Allison, 55 P.3d 257 (Colo.App.2002); Mull Drilling Co. v. Medallion Petroleum, Inc., 809 P.2d 1124 (Colo.App.1991).
[126] Lowe, *supra* note 27, at 131.
[127] TEX. NAT. RES. CODE ANN. §§ 52.171 to 52.190 (Vernon 2007).

royalty interest of any future royalty rate as stated in any lease executed by the grantor…." Since there is no oil and gas lease and a right to receive production was not term limited, this royalty interest conveyed is of perpetual duration and is not limited to a specific lease.

Fractional Interest Conveyances

In addition to the issue of whether the conveyance is a mineral or a royalty conveyance, the drafter of the conveyance must be careful when dealing with fractional interests. Where transfers or reservations of less than an entire mineral fee interest occur, it is on the turn of a few words or the location of the reservation/exception that the document could over convey or under convey the interest inconsistent with the intent of the parties. Historically, there was a difference between a reservation of an interest and an exception of an interest. An exception saved back a part of what was being granted. A reservation created a new right in what was being granted.[128] However, modern courts do not make the same distinction because these terms "are often used interchangeably without any intent to preserve the historical distinction and that historical distinction is without significance when the deed itself unambiguously manifests the intent of the parties." [129]

In the majority of the jurisdictions in the cases involving fractional interests, the determining factor is what was purported to be conveyed to the grantee. These cases have stressed that the risk of loss is on the grantor in a warranty deed. Suppose that A owns a full fee interest, 100% of surface and minerals, and in 1940 conveys the entire surface and ½ of the mineral interest to B, reserving a ½ mineral interest to A. In 1965, by warranty deed, B conveys to C all his right, but reserving ½ of the mineral estate. The question arises, did B intend to reserve and except out of the conveyance the remaining ½ mineral estate for himself, or did he reserve and except out the ½ mineral interest owned by A to protect himself in the warranty provision? The answer is that unless B specifically reserves and excepts out the minerals that were conveyed to him, his reservation will be construed as being applicable and referring to the prior reservation. Therefore, words like "reserving all of **my** mineral interest or 100% of the mineral interest" in the granting clause would operate to reserve the remaining ½ (50%) mineral interest to the grantor. As for the warranty clause, as long as the desired minerals are properly reserved in the granting clause, it is sufficient to simply except from the warranty clause any prior reservations of record, as long as they are of record.

This example is the case of *Duhig v. Peavy-Moore Lumber Co.*[130] In his conveyance deed, Duhig reserved a ½ mineral interest, but warranted full surface and mineral rights. At the time of the conveyance, Duhig only owned ½ of the minerals because the other ½ had been previously reserved. The opinion adopted by the court was based on the rationale of deed construction. Construed as a whole, the deed shows an intent to convey to the grantee all the surface and ½ of the minerals, therefore that is what is conveyed. However, the concurring opinion created what is now known as the Duhig doctrine. The concurring opinion had a two-

[128] 1 H. WILLIAMS & C. MEYERS, *supra* note 5, § 310.
[129] O'Brien v. Village Land Company, 794 P.2d 246 (Colo. 1990).
[130] 144 S.W.2d 878 (Tex. 1940).

step reasoning process based on 1) deed construction and 2) breach of warranty. As in the official court opinion, the deed was construed to convey ½ of the minerals and all of the surface; but Duhig's reservation of ½ of the minerals coupled with the previously reserved ½ interest in minerals also created a breach of the warranty provision.

Therefore, under the doctrine of estoppel by deed, the grantor was estopped from asserting the reservation of his ½ of the minerals, and therefore Duhig conveyed the ½ mineral interest which he was attempting to retain. The concurring opinion reasoning is based on the fact that because of the warranty, as between the conflicting objectives of reserving ½ minerals yet also conveying ½ minerals with only the ½ to either reserve **or** convey, the risk of loss of title rests on the grantor.

To show the complexity of the cases regarding the Duhig doctrine and fractional interest cases in the majority of oil and gas producing states, below I have reflected the Colorado cases which reach the *Duhig* result. The most noted case is the 1990 case of *O'Brien v. Village Land Company.* [131] It is interesting to note that the court found only on the premise that the deed itself was unambiguous. The facts of the case are similar to *Duhig* in that ½ of the minerals had been previously reserved, and the deed from Village Land Company contained a reservation of ½ of the minerals, but warranted all the surface and minerals. In the footnotes of the case, the Colorado Supreme Court specifically stated that "We do **not employ the Duhig analysis** in this case and instead reach our result by giving effect to the unambiguous and un-equivocal terms of the Village Land ... Deed." Basically the court found that the actual interest conveyed by the plain terms of the deed, (½ of the mineral interest) was still **within** the power of Village Land to convey, (the remaining ½ that they attempted to reserve).

The warranty clause in the Village Land deed excepted "… and any and all other items and agreements of record." At the time of execution of the Village Land deed, the prior reservation of ½ of the minerals had not been placed of record. The court addressed the issue of exceptions in the warranty clause and noted that the prior reservation had not been recorded. However, the court emphasized that even if the grantee had actual knowledge of the prior reservation, such knowledge would not have placed the grantee on notice that Village Land was unable to convey the ½ interest, because Village Land still held the ½ mineral interest which it could convey.

Although the *O'Brien* ruling achieved the *Duhig* outcome, the court did not follow the strict "four corners of the deed" principle which appears to be central in *Duhig* type cases. Simply put, this principle is that unless the deed is ambiguous, the court should **not** look beyond the four corners of the deed, therefore no extrinsic evidence is allowed to clarify intent. An early Colorado case establishing this principle is the 1953 case of *Brown v. Kirk*; [132] which is often referred to when discussing *Duhig* facts. The *Brown* court clearly stated this principle as follows: "Where a deed is unambiguous and unequivocal, the intentions of the parties hereto must be determined from the

[131] 794 P.2d 246 (Colo. 1990).
[132] 127 Colo. 453, 257 P.2d 1045 (1953).

deed itself, and extrinsic evidence to alter, vary, explain or change the deed by any such evidence is not permissible."

The facts in the *Brown* case deal with the reservation of fractional interests that are different (not the ½ and ½ as in *Duhig* and *O'Brien*). The prior reservation was a ¼ mineral interest, the granting clause of the deed in question reserved ½ of the minerals, and the warranty provision of said deed was "subject to the reservations above mentioned." The court ruled that the grantee receive ½ of the minerals, and the grantor retain ¼ of the minerals, not the ½ interest that he attempted to reserve. The outcome is similar to *O'Brien*, but the *Brown* court ruled pursuant to the strict four corners of the deed principle. In the opinion, the *Brown* court also discussed the difference between the terms "reservations" and "exceptions." However, the court dismissed any significance of these terms based on the grantor's use of the terms "interchangeably and synonymously without attempting any legal distinction or effect thereof...." It is interesting to note that based on the facts, the *Brown* court could have easily ruled that the deed was unambiguous, that the grantor purported to sell ½ (by reserving a ½), and warranted ½, (by excepting what he had reserved). The fact that ¼ was outstanding did not prevent the grantor from selling and warranting ½ since he still had a ¾ interest within his control.

The plain language of the deed theory noted in *O'Brien* was established earlier in Colorado, the most cited of which is in the case of *Percifield v. Rosa*.[133] The *Percifield* court stated that it is a ". . . well settled rule of construction of deeds [to] give force and effect to all of the provisions and terms of the deed which the parties intended at the time of its execution . . . [I]f a deed can be construed and interpreted so as to make all of its provisions operative and effective, that construction must be adopted." This theory is reiterated in the case of *Dixon v. Abrams*,[134] another case often discussed in relation to *Duhig* facts.

The *Dixon* case also points out some problems with following a simplified formula for *Duhig* type facts. Although the facts are somewhat complicated in *Dixon*, in effect, the grantee was prevented from claiming a mineral interest because their predecessor had "admitted" in the deed the prior reservation. The *Dixon* court distinguished their facts from the strict four corners principle set out in the *Brown* case by the facts that the grantee had notice of the prior reservation, that there was no privity created between the parties, and by certain rights created by the tax sale.

A 1991 Colorado Court of Appeals case, *Appling v. Federal Land Bank of Wichita*,[135] actually discusses the *Duhig* principle, and further states that the *Brown* case "represents the application of the *Duhig* principle." The *Appling* court states the *Duhig* principle as follows: "to the extent necessary to give to the grantee the undivided interest purported to be conveyed by the particular instrument, the exception or reservation is interpreted as including all outstanding mineral interests." The *Appling* case appears pretty convincing in favor of the *Duhig* principle. However, a review of subsequent cases reveals that the *Appling* case has only been cited in two Colorado

[133] 122 Colo 167, 220 P.2d 546 (1950).
[134] 357 P.2d 917 (Colo. 1961).
[135] 816 P.2d 297 (Colo. App. 1991).

Court of Appeals cases as authority for the premise "that if a deed is unambiguous, extrinsic evidence is inadmissible and must be ignored."[136]

Clearly, as the above Colorado cases demonstrate, there has been much litigation on the conveyance of mineral interests and their constituent parts. Instead of allowing a court to determine what the parties intended, the best method is to carefully draft the conveyance to reflect the parties' intent. Many practitioners believe that the only way to prevent these types of issues is to run a complete mineral title examination of the mineral interest in the lands being conveyed. However, to perform a complete mineral title examination is often logistically and financially prohibitive.

Therefore, my fundamental rule of drafting documents is BE specific in what you do know. If there is any chance of ambiguity, then specify the intentions of the parties. Make sure that you reserve all "your" outstanding interest; be sure to note **and** except all prior reservations in the **granting clause**, in addition to the warranty clause; and specify what interest you are attempting to reserve out of the whole.

On the flip side, do not over specify in the conveyance document such that the reservation or grant becomes limited. If you intend to reserve a mineral interest, do not use the word "royalty", and do not use the royalty interest percentage from a division order. Unless you are reserving a royalty interest in specific wellbores, do not list the wellbores, an inadvertent exclusion of a wellbore from the list or a wellbore that has yet to be drilled will be interpreted to be excluded.

Calculation of Royalty Interests

At this point it is important to understand how royalty interests are calculated once a well is drilled in terms of the relation between a mineral interest and a royalty interest in a well. As discussed earlier, oil and gas jurisdictions have regulations in place to promote conservation and protect the correlative rights of owners under a common source or pool. Pursuant to these regulations, a spacing unit or pro-ration unit is established for each well. The regulations take into account engineering data on the producing zone, the type of production and the formation wherein the production is located. Based on this data, an acreage spacing unit is established for the specific well from which the well will efficiently produce.

Typically, a spacing unit/pro-ration unit is a smaller portion of a governmental section of 640 acres.[137] In the Addendum, there are several pages titled "Land Measurements" which reflect the measurements of a section as established by the Public Land Survey System,[138] and the

[136] Terry v. Salazar, 892 P.2d 391 (Colo App. 1994); Michael Uhes, P.C. v. Blake, 892 P.2d 439 (Colo. App. 1995).

[137] In Colorado, under Rule 318A.e of the Colorado Oil & Gas Conservation Commission, a "boundary line" well may be drilled close to a section line and include portions of different sections in the wellbore spacing unit. COGCC Rule 318A.e (2007).

[138] A system of grids called townships and ranges with each township containing 36 sections as surveyed and regulated by the U.S. Department of the Interior, Bureau of Land Management.

associated system of grids. Generally, based on conservation and correlative rights principles, a spacing unit will be comprised of either 40 acres, (called a quarter-quarter of the section), 80 acres, 160 acres (quarter of section), 320 acres (½ of section) or sometimes even a full section. Essentially, the acreage of the spacing unit is the basis of the determination of the royalty share of each mineral/royalty owner within the spacing unit. The royalty share of a mineral owner in a specific well is an algebraic equation as follows:

(Mineral Interest Percentage) x (Lease Royalty Rate) x [(ownership acreage)/(spacing unit acreage)]

Examples

Facts:

- Farmer Fred owns 100% mineral interest in 160 acres (NW/4 of Section 4) and executed an oil and gas lease to Oil Company with a royalty rate of 1/8th.
- Harry Heir owns a 50% mineral interest in 80 acres (W/2SW/4 of section 4), and executed an oil and gas lease to Oil Company with a royalty rate of 15%.
- Ranchette Roger owns a 50% mineral interest in 80 acres (W/2SW/4 of Section 4) and executed an oil and gas lease to Oil Company with a royalty rate of 18.75%.
- Landman Lou owns an overriding royalty of 1.0% of 8/8ths in 80 acres (W/2SW/4 of Section 4) acquired from Oil Company.
- Developer Dan owns a 75% mineral interest in 80 acres (E/2SW/4 of Section 4) and executed an oil and gas lease to Oil Company with a royalty rate of 20.0%.
- Suburbanite Sandy owns a 25% mineral interest in 40 acres (NE/4SW/4 of Section 4) and is subject to the oil and gas lease to Oil Company executed by Dan with a royalty rate of 20.0%, **LESS** the interest conveyed to Steve.
- Investor Ida owns a 25% mineral interest in 40 acres (SE/4SW/4 of Section 4) and is subject to the oil and gas lease to Oil Company executed by Dan with a royalty rate of 20.0%, **LESS** the interest conveyed to Sally.
- Schemer Steve owns a 2.0% royalty interest in 40 acres (NE/4SW/4 of Section 4) conveyed to him by Sandy, **with no proportionate reduction clause.**
- Speculator Sally owns a 2.0% royalty interest of Ida's 25% mineral interest in 40 acres (SE/4SW/4 of Section 4) **subject** to the oil and gas lease to Oil Company executed by Dan with a royalty rate of 20.0%.
- Underwriter Ulysses owns a 2.0% overriding royalty interest in 320 acres (W/2 of Section 4) limited to depths below 10,000 feet.

Example 1: Oil Company drills a shallow well, (above 10,000 feet), the Spindletop # 1 in the SW/4NW/4 that is spaced on the W/2NW/4 of Section 4 (80 acres), the royalty rate is as follows:

Fred: 12.5% = 100% (MI) x 12.5% (Roy Rate) x (80 acres/80 acres)

<u>Example 2</u>: Oil Company drills a shallow well (above 10,000 feet), the Spindletop # 2 in the SW/4SW/4 that is spaced on the W/2SW/4 of Section 4 (80 acres), the royalty share is as follows:

Harry: 7.5% = 50% (MI) x 15.0% (Roy Rate) x (80 acres/80 acres)
Roger: 9.375% = 50% (MI) x 18.75% (Roy Rate) x (80 acres/80 acres)
Lou: 1.0% = 1.0% (ORI) x 8/8th x (80 acres/80 acres)

<u>Example 3</u>: Oil Company drills a shallow well, (above 10,000 feet), the Spindletop # 3 in the SE/4SW/4 that is spaced on the E/2SW/4 of Section 4 (80 acres), the royalty share is as follows:

Dan: 15.0% = 75% (MI) x 20.0% (Roy Rate) x (80 acres/80 acres)
Sandy: 1.5% = [25% (MI) x 20.0% (Roy Rate) x (40 acres/80 acres)] **Less** 2.0% RI x (40 acres/80 acres)
Steve: 1.0% = 2.0% RI x (40 acres/80 acres)
Ida: 2.25% = [25% (MI) x 20.0% (Roy Rate) x (40 acres/80 acres)] **Less** 2.0% RI x 25% MI x (40 acres/80 acres)
Sally: 0.25% = 2.0% RI x 25% MI x (40 acres/80 acres)

<u>Example 4</u>: Oil Company drills a deep gas well below 10,000 feet, the Blow Out # 1 in the SE/4NW/4 that is spaced on the W/2 of Section 4 (320 acres), the royalty share of all is as follows:

Fred: 6.25% = 100% (MI) x 1/8th (Roy Rate) x (160 acres/320 acres)
Harry: 1.875% = 50% (MI) x 15% (Roy Rate) x (80 acres/320 acres)
Roger: 2.34375% = 50% (MI) x 18.75% (Roy Rate) x (80 acres/320 acres)
Dan: 3.75% = 75% (MI) x 20.0% (Roy Rate) x (80 acres/320 acres)
Sandy: 0.375% = [25% (MI) x 20.0% (Roy Rate) x (40 acres/320 acres)] **Less** 2.0% RI x (40 acres/320 acres)
Steve: 0.25% = 2.0% RI x (40 acres/320 acres)
Ida: 0.5625% = [25% (MI) x 20.0% (Roy Rate) x (40 acres/320 acres)] **Less** 2.0% RI x 25% MI x (40 acres/320 acres)
Sally: 0.0625% = 2.0% RI x 25% MI x (40 acres/320 acres)
Ulysses: 2.0% = 2.0% ORI x (320 acres/320 acres)

The examples above illustrate some of the problems when conveying less than the full mineral interest without being specific. Both Sandy and Ida owned the same mineral interest of 25% in 40 acres prior to their royalty conveyances. However, in the royalty conveyance from

Sandy to Steve, there was no proportionate reduction clause or a simple statement that the royalty interest conveyed was subject to Sandy's 25% mineral ownership. In the royalty conveyance from Ida to Sally, the conveyance was subject to Ida's current mineral ownership and therefore, Ida conveyed a percentage of what she owned, not a percentage of the total.

VII. CONCLUSION

As reflected throughout this presentation, there are numerous pitfalls and hazards for the drafter of a conveyance document for minerals. Below, I have listed the Top 5 Pitfalls to avoid and the Top 5 safeguards to include.

Top 5 Pitfalls

1. Attempt to reserve the minerals by stating conveyance is limited to "real property".
2. Attempt to grant or reserve a mineral interest and using the word "royalty".
3. Inadvertently limiting a mineral grant or reservation by listing well names instead of lands.
4. Using a royalty interest decimal from a division order to describe the mineral interest.
5. Correction deed only signed by original grantors.

Top 5 Safeguards

1. Include an Intent clause.
2. Specify interest to be reserved or granted, i.e. "reserving all of MY mineral interest" or "reserving ½ of all or 100% of the mineral interest."
3. Set out prior reservations in both the granting clause and in the warranty clause to illustrate that the minerals being reserved by current grantor are not the previously reserved minerals.
4. If reserving or granting a royalty interest, specify if it is subject to a royalty rate on a current or future lease.
5. Compare language in conveyance document to language of the purchase and sale agreement in terms of the mineral interest to be granted or reserved for purposes of intent.

Otherwise, as I have said numerous times: "Poor drafting …(of conveyance documents) … is what keeps title attorneys in business."