CROSSING STATE LINES–TEXAS, OKLAHOMA, AND NEW MEXICO

(A Discussion of Differences between States as to Leasing Issues, Interpretation of Oil and Gas Lease Provisions, and Conveyancing Requirements)

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INTRODUCTION

Imagine you are a landman who has worked for a company in Amarillo, Texas and you have checked records in Texas for over eight years. You are asked to go to Roger Mills County, Oklahoma and check the records to a 160-acre tract. You wonder, what are the significant differences in oil and gas law between Texas and Oklahoma which I need to know before I check records to land in Oklahoma? This article is designed to meet this specific need. This article can also serve as a convenient refresher of basic principles for an experienced landman who has already worked in Texas and Oklahoma.

George has taught the Oil and Gas Lease, Lease Admini- stration, Contracts and Conveyancing topics for AAPL's CPL Review Course for the last four years. That experience gave birth to the idea of comparing the significant differences in oil and gas law between producing states. We have already contacted other lawyers in other producing states and our plan is that this format will be utilized to identify the significant differences in oil and gas law ultimately between all producing states. We hope this article will be of value to all landmen, both office and field, and to attorneys dealing with oil and gas title issues in different states. We attempt to provide general rules, or black letter law, with enough detail to be of practical benefit.

In an effort to provide direction to those who desire additional study in these areas, we include as a reference at the end of the Texas portion of each topic a reference to some of the appropriate sections of the following authorities:

> <u>Hemingway - Law of Oil and Gas</u> - Hornbook Series (1983) by Richard W. Hemingway - West Publishing
>
> <u>Kuntz - Oil and Gas Law</u> - 9 volumes - By Eugene Kuntz -Anderson Publishing Co.
>
> <u>Summers - Oil and Gas Law</u> - 8 volumes - By W. L. Summers, updated by William J. Flittie and John S. Lowe - West Publishing.
>
> <u>W & M - Oil and Gas Law</u> - 8 volumes - By Howard R. Williams and Charles J. Myers - Matthew Bender.

The Oklahoma references are the same as shown under Texas unless noted.

DISCLAIMER

The purpose of this article is to provide general principles of oil and gas law or of court procedures applicable to the activities of a landman. All of the subjects discussed herein could be and likely have been discussed in much greater detail in other articles or legal treatises. This article is intended only to provide these principles in a summary form so that a landman may review these principles prior to checking the records in a state where he has not had previous experience as an initial aid to his evaluation of lease prospects. This article is not intended to give specific legal advice!

While the authors have sought to draw together statutory and case law from numerous jurisdictions, the law is subject to many exceptions or variations from general principles, depending on the precise fact situation. The law also is subject to frequent change by reason of constant legislative and judicial review. Even as this article reaches publication it is possible that some change already may have occurred in that statutory or case law. Because of this, any reader who has a legal question, even if it regards a matter discussed in this article, should seek the professional advice of an attorney of his choosing to analyze the application of the law to the specific facts involved.

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I - CHARACTERISTICS OF THE MINERAL-ROYALTY ESTATE

A. Elements of a Mineral Interest

TEXAS

The mineral estate consists of the following elements:

f. the right to explore and develop yourself (includes the rights of ingress and egress);

g. the right to execute an oil and gas lease (usually called the leasing right or the executive right);

c. the right to receive bonus;

d. the right to receive delay rental; and

e. the right to receive royalty (Texas acknowledges nonparticipating royalty)

If a mineral owner drills a well himself or participates himself in the drilling of a well, he is entitled to receive his proportionate part of all production, less his share of expenses, and there is no bonus, delay rental or royalty paid to him. He would be considered a non-leasing co-tenant. Bullard v. Broadwell, 588 S.W.2d 398 (Tex. Civ. App.-Eastland 1979, writ ref'd n.r.e.), 64 O&GR 336. Normally however, the party owning the leasing right executes an oil and gas lease and part of the consideration of granting said lease is the payment of bonus, delay rental and royalty. Griffith v. Taylor, 156 Tex. 1, 291 S.W.2d 673 (1956), 5 O&GR 1371.

OKLAHOMA

Same. Greenshields v. Warren Petroleum Corp., 248 F.2d 61 (10th Cir. 1957), 8 O&GR 937.

NEW MEXICO

B. Conveyability

TEXAS

Each element of the mineral estate can be owned, conveyed, reserved or inherited separately from the other elements. The leasing right, however, has been held to be a personal right, not a real property right, and thus not inheritable when it was reserved by the grantor, and not by the grantor, his "heirs and assigns." Pan American Petroleum Company v. Cain, 355 S.W.2d 506 (Tex. 1962), 16 O&GR 427. However, the Texas Supreme Court overruled itself in Cain and held in Day & Co., Inc. v. Texland Petroleum, Inc., 786 S.W.2d 667 (Tex. 1990), effective on March 7, 1990, that the executive right is a real property right, not a personal or contract right, and that it is treated as any other element of the mineral estate.

OKLAHOMA

Same. Stone v. Texoma Production Co., 366 P.2d 1099 (Okla. 1959); Howard v. Dillard, 198 Okla. 116, 176 P.2d 500 (1947).

NEW MEXICO

C. Overriding Royalty

TEXAS

Overriding royalty interests are real property interests created out of or reserved in a conveyance of a leasehold and, along with royalty, burdens the leasehold owner. Overriding royalty is non-expense bearing and it reduces the net revenue available to the leasehold owner. An overriding royalty interest terminates upon the termination of the oil and gas lease it burdens, unless the instrument creating the overriding royalty contains language continuing the overriding royalty as to renewals and extensions of the original lease. MacDonald v. Follett, 142 Tex. 616, 180 S.W.2d 334 (1944).

OKLAHOMA

Same. Thornburgh v. Cole, 201 Okla. 609, 207 P.2d 1096 (1949).

NEW MEXICO

D. Definition of "Oil", "Gas" and "Casinghead Gas"

TEXAS

Seldom does a well produce oil only or gas only. Assuming no separate ownership of oil and gas, in the absence of a contract to the contrary, it is the general understanding and commonly accepted custom and practice in the oil and gas industry that gas produced with a well classified as an oil well is called casinghead gas and belongs to the owner of the oil, while liquids produced from a well classified as a gas well is gas condensate and belongs to the owner of the gas. If the oil and gas are not owned separately, then the leasehold owner owns both oil and gas, and all hydrocarbons products produced therewith. Reynolds v. McMan Oil & Gas Co., 11 S.W.2d 778 (Tex. Comm'n. App. 1928, holding approved). If, however, the "oil rights" are owned separately from the "gas rights," then, in the absence of a definition in the instrument creating the separate ownership, the oil and gas rights are as defined in the statute in existence at the time of the instrument of severance. See Dorchester Gas Producing Co. v. The Harlow Corp., 743 S.W.2d 243 (Tex Civ. App.-Amarillo 1987, no writ history) and Amarillo Oil Company v. Energy-Agri Products, 32 Tex. Sup. Ct. Journal, page 252 (March 8, 1989), both of which dealt with the "white oil controversy" in the Texas Panhandle field, one of the oldest continuously producing regions in the United States. Both cases applied Article 6008(2)(i), V.A.T.S., now recodified as Sec. 86.002(10) Natural Resources Code, which defines "casinghead gas" as "gas and/or vapor indigenous to an oil stratum and produced from such stratum with oil," (emphasis added). A restatement of this definition is that casinghead gas is gas which is in solution with oil in the reservoir and is produced with the oil.

OKLAHOMA

Same. Except in Oklahoma, casinghead gas is considered neither oil nor gas. Hammett Oil Co. v. Gypsy Oil Co., 95 Okla. 235, 218 P. 501 (1921), 34 A.L.R. 275. In Mussellem v. Magnolia Petroleum Co., 107 Okla. 183, 231 P. 526 (1924) the Court held that casinghead gas was covered by an oil and gas lease and was subject to a special royalty provision where the lease contained a provision for gas which is produced from an oil well and used off the premises. As a practical matter, the fact that casinghead gas is considered neither oil nor gas would be important in only very old oil and gas leases which provided for royalty on oil and a flat annual payment for gas, but did not provide for any royalty for casinghead gas.

NEW MEXICO

E. Term Mineral Interest and Term Royalty Interest

TEXAS

1. Term-royalty and term-mineral interest are divided into two basic types: A grant or reservation for a fixed term only, and a grant or reservation for a fixed term and "as long thereafter as oil or gas is produced" in paying quantities. In the second instance, there must be actual production from the land covered by the term interest at the expiration of the primary term or the term interest ceases. Minchen v. Fields, 162 Tex. 73, 345 S.W.2d 282 (1961) 14 O&GR 266. Temporary cessation of production will not terminate the term interest where it is attributable to mechanical breakdown and the operator commences diligent reworking operations. Midwest Oil Corp. v. Winsauer, 149 Tex. 560, 323 S.W.2d 1944 (1959), 10 O&GR 1123.

2. If the owner of the term interest and the owner of the possibility of reverter join together in executing a joint lease, the habendum clause of the term interest is modified thereby so that the term interest is perpetuated by production anywhere on the leased premises, Southland Royalty Company v. Humble Oil & Refining Co., 151 Tex. 324, 249 S.W.2d 914 (1952), 1 O&GR 1431, or on land pooled therewith. Spradley v. Finley, 157 Tex. 260, 302 S.W.2d 409 (1957), 7 O&GR 650.

3. The payment of a shut-in gas royalty pursuant to a lease will not continue a term mineral interest into its secondary term, unless the instrument creating the term mineral interest ties its term contractually into the term of an oil and gas lease covering said land or contains a shut-in gas royalty clause itself. Archer County v. Webb, 326 S.W.2d 250 (Tex. Civ. App.-El Paso 1959), affirmed 161 Tex. 210, 338 S.W.2d 435 (1960), 13 O&GR 280.

4. BEWARE - If the phrase "and as long thereafter as..." is omitted, then a term interest can result in a perpetual interest. In Browning v. Grigsby, 657 S.W.2d 821 (Civ. App.

Texarkana 1983, no writ history) 78 O&GR 548, there was a reservation of 1/2 of the mineral estate with a proviso that "this mineral exception and reservation shall expire on October 25, 1958, unless at that time the above named minerals or either of them, is being produced from said premises in paying quantities." The Court held that production in paying quantities on the date stipulated maintained the Grantor's interest in perpetuity; it did not terminate when production later ceased.

OKLAHOMA

1. Same. For a term mineral deed in its secondary term, production need not be on the land conveyed by the term deed but can be from a spaced unit containing the land in the mineral deed. Fox v. Feltz, 697 P.2d 543 (Okla. Ct. App. 1984), 84 O&GR 157. Unless there is contrary language in the deed, production from one tract in a deed will also perpetuate production from all tracts. Turner v. McBroom, 565 P.2d 44 (Okla. 1977), 56 O&GR 574.

2. Oklahoma courts have not ruled on this fact situation.

3. Same. A shut-in well will not perpetuate a term mineral interest into its secondary term if the deed calls for production. Fransen v. Eckhardt, 711 P.2d 926 (Okla. 1985), 87 O&GR 326.

4. In Barton v. Crouch, 42 O.B.A.J. 839 (Okla. Ct. App. 1971), 38 O&GR 455, the Court reformed a term deed from "20 years unless oil is being produced therefrom" to mean "and as long thereafter as oil is being produced therefrom."

NEW MEXICO

F. Dormant Mineral Act, Marketable Title Act or Title Standards?

TEXAS

Texas has adopted neither a Dormant Mineral Act nor a Marketable Title Act. However, the State Bar of Texas has adopted title standards and the title examination standards joint editorial board, sponsored by the Bar's Real Property, Probate and Trust Section and the Oil, Gas and Mineral Law Section will continue to draft and revise additional standards.

OKLAHOMA

Oklahoma does not have a Dormant Mineral Act but Oklahoma has Title Examination Standards which govern marketability of title. 16 O.S., Ch. 1.

Oklahoma also has a Marketable Record Title Act which has been enacted in the statutes and has also been incorporated into the Title Examination Standards. 16 O.S. § 71-80. The Marketable Record Title Act provides for marketable record title when:

A. A person has an unbroken chain of title of record extending back at least 30 years; and

B. Nothing appears of record purporting to divest such person of title. The unbroken chain of title of record, within the meaning of the Marketable Record Title Act, may consist of a single conveyance of other title transaction which purports to create an interest and which has been a matter of public record for at least 30 yeras, or a connected series of conveyances or title transactions of public record in which the root title has been a matter of public record at least 30 years. However, there are several interests that would not be extinguished or barred by the act, including mineral or royalty interests. 16 O.S.§ 76. The importance is that parties may be able to rely upon this act when the owner owns the surface and all minerals and there are defects in title over 30 years old.

NEW MEXICO

Hemingway - Sec. 2.2-2.6, 3.2(A), 5.1(B), 6.4(B), 6.5(A), 7.13(B), 9.4(A) and 9.11(A)

Kuntz - Sec. 6.9 & 15.8

Summers - Sec. 305, 511, 554, 586, 599, 604, 611, 958, 962,965

W & M - Sec. 323, 327.2, 334.8, 338, 418.2, 633.5, 955, 961.2

Hemingway - Sec. 1.3, 2.2, 2.5(B), 7.2(B)

Kuntz - Sec. 15.2, 15.3, 15.4, 16.1

Summers - Sec. 62, 136, 554, 586, 589, 595, 597.1, 604, 962

W & M - Sec. 324.2, 334.9, 428.1, 607.7 651.2, 654, 953

A. MARITAL PROPERTY

1. Jointly Owned Community Property

TEXAS

a. Texas has adopted the Spanish-Mexican influenced community property system, not the English common law system, for marital property. Tenancies by the entirety are abolished. Joint tenancies with right of survivorship cannot be created between spouses with existing community property except as discussed at Paragaph 5 below. Spouses using their separate property only, or other persons, can own property as joint tenants with right of survivorship if the creating instrument expressly identifies the grantees as "joint tenants with right of survivorship." Texas Probate Code, Sec. 46.

b. All property acquired while married, other than separate property, is community property. Texas Family Code, Sec. 5.01(b). Community property is owned equally by both spouses. Where title is joint, both can manage. Where title is in one spouse only, then that spouse alone can manage, lease or sell, except for homestead. Texas Family Code, Sec. 5.22 and Sec. 5.24.

OKLAHOMA

1. Oklahoma is a common law state. Oklahoma was a community property state from 1939 until 1949. If a non-record owner spouse claims a share of property acquired during that time, he was required to enter into an agreement or file suit regarding the community property status within one year from the repeal of the community property statute. 32 O.S. Sec. 83.

NEW MEXICO

2. Separate Property

TEXAS

a. Property acquired while single
b. If married, property acquired by:

(1) gift
(2) inheritance Texas Family Code, Sec. 5.01

Normally, both spouses execute oil and gas leases jointly, whether the mineral interest is community property or separate property. However, if the mineral interest is separate property, that spouse alone can execute a binding oil and gas lease, except upon homestead property.

OKLAHOMA

2. Not applicable.

NEW MEXICO

3. Homestead

TEXAS

If the mineral estate has not been severed from the surface estate and if the surface estate is a homestead (see II-B, infra), then both spouses must execute an oil and gas lease or it is inoperative as to the non-joining spouse. Texas Family Code, Sec. 5.81 and 5.82.

OKLAHOMA

3. Not applicable.

NEW MEXICO

4. Classification as either Separate or Community Property

TEXAS

a. Property held during marriage takes its status as separate property or community property at the time it is acquired. Such status is fixed by the facts or circumstances existing at that time. This is called the Inception of Title Doctrine. Smith v. Buss, 136 Tex. 566, 144 S.W.2d 529 (1940).

b. Property possessed by either spouse during or on dissolution of the marriage is presumed to be community property. This presumption can be rebutted by "clear and convincing evidence". Texas Family Code Sec. 5.02.

OKLAHOMA

a. Property acquired during marriage in the name of one spouse is owned solely by that spouse. Property acquired jointly during marriage is owned equally by both spouses. 32 O.S. Sec. 4.

b. Upon the death of one spouse, the surviving spouse owns no legal interest in the property owned by the decedent spouse except for their right to inherit pursuant to intestate succession and Oklahoma's forced heirship statute, both of which are discussed at II-E.

NEW MEXICO

5. <u>Conversion of Community Property to Joint Tenancy with Right of Survivorship</u>

TEXAS

Prior to November 3, 1987, spouses could not convey their community property to themselves as joint tenants with right of survivorship without first having a formal partition of said community property into the separate property of each spouse. <u>Hilley v. Hilley</u>, 161 Tex. 569, 342 S.W.2d 565 (1961), as explained in <u>Williams v. McKnight</u>, 402 S.W.2d 505 (Tex. 1966). After November 3, 1987, spouses can acquire title to a mineral estate as joint tenants with right of survivorship and spouses can convey community property to themselves as joint tenants with right of survivorship as long as the instrument creating said interest expressly states that the grantees take as "joint tenants with right of survivorship," and said instrument is signed by both parties. Article 16, Sec. 15, Texas Constitution and Sec. 5.52-5.54, Texas Family Code, as amplified by Sec. 451 et seq, Texas Probate Code, effective August 28, 1989.

OKLAHOMA

5. Not applicable.

NEW MEXICO

6. Individual Acknowledgment

TEXAS

I include a Texas short form acknowledgment for an individual, which form can be used for more than one person:

THE STATE OF TEXAS)
)
COUNTY OF)

This instrument was acknowledged before me on (date) by (name or names of person or persons acknowledging).

____
Notary Public - State of Texas

My commission expires:________

OKLAHOMA

Same as Texas.

NEW MEXICO

Hemingway - Sec. 2.4
Kuntz - Sec. 5.11
W & M - Sec. 5.16

B. HOMESTEAD

TEXAS

1. Definition of Homestead Rights

In Texas, the homestead right consists, in part, of the following:

a. Homestead property is exempt from forced sale for debts except for purchase money liens, property improvement liens and taxes; Tex. Prop. Code Sec. 41.001(b).

b. Neither spouse may convey or encumber the homestead without the joinder of the other spouse; Tex. Family Code Sec. 5.81.

c. A surviving spouse has the right to possession of the property for life or until abandonment, without regard to how title is then vested; Tex. Probate Code Sec. 283

d. A guardian for minor children has the right to possession of the property during the minority of the children, without regard to how title is then vested; Tex. Probate Code Sec. 284.

The homestead right does not extend to severed minerals.

OKLAHOMA

1. In Oklahoma, the homestead right consists, in part, of the following:

a. Same. 31 O.S. Sec. 1.

b. Because it is not possible to determine from the record whether property is homestead or not, the husband and wife should sign the same lease or conveyance of real property. Grenard v. McMahan, 441 P.2d 950 (Okla. 1968).

c. Same. 58 O.S. Sec. 311.

d. Same. 58 O.S. Sec. 311.

The joinder of the spouse is not necessary for the leasing of severed minerals, as severed minerals cannot be impressed with homestead character. 16 O.S. Ch. 1, App. 7.1.

NEW MEXICO

2. Who does Homestead Benefit and the Types of Homestead?

TEXAS

a. The homestead right extends to a "family" and to a "single adult person, not otherwise entitled to a homestead." Tex. Prop. Code Sec. 41.002(a). The term "family" is not defined by statute.

b. A rural homestead for a family shall consist of not more than 200 acres of land, which may be in one or more parcels, with the improvements thereon. A rural homestead for a single adult shall consist of not more than 100 acres of land, which may be in one or more parcels, with the improvements thereon. Tex. Prop. Code Sec. 41.002(b). An urban homestead may consist of a lot or lots consisting of not more than one acre of land. An urban homestead may be either the urban home of the single adult person or family, or "a place to exercise a calling or business in the same urban area," or both. Tex. Prop. Code Sec. 41.002(a). Texas is the only state in the Union to recognize an urban business homestead.

OKLAHOMA

a. The homestead is the residence of the family. Matter of Wallace's Estate, 648 P.2d 82 (Okla. 1982). Family is not defined by statute.

b. A homestead for an individual or family, not within any city, town or village, may consist of not more than 160 acres of land, which may be in one or more parcels. The homestead within any city or town owned and occupied as a residence only, shall consist of not more than 1 acre of land unless the equity value exceeds the sum of $5000.00. In no event shall homestead be reduced to less than one-fourth of an acre, without regard to value. 31 O.S. Sec. 2.

NEW MEXICO

3. Extent of Possession Necessary

TEXAS

Homestead rights attach to property which is actually occupied as a homestead or property which the owner intends to occupy as a homestead. In the latter situation, the property is not impressed with homestead character until the owner has made some "overt act of preparing" the property for homestead use. Cheswick v. Freeman, 155 Tex. 372, 287 S.W.2d 171 (1956).

OKLAHOMA

3. Same. Enosburg Falls Savings Bank & Trust Co. v. McKinney, 172 Okla. 298, 44 P.2d 987 (1975).

NEW MEXICO

4. Leasing Homestead

TEXAS

An oil and gas lease executed by only one spouse or less than all of the persons owning the homestead right is inoperative as to the nonsigning parties as long as the property is homestead, or until the homestead is abandoned or the lease is ratified by all owners. Such lease can be set aside if done so before the homestead is abandoned. Grissom v. Anderson, 125 Tex. 26, 79 S.W.2d 619 (1935).

BEWARE - Because of the rules in Paragraphs 1-4, both spouses and all other homestead claimants should always jointly execute an oil and gas lease. The only exception is when there is no possibility that the property covered in the lease could be claimed as homestead property.

OKLAHOMA

There is no question that an instrument relating to the homestead is void unless subscribed by both husband and wife. It is also settled that a husband and wife must execute the same instrument. Separately executed separate instruments would both be void. Grenard v. McMahan, 441 P.2d 950 (Okla. 1968). An oil and gas lease could be ratified if both spouses sign a Ratification which contains granting language.

NEW MEXICO

5. Caveat

TEXAS

BEWARE - The homestead right can be utilized to defeat a testator's stated intention. For example, a testator willed all of his producing mineral rights in his homestead to his children from a former marriage. The widow renounced all benefits under the will and claimed her statutory share of the royalties as part of the homestead, in addition to possession of the homestead. Applying the Open Mine Doctrine, it was held that the widow, as life tenant, was entitled to receive all of the royalties, not just the interest from a 1/3 life estate, and that the division order executed by the widow and her husband subsequent to the lease, while vesting title to the oil as produced in the lessee, did not affect her homestead rights as to the oil in place. Thompson v. Thompson, 149 Tex. 632, 236 S.W.2d 779 (1951)

OKLAHOMA

No similar case has been decided in Oklahoma

NEW MEXICO

Hemingway - Sec. 2.7(C), 6.3(B)
Kuntz - Sec. 8.5
Summers - Sec. 452, 583, 613
W & M - Sec. 218, 516, 606.4, 707

C. CONVEYANCING RULES RELATING TO BUSINESS ENTITIES

1. Corporations

TEXAS

a. A Texas corporation may purchase, lease, or otherwise acquire, use or deal in oil, gas or other real property, or any interest therein. Tex. Bus. Corp. Act, (TBCA) Art. 2.02(A)(4)and(5). A corporation may convey or lease minerals, with or without a corporate seal, signed by the President, a Vice-President or an Attorney-in-Fact. TBCA Art. 5.08(A).

b. Acknowledgment

I include a Texas short form corporate acknowledgment:

STATE OF TEXAS

COUNTY OF

This instrument was acknowledged before me on (date) by (name of officer), (title of officer) of (name of corporation acknowledging) a (state of incorporation) corporation, on behalf of said corporation.

My Commission Expires:

Notary Public

OKLAHOMA

a. General Principles

An Oklahoma corporation has the power to purchase, lease or own oil, gas and other minerals and oil and gas leases. Transfers of real property from a corporation in Oklahoma must be evidenced by an instrument which has been executed by a president, vice president, chairman or vice chairman of the Board of Directors. 16 O.S. § 93.

Prior to September 1, 1994, if an instrument was recorded without being attested by the secretary or assistant secretary and/or without having the corporate seal affixed, the recording of the conveyance (with the exception of mechanic's and materialmen's liens) would not operate to serve as constructive notice of the conveyance. Smith v. Thompson, 402

P.2d 882 (Okla. 1965).

The erroneous filing of the conveyance may be actual notice to any individual who has used the instrument. See Davidson Oil Country Supply v. Pioneer, 689 P.2d 1279 (Okla. 1984), 82 O&GR 299.

Alternatively, a corporation can appoint an attorney-in-fact to execute specified documents affecting real property. 16 O.S. § 91. The power of attorney needs to be recorded in the county where the real property is located. See the section on Attorneys-in-Fact included herein.

Any corporate conveyance affecting real property which has been of record for five years or more can be considered marketable, even if it is defective because of:

a. the failure of the proper corporate to sign the instrument;

b. the absence of a corporate seal; or

c. the lack of an acknowledgement.

16 O.S. Sec. 279.

b. Acknowledgment

The acknowledgment form for a corporate executed conveyance should be substantially as follows:

STATE OF OKLAHOMA

___________ COUNTY

Before me, a _____________ in and for said county and state, on this ________ day of ________ 19__, personally appeared ______________, to me known to be the identical person who subscribed the name of the maker thereof to the foregoing instrument as its (Attorney-in-Fact, President, Vice-President, as the case may be) and acknowledged to me that he executed the same as his free and voluntary act and deed, and as the free and voluntary act and deed of such corporation, for the uses and purposes therein set forth.

____

Notary Public

My Commission Expires:

____

NEW MEXICO

2. General Partnership

TEXAS

a. General Principles

The Texas Uniform Partnership Act (TUPA) Art. 6132(b), provides that a general partnership may acquire and convey real property in the partnership name, Art. 6132(b) Sec. 8(3). Any partner may execute such conveyance in the partnership name, Sec. 10.

b. Acknowledgment

A Texas short form acknowledgment for a partnership is as follows:

STATE OF TEXAS

COUNTY OF

This instrument was acknowledged before me on (date) by (name of acknowledging partner or partners), partner(s) on behalf of (name of partnership), a partnership.

My Commission Expires:

Notary Public

____

OKLAHOMA

a. General Principles

A partnership may purchase, own or lease minerals on oil and gas leases. General rules governing partnerships are applicable to oil and gas leasing. One partner can bind the partnership by executing an oil and gas lease for the partnership. 54 O.S. Sec. 208. A partnership can hold title in Oklahoma. 54 O. S. Secs. 209 & 215.

b. Acknowledgment

The acknowledgement for a general partnership is as follows: The same format can be utilized for limited partnerships.

STATE OF

COUNTY OF

This instrument was acknowledged before me on _______ day of ________, 19__, by ______________________ as general partner of ________________________.

My Commission Expires:

____
Notary Public

____

NEW MEXICO

3. Limited Partnerships

TEXAS

a. General Principles

The Texas Revised Limited Partnership Act (TRLPA), Art. 6132(a)-1, provides that a Texas limited partnership may engage in any lawful business. Sec. 1.09(a). An oil and gas lease may be executed by the general partner of the limited partnership. Sec. 4.03(a).

b. Acknowledgment

An acknowledgment for a limited partnership is as follows:

STATE OF TEXAS

COUNTY OF

This instrument was acknowledged before me on (date) by (name of acknowledging partner or partners), partner(s) on behalf of (name of limited partnership), a limited partnership.

My Commission Expires:

Notary Public

____

OKLAHOMA

a. General Principles

Oklahoma Statute Title 54, Sec. 144 recites that a limited partnership may conduct any business which a partnership without limited partners may conduct. An oil and gas lease may be executed by the general partner of the limited partnership. 54 O.S. Sec. 150. The identity of the general partners of a limited partnership may be established by the examination of a certificate of limited partnership on file in the office of the Secretary of State. 54 O.S. Secs. 81 - 85.

A landman should routinely obtain this material based upon the reasonable business risk rule and the size of the lease.

NEW MEXICO

4. Limited Liability Company

TEXAS

a. General Principles

The Texas Limited Liability Company Act (TLLCA), Art. 1528n, effective August 26, 1991, allows the creation of a new business entity creating limited liability for all participants but having most of the characteristics of a corporation. A Limited Liability Company (LLC) has "members", similar to investors, and "managers", similar to officers and directors of a corporation or similar to general partners of a limited partnership. A LLC is identified by the word "limited" or abbreviations "Ltd." or "L.L.C.". Art. 2.03A.1. An oil and gas lease or other conveyance may be executed by a manager, office or agent vested with actual or apparent authority or a member, if management is retained by members. Art. 2.10 and Art. 2.21A. § 121.008 of the Civil Practices & Remedies Code entitled "Short Forms for Certificates of Acknowledgment" does not identify an acknowledgment form for a L.L.C.

b. Acknowledgment

The corporation acknowledgment form should be adapted as follows:

STATE OF TEXAS

COUNTY OF

This instrument was acknowledged before me on ______ (date) by ______ (name of acknowledging manager, officer, agent, or member), (title of executing person) of (name of L.L.C. acknowledging) (state of residence) (limited liability company, on behalf of said limited liability company).

My commission expires:

Notary Public

____

OKLAHOMA

Oklahoma has a Limited Liability Company Act similar to Texas at 18 O.S. §§ 2000-2060.

NEW MEXICO

Hemingway - Sec. 5.7
Kuntz - Sec. 20.6
Summers - Sec. 164, 231, 551
W & M - Sec. 213.4, 214.2, 226.3

D. ATTORNEY-IN-FACT

1. General Rules

TEXAS

1. An Attorney-in-Fact may execute an oil and gas lease if the Power of Attorney expressly grants the authority to execute said lease. Powers of Attorney are to be strictly construed and a general power to sell land does not authorize the agent to sell and convey minerals under the land by lease or deed. Bean v. Bean, 79 S.W.2d 652 (Tex. Civ. App. Texarkana, 1935, writ ref'd). However, the Texas Supreme Court has not, and may not, expressly affirm this strict rule.

2. A universal Power of Attorney, which gives the Attorney-inFact broad powers, usually stating that the Attorney-in-Fact has all authority that the principal would have, but does not expressly authorize executing an oil and gas lease, is usually given effect. (There is no Texas case confirming this principle yet).

3. The Power of Attorney may be recorded in the county where the land covered by the oil and gas lease is located. Tex. Prop. Code Sec. 12.016

4. A title examiner will require an affidavit from a knowledgeable person stating:

   a. that the principal was alive on the date said power was exercised;

   b. that the principal was competent on the date said power was exercised; (An exception to the competency requirement exists if the Power of Attorney expressly states that the power survives the disability of the principal, making it a durable Power of Attorney. Effective August 28, 1989, a durable Power of Attorney must be witnessed and signed by two adults and be recorded in the county of the principal's residence. Tex. Prob. Code Sec. 36A.) and

   c. that the Power of Attorney has not been revoked.

5. I include a Texas short form acknowledgment for an Attorney-in-Fact:

   STATE OF TEXAS)
)

COUNTY OF)

This instrument was acknowledged before me on (date) by (name of Attorney-in-Fact) as Attorney-in-Fact on behalf of (name of principal).

____
(Signature of Officer)
(Title of Officer)

My commission expires:____________

Hemingway - Sec. 5.7(A)
Kuntz - Sec. 20.9

OKLAHOMA

1. Powers of Attorney are to be strictly construed. Matter of Rolater's Estate, 542 P.2d 219 (Okla. Ct. App. 1975). If the Power of Attorney authorizes the agent to sell the land, but the instrument is silent as to leasing, it is thought that the general power is not sufficient authority to lease.

2. Same (There is no Oklahoma case confirming this).

3. The Power of Attorney for the conveyance of real estate must be filed in the office of the county clerk where the property is located. 16 O.S. Sec. 20.

4. The principal's death usually revokes the power of attorney, Bowman v. Ledbetter, 48 P.2d 334 (Okla. 1935).

   A Power of Attorney which contains the words, "This Power of Attorney shall not be affected by subsequent disability or incapacity of the principal or lapse of time" is a durable Power of Attorney which shall be effective regardless of the principal's disability or the principal's death, if the Attorney-in-Fact is not aware of the death. 58 O.S. Secs. 1072 & 1073.

5. Same. Also, see Section II-C(1) regarding a Power of Attorney for a corporation.

<u>II-E - WHO CAN LEASE? - ESTATE OF RESIDENT DECEDENT</u>

TEXAS

1. The applicable rules of descent and distribution in Texas are summarized as follows:

   a. Intestate - community property - no children - all to surviving spouse. Texas Probate Code, Sec. 45. (All subsequent references in II-E and II-F are to Secs. of the Texas Probate Code.)

   b. Intestate - community property - spouse and children - the decedent's share of the community to children, per stirpes. Sec. 45.

   c. Intestate - decedent's separate property - survived by spouse and children - 1/3 life estate to spouse with remainder in children; 2/3 in fee to children (realty only). Sec. 38(b).

   d. Intestate - decedent's separate real property - spouse and no children - 1/2 to spouse and 1/2 to "heirs at law." Sec. 38(a). "Heirs at law" are defined as:

      (1) Surviving parents - 1/2 each

      (2) If only one parent survives, the other 1/2 to brothers and sisters, per stirpes -

      The result is that the surviving spouse becomes a tenant in common with the "heirs at law."

      (3) If no parents, brothers, sisters, nieces or nephews, then all to surviving spouse.

2. Texas has adopted the common law lapse doctrine. This doctrine provides that a gift to a devisee who predeceases the testator lapses and passes pursuant to the residuary clause in the will. If the will does not contain a residuary clause, then the gift passes by descent and distribution, as summarized above. In Texas, the common law lapse doctrine is modified by the Texas lapse statute, Sec. 68 of the Texas Probate Code. This section provides that a gift to the testator's "child or other descendant," who predeceases the testator, shall not lapse but shall vest in "the children or descendants of such...devisee in the same manner as if he had survived the testator and died intestate."

3. Some general rules concerning the administration of an intestate decedent's estate are:

   a. Formal dependent administration is required if two or more debts, or other necessity is determined by the Court. Sec. 178(b). However, informal Affidavits of Death and Heirship are frequently used where the estate is small and where all heirs are adults and are in agreement as to the manner of administration.

   b. An oil and gas lease from a dependent administrator obtained by private sale must be approved by the Court, Sec. 368, unless administration is an "independent administration," as permitted in Sec. 145.

   c. Heirs should not manage property until dependent administration is closed by court order.

4. A will is not effective until it is probated. The heirs' title relates back to the date of death. Sec. 37.

   If the will names an Independent Executor, unless the will states otherwise, the Independent Executor can execute an oil and gas lease without court approval and without ratification by the heirs for the purpose of preserving and protecting the assets of the estate as long as the estate still has unpaid debts and the estate has not been closed. Lowrance v. Whitfield, 752 S.W.2d 129 (Tex. App.-Houston [1st Dist.] 1988, no writ history). The Lowrance case acknowledges that an Independent Executor has the authority that an administrator or executor under court order would have in the settlement of an estate. Sec. 367(b) permits courts to issue orders allowing personal representatives to execute oil and gas leases. Sec. 367(c)(7) limits the lease to no more than a five year primary term and to containing no more than a 60 day cessation of operations clause.

5. The Independent Executor closes the estate either by court order or, more commonly, by affidavit. Sec. 151. However, estates are frequently kept open for an indefinite period even though all taxes and debts have been paid and frequently closing affidavits are not recorded in all counties where the decedent owns property. Sec. 188 provides that if executors are legally qualified and their acts appear from the record to be in conformity with provisions of the will and the powers which executors have under the law, then their acts will be regarded as valid so far as said acts affect the rights of innocent purchasers for value and subsequent purchasers from them. Therefore, such purchasers will be protected against

any attack on their title based on a claim of invalidity of the acts of the executors. The following case holds that the actions of an Independent Executor are protected in the same manner as a dependent executor. Dallas Services for Visually Impaired Children, Inc. v. Broadmoor, II, 635 S.W.2d 572 (Tex. App.-Dallas 1982, writ ref'd n.r.e.).

6. Forced heirship - no statute in Texas.

OKLAHOMA

1. For a death prior to July 1, 1985:

   a. Intestate and no issue - 1/2 to surviving spouse and 1/2 to decedent's parents.

   b. Intestate and one issue - 1/2 to surviving spouse and 1/2 to child.

   c. Intestate and more than one issue - 1/3 to surviving spouse and remainder in equal shares to children.

   For a death after July 1, 1985:

   a. Intestate and no issue - the spouse inherits all property acquired by "joint industry" of husband and wife plus 1/3 of all other property; the remaining 2/3 of the other property is inherited by the decedent's parents, or other surviving heirs.

   b. Intestate and issue, who are also issue of the surviving spouse - the spouse inherits 1/2 of all property, whether acquired by "joint industry" or not; the remaining 1/2 passes to the surviving children and issue of any deceased child by right of representation.

   c. Intestate and surviving issue, when one or more are not also issue of the surviving spouse - the spouse inherits 1/2 of the property acquired by "joint industry" during marriage, plus an equal share in the remainder of the estate with all issue. 84 O.S. Sec. 213.

   The provision regarding "joint industry" of husband and wife is a rule of descent and distribution and is not a rule of property. It does not vest the non-titleholding spouse with any interest in the property except upon the death of the titleholding spouse. Essex v. Washington, 198 Okla. 145, 176 P.2d 476 (1947).

2. Same. Under Oklahoma law, a gift to a devisee who predeceases the testator lapses and passes under the residuary clause in the will, if the residuary clause is properly written. In the absense of a residuary clause or a sufficiently broad residuary clause, the devise passes according to the intestacy statutes. 84 O.S. Sec. 177; Dean v. Moore, 380 P.2d 934 (1963). However, 84 O.S. Sec. 142 provides that if the gift is to a "child or other relative of the testator", the lineal

descendants of the devisee inherit the estate devised by the will.

3. With the exception noted in paragraph 4 below, Court approval is needed to obtain a lease from any estate, intestate or testate, in Oklahoma. Notice must be published in the county where the land is located and the lease must be sold to the highest bidder in an auction in the courtroom. 58 O.S. Sec 925. If the bonus value of the lease is less than $500.00, then approval by a judge having jurisdiction over the estate is sufficient without notice or a court proceeding. 58 O. S. Sec. 928.1. This approval can be evidenced by court order or simply by the judge's handwritten approval upon the lease. The lease should contain a recitation that the consideration was less than $500.00.

4. If the will of the decedent empowers the executor to execute an oil and gas lease, the executor may execute an oil and gas lease and make a return of sale, which must be approved by the court. 58 O.S. Secs. 426, 462 & 924.

   Alternatively, some practitioners will force pool all of the potential heirs at the Corporation Commission which will issue an order forcing the parties to either lease or participate in the well. <u>See</u> 52 O.S. 87.1. Whether the leasing statute is the exclusive means of acquiring a lease from an estate in Oklahoma or whether the Commission can also force the estate to lease under the police power has not been adjudicated.

5. The determination of heirs and devisees of the decedent is confirmed in an Order isued by the probate court frequently called the Final Decree or Order Determining Distribution of Estate. 58 O.S. Secs. 631 & 632. The determination of heirship is conclusive as to the rights of all heirs, legatees or devisees, subject to being reversed, set aside, or modified upon appeal. 58 O.S. Sec. 632.

6. Forced heirship statute - A surviving spouse may not be deprived of less of a share of the deceased spouse's estate by will than he would be entitled to under the intestate succession statutes. 84 O.S. Sec. 44.

II-F - WHO CAN LEASE - ESTATE OF NON-RESIDENT DECEDENT

TEXAS

1. Ancillary Probate of Foreign Will - It is not necessary to probate the foreign will if the only transaction necessary in Texas is to execute an oil and gas lease. If administration is necessary, pursuant to application, the foreign will and the proceeding admitting same to probate in the other state, exemplified in the manner required by Sec. 95(c), are filed in the probate records of a county where the decedent owned real property. No order by the probate court is necessary. Sec. 95.

2. Recording Foreign Will in Deed Records - If ancillary administration of the foreign will is not necessary, and usually it isn't, then an exemplified copy of the foreign will and the order admitting same to probate can be recorded in the Deed Records of the county where the decedent owned real property in Texas. Sec. 96. Such recording has the same force and effect as a Deed of Conveyance as to all property in the state covered by the foreign will. Sec. 98. It is a better practice to also include the application to admit the foreign will and, if the foreign estate is closed, the closing order. Both the application to probate the will and the closing order contain important information, such as the date of the decedent's death and the names and addresses of surviving heirs.

3. Conflict of law rules

a. While property acquires its status as community property or separate property at the time it is acquired, there is a rebuttable presumption that property owned on the date of death is community property. See Paragraph 4 of II-A supra.

b. Title to real property is exclusively subject to the law of the state where the land is located. In other words, where a non-resident dies intestate owning minerals in Texas the Texas statutes of descent and distribution determine who inherits the Texas minerals. Colden v. Alexander, 141 Tex. 134, 171 S.W.2d 328 (1943). Texas courts, because of their ultimate power over lands located within the State, have the jurisdictional authority to change the above rule and apply the law of the domicile of the parties in preference to the law of Texas. Toledo Society for Crippled Children v. Hickok, 152 Tex. 578 261 S.W.2d 692 (1953), 43 ALR 2d 553, cert. denied 347 U.S. 936, 98 L Ed. 1086.

c. It has long been the rule in Texas that, when a non-resident dies intestate owning minerals in Texas that must be characterized as either separate property or community property for descent and distribution purposes, the presumption of community property status can be rebutted by evidence showing that the law of the state of the matrimonial domicile would hold that the property in question was the decedent's separate property. Oliver v. Robertson, 41 Tex. 422 (1874), confirmed by Estate of Hanau v. Hanau, 730 S.W.2d 663 (Tex. 1987).

CAUTION - Making this determination, and thus rebutting the community property presumption, requires both knowledge of the property law of the state of marital domicile plus "clear and convincing" evidence that the spouses did not intend the property in question to be owned jointly. In the absence of such proof, a stipulation of interest identifying the actual heirs should be executed by all potential heirs.

4. Non-resident Decedent Dies Intestate Without Administration - While the statutory procedure for determining heirship, Sec. 48-56, is seldom used because of the time and expense involved, Affidavits of Death and Heirship are frequently recorded in the Deed Records of a county in Texas where the decedent owned real property to verify who the heirs at law were at the time of death. Sec. 37. Said Affidavit is effective for this purpose if it contains all of the information required by Sec. 49, which is:

   a. The name(s) of the decedent, the decedent's residence at the time of his death, and the time and place of death;

   b. The names and residences of the decedent's heirs, the relationship of each heir to the decedent and the true interest of each of said heirs;

   c. The decedent's marital history, including the names and addresses of all spouses and children, whether born or adopted, and the date of death and heirs of any predeceased spouse or child;

   d. Whether the decedent died testate or intestate and, if testate, the disposition of the decedent's will;

   e. At least a general description of the real and personal property belonging to the estate of the decedent located in Texas but, if possible, a legal description of the property in question and a description of how and when the decedent acquired the property; and

f. An explanation for the omission of any of the above information.

g. A statement that all debts are paid or the manner in which all debts will be paid.

BEWARE - An Affidavit of Death and Heirship, like any other affidavit, may contain inaccurate information caused either by the negligence or the intent of the affiant. The benefit of relying upon the statutory proceeding for determining heirship is that all third parties can rely upon the facts confirmed in the court's final order. Sec. 55.

OKLAHOMA

1. Where Oklahoma minerals are owned by an out-of-state resident, the estate of the decedent will need to go through the probate process in order for the heirs or devisees to obtain clear and marketable title. This process is termed an "ancillary probate." Failure to conduct an ancillary probate will result in a cloud on the title to the minerals, difficulty in selling such minerals, and possible problems with regard to leasing or the distribution of monies from productive wells on the property.

   An ancillary probate is almost identical to the probate of a will of an Oklahoma resident. The out-of-state will must be admitted to probate pursuant to 58 O. S. Secs. 51-53. To do this, you will need authenticated copies of the will and of the order admitting the will to probate in the state where the decedent resided.

2. The following is a summary of the steps required in an ancillary probate:

   a. Upon filing the petition to have the will admitted into probate, notice must be mailed to all the heirs pursuant to 58 O.S. Secs. 25 and 26. Also, this notice should be published in the county where the estate proceeding is being conducted.

   b. The judge will sign an order appointing the personal representative (or executor) who will manage the estate.

   c. Notice to creditors must be published after the personal representative is appointed under 58 O.S. Sec. 331.

   d. If the personal representative is not from Oklahoma, he must appoint an agent residing in the county where the probate proceedings are held to receive service of any legal process. 58 O.S. Sec. 162. Generally the agent is an attorney in the county where the property is located, or an acquaintance or relative.

   e. Leasing is identical to that for a resident decedent.

3. Conflict of Law Rules.

   a. Not applicable in Oklahoma. See Paragraph 4 of Section II-A above.

   b. The law of Oklahoma governs intestate succession as to real property located in Oklahoma. White House Lumber Co. vs. Howard, 142 Okla. 163, 286 P. 327 (1930).

c. As Oklahoma law governs the descent and distribution of an intestate decedent, Oklahoma Courts are not concerned with the question as to whether or not the property is separate or community.

4. Often the estate of an individual will not be probated due to cost or the apparent lack of value of the minerals involved. In such an instance, the landman may have no choice but to rely upon an Affidavit of death and Heirship. While this affidavit does not render title to the property marketable, it is the best (and sometimes only) source of information as to the heirs of the decedent. The affidavits should be relied upon only for facts as to dates of death and identity of the surviving heirs, and should not be relied upon for the affiant's view as to the present ownership of property.

II-G - WHO CAN LEASE? TRUSTEE

TEXAS

1. A Trustee appointed in a written trust instrument has the powers stated therein. If the Trustee is expressly given the authority to manage and sell land then he impliedly has the authority to execute an oil and gas lease and related instruments. Wills and trust intruments are liberally construed. Avis v. First National Bank of Wichita Falls, 141 Tex. 489, 174 S.W.2d 255 (1943). Sometimes, a trust instrument or will gives the Trustee all powers authorized by statute.

2. The statutory powers of trustees are provided in the Texas Trust Code, which has been recodified as part of the Texas Property Code Secs. 101.001-115.015. Sec. 113.012 lists the specific actions a Trustee may take, which includes negotiating and executing oil and gas leases covering mineral or royalty interests that extend beyond the term of the trust. Sec. 113.002 authorizes a Trustee to exercise additional powers that are "necessary or appropriate to carry out the purposes of the trust." The only limitation upon the Trustee's powers is contained in Sec. 113.001 which provides that the powers granted in Sec. 113.002 et seq. do not apply if the trust instrument, a subsequent court order, or another provision of the trust code "conflicts with or limits the power."

3. If a trust is created by conveying to, i.e. "Jack Smith, Trustee" and the creating instrument does not identify a trust instrument or the name of any beneficiary, then the Trustee may "convey, transfer or encumber the title of the property without subsequent question by a person who claims to be a beneficiary under the trust or who claims by, through, or under an undisclosed beneficiary" and "the trust property is not liable to satisfy the personal obligations of the Trustee." Sec. 101.001. This situation is frequently referred to as a "blind trust," and permits the trustee to execute an oil and gas lease. However, if the instrument creating the trust, or some other recorded instrument, identifies a trust instrument or the name of a beneficiary of said trust, then you should make inquiry and obtain a copy of said trust instrument to verify that the trust instrument does not limit the power of the trustee, and to determine that the trust has not terminated.

   If there is a question as to the authority of the trustee or the possibility of the trust having terminated, then ratifications of the lease should be obtained from the beneficiaries.

4. If an instrument creating a trust directs the Trustee how to allocate to principal and income the proceeds from oil and gas production, then said direction should be followed. However, in the event the trust instrument does not address the question of allocation, then the Trustee shall make said allocation in accordance with Sec. 113.107 of the Texas Trust Code as follows:

   a. "Rent or extension payments on a lease" are allocated as income.

   b. The proceeds from a production payment "...are income to the extent of any factor for interest or its equivalent provided in the governing instrument, and the balance of the proceeds is principal."

   c. The proceeds of "royalty, overriding royalty or limited royalty, or bonus or from a working interest, net profit interest, or any other interest in minerals..." are allocated as follows:

      (1) 27.5% of the gross proceeds, but not to exceed 50% of the net, after deducting the expenses and carrying charges on the property, is principal; and

      (2) the balance is income.

   Section 113.107 provides that the proceeds from oil and gas "...shall be apportioned on a yearly basis in accordance with this subsection whether or not any natural resources were being taken from the land at the time the property was placed in the trust." This appears to mean that if producing property was placed into a trust, this statute would override the Open Mine Doctrine. Thus, the life tenant would only receive the "income" as defined by Section 113.107.

Kuntz - Sec. 8.7

OKLAHOMA

1. In the absence of contrary or limiting provisions in a Trust Agreement or by order of the Court, a Trustee has the power to execute an oil and gas lease and related instruments. 60 O.S. Sec. 175.24(c).

2. A trustee of an express trust has the power to grant, assign or release leases, real property, or any interest subject to the trust. These acts are binding upon the trust and the beneficiaries unless the trust instrument containing limitations has been recorded in the county where the real estate is located. 16 O.S. Ch. 1, App. 22.1, 60 O.S. Sec. 72.

3a. Prior to November 1, 1988, a conveyance to a trust without naming the Trustee was ineffectual, as all real property interests must be held in the name of the trustee of the trust. 16 O.S. Ch. 1, App. 22.2.

Effective November 1, 1988, real property can be held in the name of the trust and not the trustee. 60 O.S. Sec. 171B. The statute, which is retroactive, has a constitutional problem in that if the grantee was not a legal entity capable of holding title, then the interest remained in the grantor. Thus, any law taking title of the grantor and transferring it to the now valid grantee may be held to violate due process of law.

Effective November 1, 1989, a trust (without a named Trustee) is a legal entity. However, the Trustee is rquired to file a Memorandum of Trust with the County Clerk in which the real property is located. Oklahoma Statute Title 60, Sec. 175.6 validates conveyances to a Trust (without a named Trustee) prior to November 1, 1989, unless any person claiming adversely to the trust files an Affidavit relating to the matter within one year from November 1, 1989.

b. The words "trustee", "as trustee" or agent following the name of a grantee, without additional language actually identifying a trust, does not give notice, or put one upon inquiry that a trust does exist or that any other person holds a beneficial interest. Thus, a subsequent conveyance by the grantor, whether or not his name is followed by such words in the subsequent conveyance, vests title in the grantee of the subsequent conveyance. 60 O.S. Sec. 156.

4. In the absence of a provision providing for the disposition of the net proceeds, 60 O.S. Sec. 175.33 provides that the percentage used to be allocated as principal and held for the

benefit of the remainderman is the same percentage as the oil depletion allowance (for tax purposes) or 20%, if no provision for depletion is made by the then existing Federal tax laws. The remainder is income. The disposition of proceeds shall apply whether the property is producing or nonproducing at the time the trust becomes effective.

II-H - WHO CAN LEASE? - LIFE TENANT/REMAINDERMAN AND OPEN MINE DOCTRINE

TEXAS

1. The life tenant, of either a legal life estate or a conventional life estate, has the right to possession of the property with the remainderman obtaining possession upon the death of the life tenant. Neither the life tenant nor the remainderman can execute an effective oil and gas lease without the joinder of the other. Davis v. Bond, 158 S.W.2d 297 (Tex. 1942).

2. The life tenant is entitled to receive the delay rental. In the absence of a written agreement, the bonus and royalty should be paid to the life tenant and remainderman jointly. The life tenant is entitled to the interest produced from the bonus and royalty as set aside in an interest bearing account. This is because bonus and royalty are considered corpus while the delay rental is considered income or rent. Clyde v. Hamilton, 414 S.W.2d, 434 (Tex. 1967), 26 O&GR 220.

3. An exception to the above is the "Open Mine Doctrine." This doctrine states that, if a lease was in effect or if a well was producing, at the time the life estate was created, the life tenant can use the land for that purpose and is thus entitled to receive all royalty himself. The theory is that the person creating the life estate must have intended that the life tenant benefit from the activities being conducted at the time the life estate was created. Youngman v. Shular, 155 Tex. 437, 288 S.W.2d 495 (1956), 5 O&GR 1069.

4. Normally, if the lease in effect at the time the life estate was created terminates, then the "mine closes" and the Davis v. Bond rule becomes effective. Moore v. Vines, 474 S.W.2d 437 (Tex. 1971), 41 O&GR 82.

Hemingway - Sec. 5.2-5.2(D)
Kuntz - Sec. 8.2

Summers - Sec. 32, 36, 572, 583, 586, 613
W & M - Sec. 512.2, 513, 515

OKLAHOMA

1. Same. Nutter v. Stockton, 626 P.2d 861 (Okla. 1981) 69 O&GR 497.

2. Contra. The bonus, delay rental, and interest on the royalty, all being considered income, are paid to the life tenant, while the corpus of the royalty is preserved for the remainderman. Franklin v. Margay Oil Corporation, 194 Okla. 519, 153 P. 2d 486 (1944)

3. Same. A lease alone will open the mine. In re Shailer's Estate, 266 P.2d 613 (Okla. 1954).

4. Same. Nutter v. Stockton, 626 P.2d 861 (Okla. 1981) 69 O&GR 497.

Summers - Sec. 76, 223, 581, 613

II-I - MINORS AND MENTAL INCOMPETENTS

TEXAS

1. A person is a minor until he becomes 18 years of age, is married or had the disability of minority removed. Tex. Probate Code, Sec. 3(t). An oil and gas lease executed by a minor is voidable by the minor for a reasonable time after the minor becomes 18. Prudential Bldg. and Loan Assn. v. Shaw, 119 Tex. 228, 26 S.W.2d 168, rehearing overruled at 119 Tex. 240, 27 S.W.2d 157 (1930). An oil and gas lease executed by a guardian can be effective for a period longer than the time the ward is a minor but said lease can not be for a primary term in excess of five years. Tex. Prob. Code Sec. 367(c)(7).

2. A person is not mentally incompetent to execute an oil and gas lease until he has been determined by a court to be mentally incompetent. An oil and gas lease taken from a person who has been judicially declared to be mentally incompetent is voidable at the lessor's election for a reasonable time after the person is judicially declared to be sane. Neill v. Pure Oil Company, 101 S.W.2d 402 (Tex. Civ. App.-Dallas 1937, writ ref'd), 3 OGR 419.

Kuntz - Sec. 20.8, 820.9

OKLAHOMA

1. A minor is defined by law in Oklahoma as an unmarried person under 18 years of age; all other persons are classified as adults. 15 O.S. Secs. 13 & 14. However, a married person under 18 years of age can convey property he acquired during marriage. A minor can execute an oil and gas lease, however the lease is voidable by the minor upon reaching the age of majority, for one year after reaching the age of majority. 15 O.S. Sec. 19. To obtain a lease with a minor that is not voidable, a lessee can have a guardian appointed to act on behalf of the minor. 58 O.S. Sec. 808. A guardian has the duties of a trustee, must post a performance bond, and must be approved by a Judge. 58 O.S. Sec. 776.

   A Guardian can sell or execute an oil and gas lease for a minor for a term not to exceed ten years or as long as oil or gas is produced, and the court needs to approve the transaction. 58 O.S. Sec. 924. If the lease bonus is greater than $500.00, a public auction must be held in the courtroom, and notice of the action must be published in a paper where the land is located at least five days in advance of the auction. 58 O.S. Sec. 924. If the lease bonus is less than $500.00, a guardian can grant a lease without an auction if the court approves. 58 O.S. Sec. 928.1.

2. In the absence of actual or constructive notice to the contrary, it is presumed that a grantor has the mental capacity to convey. 16 O.S. Ch. 1, App. 23.2. An adjudication of a grantor's incompetency in a sanity or mental health case filed prior to June 3, 1977 constitutes constructive notice of lack of capacity. On or after June 13, 1977, lack of mental capacity must be established (a) in a mental health case filed prior to that date; (b) in a civil action; or (c) in a guardianship proceeding. 43A O.S. Sec. 5-401.

   The time period for the commencement of a lawsuit to recover real property is two years after the legal disability (i.e. minority or mental incapacity) is removed. 12 O.S. Sec. 94.

II-J - HOW TO LEASE? - MINERAL OWNERS THAT CANNOT BE LOCATED

TEXAS

1. Texas Civil Practices & Remedies Code (TCP&RC) Sec. 64.091 provides a procedure, with some limitations, for the appointment of a receiver to execute an oil and gas lease covering a mineral interest or a leasehold interest owned by a person or company who cannot be located.

   The Plaintiff must file an application in the District Court in the county where the property is located and cite the defendant either by publication or by some other substituted service. Gray v. PHI Resources, Ltd., 710 S.W.2d 566 (Tex. 1986). The Defendant must not have paid taxes on the mineral or leasehold interest or rendered same for taxes within the last five years. The Plaintiff must prove:

   (a) that he has made a diligent but unsuccessful effort to locate the Defendant; and

   (b) that the Plaintiff will suffer substantial damage if the Receiver is not appointed; and

   (c) that the lease terms offered the receiver are reasonable compared to the lease terms accepted by other mineral owners similarly situated.

   The receiver may be a county official, such as the county judge or county clerk, or any other resident of the county in which the land is located. The receiver is not required to post bond.

   The receivership can continue as long as the Defendant, his heirs or assigns, fail to appear and claim the proceeds held by the receiver. Normally, if no production is obtained from the lease executed by the receiver, the proceeds will escheat to the State of Texas in three years pursuant to Texas Property Code, Sec. 72.101. The Defendant can still obtain said funds from the state by properly identifying himself to the Texas State Treasurer, Attn: Unclaimed Property Department.

2. Sec. 64.092 (TCP&RC) provides a procedure for the appoint-ment of a receiver to execute an oil and gas lease covering a mineral interest or a leasehold interest owned by a person or company who may own a contingent future interest, legal or equitable, whether arising by way of remainder, reversion, possibility of reverter, executory devise upon the happening

of a condition subsequent or otherwise. The procedure for obtaining said receivership is essentially the same as that briefly described in paragraph 1 above.

3. Texas has a force pooling statute, the Mineral Interest Pooling Act (MIPA), which is included in the Texas Natural Resources Code, Sec. 102.001 et seq. The MIPA has limited application. Two of its limitations are that it covers only "reservoirs discovered and produced" after March 8, 1961 and reservoirs for which the Railroad Commission has already established temporary or permanent field rules. Thus, the MIPA does not apply to old reservoirs, which were discovered and produced prior to March 8, 1961, and to new reservoirs in wildcat areas which are subject to Statewide spacing rules. A complete discussion of the MIPA is beyond the scope of this article.

Summers - Sec. 39

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1. When a mineral owner's residence, business address or current location is unknown, the district court of the county where the land is located can appoint a receiver to protect and administer his interest. 52 O.S. Sec. 521.

   To obtain such relief the lessee must file a verified petition showing that due diligence has been used to locate the mineral owner. 52 O.S. Sec. 522.

   Notice must be given by publication one time in a newspaper of general circulation in the county where the land is located at least 15 days prior to the hearing. 52 O.S. Sec. 522.

   The primary term of a lease executed under this statute can not exceed 5 years in length. 52 O.S. Sec. 522.

   The bonus money, delay rentals and/or royalty paid to the receivers shall be deposited in the registry of the Court to be held for the benefit of the unlocated owners. 52 O.S. Sec. 523. The funds escheat to the State after three years. 60 O.S. Sec. 657.

2. Oklahoma Statute Title 60, Sections 71 & 72 provides the procedure for appointing a Trustee to execute an oil and gas lease on behalf of contingent remaindermen.

3. If certain formations underlying the land have been designated drilling and spacing units, unlocated owners can be force pooled. At the hearing, the applicant must show that they made a diligent effort to locate the party. Under the pooling order the unlocated parties will lease their interest pursuant to the default election in such orders. 52 Okla. Stat. Sec. 87.1. See Pooling infra.

   The bonus money in a pooling procedure is placed into an escrow account. One year after the date of the pooling order, the holder shall transmit to the Corporation Commission the funds held for the poolee. 52 O.S. Sec. 552(e).

II-K - WHO CAN LEASE? - PUBLIC ENTITIES

TEXAS

1. Cities, Towns or other Political Subdivisions

   Sec. 71.001, et seq of the Natural Resources Code (NRC) establishes the following procedure for obtaining an oil and gas lease from such Lessor:

   a. The lease is obtained from the governing body. Sec. 71.003.

      BEWARE - A "political subdivision" should not be confused with a "department, board or agency of the state", whose lands are usually leased by the Commissioner of the General Land Office (GLO). A "department, board or agency of the state" exercises jurisdiction throughout the state, i.e. - State Highway Department. A "political subdivision", sometimes called a "special purpose district", has jurisdiction over only a portion of the state, i.e. - Brownsville Navigation District. Other examples of commonly created political subdivisions are: soil and water conservation districts, school and hospital districts and river authorities. Guaranty Petroleum Corporation v. Armstrong, 609 S.W.2d 529 (Tex. 1980), 68 O&GR 715.

   b. Notice of the intent to lease must be placed in a newspaper of general circulation in the county once a week for three consecutive weeks. Sec. 71.005.

   c. On the date specified in the notice, the governing body, at a public hearing, shall receive the bids and may award the lease to the "highest and best" bidder. Sec. 71.006.

   d. In the alternative, a lease may be made at a public auction. Sec. 71.008.

2. County and other Unincorporated Public Entities

   Sec. 253.005 of the Local Government Code provides that a municipality may lease "in the manner and on the terms that the governing body of the municipality determines, for the benefit of the municipality." A municipality may not lease a "street, alley or public square" in the municipality and a well may not be drilled "in the thickly settled part of the municipality or within 200 feet of a private residence."

3. Minerals owned by the State of Texas

The State of Texas, through its agencies, owns minerals in various capacities. The leasing procedure for each category is as follows:

a. Permanent School Fund Lands (approximately 13 million acres)

(1) Fee Uplands - All surveyed but unsold land, all undedicated land and all unsurveyed public land. Sec. 11.041 (NRC), (approximately 800,000 acres).

(2) Submerged lands - "... the mineral estate in areas within tide water limits, including islands, lakes, bays and the bed of the sea which belongs to the State. . . and the arms and the beds and shores of the Gulf of Mexico within the boundaries of Texas," Sec. 11.041 (NRC).

(3) River Beds and Streams - See discussion at II-L infra

Leasing procedure for the above

(a) Leased by sealed bid sales held by the School Land Board (SLB) each year in April and October.

(b) Nominations are submitted to the Petroleum and Minerals Division of the General Land Office (GLO) with a $100.00 fee at least 120 days prior to the sale.

(c) A bid package, identifying the tracts to be sold, minimum bids, form of lease and other information is distributed by the GLO 60 days prior to the sale, which is held in Austin, Texas. Anyone may obtain a bid package and be included on the regular mailing list by contacting the Petroleum and Minerals Division.

(4) Relinquishment Act Lands. Sec. 52.171 et seq. (NRC) (approximately 7 million acres).

(a) This Act applies only to public free school land and asylum land sold with a mineral classification or mineral reservation between

September 1, 1895 and August 21, 1931.

(b) The "owner of the soil" (surface owner) is the agent of the State for the purpose of leasing oil, gas and hard minerals. A State lease form, provided by the GLO, must be used and the lease is not effective until a certified copy of the lease, as recorded in the county or counties in which the property lies, is submitted to and approved by the GLO.

(c) If the surface owner leases Relinquishment Act land, he must share all benefits received equally with the State. Greene v. Robison, 117 Tex. 516, 8 S.W.2d 655 (1928). The surface owner cannot drill the property himself and must lease to another party in an arm's length transaction (not to an affiliated company). Any arrangement, whether stated in the lease or not, that gives the surface owner a benefit that is not shared with the State renders the lease void. State v. Standard, 414 S.W.2d 914 (Tex. 1967).

(d) The only accurate source for information as to the classification of land sold by the state subsequent to September 1, 1985 is the classification records of the GLO or the classification records of the respective county. This means you cannot rely solely on the fact that the patent contains no mineral reservation in the State.

(e) Although the "owner of the soil" may sell "Relinquishment Act Land" and reserve a royalty interest in production from a lease which he executed, said owner cannot sell the land and reserve a permanent mineral or royalty interest which would be binding upon a subsequent "owner of the soil." Lewis v. Oates, 145 Tex. 77, 195 S.W.2d 123 (1946).

(5) "Free Royalty" Lands - Sales Act of 1931 (now Sec. 51.054 NRC).

(a) This Act applies after August 21, 1931 (some attorneys argue for May 29, 1931) and supersedes the Relinquishment Act of 1919.

(b) If land is classified as mineral, then the State has reserved a nonparticipating royalty of "1/8 of all sulfur and other mineral substances from which sulfur may be derived or produced and 1/16 of all other minerals", including oil and gas.

(c) While the mineral owner can lease land utilizing a form acceptable to him without State approval, the lease is not effective until a copy of same is filed with the GLO. Also, the nonparticipating royalty interest of the State can not be pooled without the written consent of the General Land Office.

(6) Lands patented, sold or traded subsequent to June 19, 1983 (Sec. 51.054 NRC).

(a) The School Land Board has the discretion to set the terms of the sale at "not less than" 1/8 of the sulfur and 1/16 of all other minerals. The practice of the School Land Board, with few exceptions, is to reserve all minerals.

(b) The mineral reservation will be contained in the patent itself, as there is no mineral classification for lands patented, sold or traded after June 19, 1983.

b. Permanent University Fund Lands (approximately two million acres)

(1) Mineral leasing is administered by the Board for the Lease of University Lands, P.O. Box 553, Midland, Texas 79702.

(2) Leasing procedure - conducted by sealed bid, usually twice a year; leases have a five year primary term and a 1/4 royalty. Sec. 66.62 and 66.63, Texas Education Code.

c. Texas Department of Corrections and Texas Parks and Wildlife Department

(1) Mineral leasing conducted by the Board of each agency. The Commissioner of the GLO is the chairman of each Board.

(2) The GLO staff administers the leases and the leasing procedure and lease form is parallel to the SLB lease of Permanent School Fund Lands.

d. Highway rights of way

(1) If fee title to a public road is in the name of a

county or the State, only the State has the right to execute an oil and gas lease covering same. Robbins v. Limestone County, 114 Tex. 345, 268 S.W. 915 (1925)., State v. Hale, 136 Tex. 29, 146 S.W.2d 731 (1941), and Attorney General's Opinion No. WW-870 dated July 5, 1960.

(2) However, the State of Texas has permitted wells adjacent to public roads to drain the oil and gas underlying the road without compensation to the State for many years. Wencker v. Railroad Commission, 149 S.W.2d 1009 (Tex. Civ. App.-Austin 1941, writ dism'd).

(3) Sec. 32.201-32.205, NRC, effective June 8, 1985, provides the procedure for obtaining an oil and gas lease covering a public road from the General Land Office. A summary of said provisions is as follows:

(a) The adjacent mineral owner has a preferential right to obtain the lease. If the adjoining land is covered by a presently effective oil and gas lease, then the royalty, bonus and rental shall be identical to those amounts in said lease. If there is more than one oil and gas lease covering the adjoining land, then the terms of the state lease shall be no less favorable to the state than the most favorable of such leases. Sec. 32.201(b).

(b) If the adjacent mineral owner elects not to exercise his preferential right to obtain said lease, then the land may be offered for lease either directly to an applicant or by sealed bid. Such lease must contain a price and terms which are at least as beneficial to the state as those offered to the adjoining mineral owner. Sec. 32.201(g).

The state may not lease a right-of-way tract if, on January 1, 1985, there was a well capable of producing oil and/or gas in paying quantities within 2,500' of the State right-of-way. Rule 153.61(a), as adopted by the Board pursuant to Sec. 32.205.

SUGGESTION - If the owner of a lease adjacent to a State right-of-way elects to obtain a lease covering said right-of-way from the State, then said party should obtain from the General Land Office a copy of the rules applicable to said purchase.

e. Dealing with the General Land Office (GLO)

Texas General Land Office
Garry Mauro, Commissioner
1700 North Congress Avenue
Austin, Texas 78701
(512) 463-5000

(1) The day to day interpretation and administration of State leases is conducted by the Petroleum and Minerals Division.

(2) For a preliminary determination of boundary and title issues, contact the Survey Division.

(3) To obtain a "Certificate of Fact" describing the contents of all GLO records affecting a particular tract, contact the Asset Management Division.

(4) To determine the classification of any land in the State, contact Asset Management.

4. Quasi-Public Land - Churches and Cemeteries

a. Cemetery tracts may be owned by a cemetery association or by a profit or non-profit cemetery corporation. Article 912a-5, V.A.T.S. One who purchases a lot or plot in a cemetery does not acquire an ordinary fee simple title. The property acquired can only be used for burial purposes. Oak Park Cemetery, Inc. v. Donaldson, 148 S.W.2d 994 (Tex. Civ. App.-Galveston 1940, writ dism'd). Church land may be owned either by an unincorporated association or by a non-profit corporation.

b. An unincorporated association, as distinguished from a corporation, may not acquire title in the associational name, but holds title to real property either in the names of the members, or, more commonly, by elected trustees and their successors. O.K.C. Corporation v. Allen, 574 S.W.2d 809 (Tex. Civ. App.-Texarkana 1978, writ ref'd n.r.e.). An oil and gas lease would be obtained from the Trustees and, if an abundance of caution seems necessary, ratified by the members. If the Lessor is a corporation, an oil and gas lease would be obtained from the President, Vice-President or Attorney-in-Fact.

c. Land dedicated for cemetery, church or other specific purposes cannot be used for oil and gas development or for any other purpose which would be considered a desecration or would defeat the use of the land for the dedicated purpose. Any use of said land inconsistent with the specific purpose could be enjoined. However, a tract dedicated for a specific purpose can be leased and be a part of a producing unit as long as there is no surface operation or other activity upon said specially dedicated tract which would impair the dedicated use of the land. Meadows v. Edwards, 116 S.W.2d 831 (Tex. Civ. App.-Texarkana 1938, writ ref'd) and Eternal Cemetery Corporation vs. Tammen, 324 S.W. 2d 562 (Tex. Civ. App. - Ft. Worth 1959, writ ref'd n.r.e.), 11 O&GR 274.

Kuntz - Sec. 20.10(d), 20.10(f)

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1. Cities, towns or other political subdivisions

Oklahoma Statute Title 64, Sec. 405 allows the following entities to execute oil and gas leases:

> Any county, township, school district, or town that now owns or may hereafter acquire any land under control of the Board of County Commissioners, Board of Town Trustees, Directors of School Districts, Boards of Education or the governing body of any city acting by and through its duly constituted officers is hereby authorized and empowered to enter, from time to time, into valid oil and gas mining lease or leases of such land to any person, firm, association, or corporation for oil and gas development for a primary term not to exceed ten (10) years and as long thereafter as oil or gas is or can be produced, and any such oil and gas lease may provide that the lessee therein shall have the right and power to consolidate the land covered by said lease with other adjoining land for the purpose of joint development and operation of the entire consolidated premises as a unit. . . .

The lease shall be executed only after notice by publication for two weeks in a newspaper of general circulation in the county in which the land is situated and a public sale thereof to the highest bidder.

2. County and other Unincorporated Public Entities

See Paragraph 1 above.

3. Minerals owned by the State of Oklahoma

The Commissioners of the Land Office are authorized to lease State lands in Oklahoma. 64 Okla. Stat. Sec. 281.

The lease must be for a term of at least one year and not more than five years, and as long thereafter as production occurs in paying quantities.

The lease must provide for a minimum 1/8 royalty, and granted after taking sealed bids after at least 15 days notice of sale is given in a newspaper in the county where the land is located.

If fee title to a public road is in the name of a public entity, then that entity has the authority to execute an oil and gas lease, as discussed in Paragraph 1 above.

4. Quasi-Public land - Churches and Cemeteries.

a. The owner of a lot in a cemetery, regardless of the wording of the deed, does not own fee simple title. The owner's title is analogous to a perpetual easement or license. Heligman v. Chambers, 338 P.2d 144 (Okla. 1959).

Ownership of the mineral rights underlying a cemetery depend upon how title to the tract was acquired by the cemetery operator and what has been done susequently. If the land was acquired by condemnation, the proceedings should be examined to determine who owns the fee.

If the land in question had been devoted to cemetery use by a common-law dedication, only the dedicator need execute the lease. Langston City v. Gustin, 191 Okla. 93, 127 P.2d 197 (1942). If the land was "donated" or "granted" by statutory dedication by plat, the public owns a fee interest, and a lease must be secured from the appropiate body. If the cemetery operator acquired a fee by conveyance or the commencement of burial, the operator owns the minerals. If any reversionary interest has been retained by the Grantor, he should also execute or ratify the lease.

There is some question in Oklahoma as to the status of title after abandonment of a cemetery. The safest alternative, whenever possible, is to secure a lease from the last person to hold fee title prior to a statutary dedication. See McClain v. Oklahoma City, 192 Okla. 4, 113 P.2d 198 (1943)

b. In Oklahoma, an unincorporated association for charitable purposes (not-for-profit) cannot hold title, but property conveyed to them can be held by the Trustees of the association. A lease should be secured from the Trustees of that organization or, if no Trustee has been appointed, the court can appoint a Trustee to administer the property conveyed to it. Matter of Estate of Anderson, 571 P.2d 880 (Okla. Ct. App. 1977).

c. It is generally agreed that the surface of a cemetery may not be used for oil and gas operations. Boggs v. McCasland, 117

Okla. 54, 299 P. 768 (1936). The issue of the surface use on church property has never been decided in Oklahoma.

II-L WHO CAN LEASE? - RIVER BEDS AND STREAMS

TEXAS

1. Navigable streams or rivers

The State owns title to the oil and gas underlying the Texas coast of the Gulf of Mexico, all land below tidewater (deemed the "arm of the sea") and all land underlying all river beds, navigable in fact or in law. By law, every river or stream in the State of Texas is a "navigable stream" if it is navigable in fact or if its average width is greater than 30 feet, from cutbank to cutbank (technically referred to as the gradient boundary), from the mouth up. The common law rule was that the sovereign would own only the minerals underlying a stream which was navigable in fact. See Manry v. Robison, 122 Tex. 213, 56 S.W.2d 438 (1932) interpreting Art. 5302, V.A.T.S., now codified as Section 21.001(3), 21.012 and 21.013 (NRC). The State holds title to the beds and minerals underlying navigable water in trust for the Permanent School Fund. Such land passes by grant or sale only when expressly provided for by patent or statute; there is no presumption of the passing away of such title. State v. Bradford, 121 Tex. 515, 50 S.W.2d 1065 (1932).

Usually, the legal description in the State's patent will identify a tract as being up to the cutbank of a navigable stream. If however, a patent crosses part or all of a navigable stream, the Patentee and his successors will own the bed and the minerals underlying the stream to the extent that the tract, as patented, does not contain excess acres, Art. 5414a, V.A.T.S., or to the extent the State has conveyed said excess acreage by a Deed of Aquittance, Art. 5414a-1, V.A.T.S. (Both articles being commonly referred to as the "Small Bill")

Where the bed of a navigable river changes gradually by natural processes, the ownership of the adjacent (riparian) land changes with the bed. Where the river bed changes quickly, for either man-made or natural reasons (this is called avulsion), the riparian owner's boundary changes from the cutbanks of the old bed to the cutbank of the new bed, with the State obtaining title to the new riverbed. Maufrais v. State of Texas, 142 Tex. 559, 180 S.W.2d 144 (1944).

To obtain a lease from the State covering the river bed under a navigable stream, see II-K-3-a.

2. Non-navigable streams or rivers

The adjacent (riparian) owners own the oil and gas underlying said stream, each to the middle of the stream. Welder v. State, 196 S.W.868 (Tex. Civ. App.-Austin 1917, writ ref'd) adopts this common law rule. If the channel for a stream or river changes as the result of natural flow, then the private ownership changes with the change in the location of the stream. However, if the riverbed or channel changes quickly, as a result of flooding or by artificial or man-made causes, the boundary remains unchanged. Hancock v. Moore, 137 S.W.2d 45, (Tex. Civ. App. - El Paso 1939) affirmed at 138 Tex. 619, 146 S.W.2d 369 (1941).

For a more complete discussion of this subject, see Sections 171-175 of Volume 4 - Texas Practice-Land Titles, by Fred A. Lange, Vernon Law Book Company.

3. Mineral Rights in the Red River

The boundary line between the states of Oklahoma and Texas is the gradient boundary on the Texas side. Oklahoma v. Texas, 256 U.S. 70 (1921).

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1. Navigable Streams or Rivers

Riparian owners adjacent to navigable streams own only to the high water mark. The title to the bed remains in the State or certain Indian tribes. In Oklahoma, all of the major rivers have been judicially determined as non-navigable except the portion of the Arkansas River between the confluence with the Grand River and the Arkansas state line. Vickery v. Yahola Sand and Gravel Co. 158 Okla. 120, 12 P.2d 881 (1932).

2. Non-navigable Streams or Rivers

As to non-navigable streams, the adjacent (riparian) owners own the oil and gas underlying said stream, each to the middle of the stream. Ellis v. Union Oil Co., 630 P.2d 306 (Okla. 1981). If the channel for a stream or river changes as the result of a natural flow, then the private ownership changes with the changes in the stream. Goins v. Merryman, 183 Okla. 155, 80 P.2d 268 (1938). Avulsion, which is the sudden change in riparian land, does not change the boundaries of ownership. The boundary line remains at the old water line and becomes fixed with the ownership of the old stream bed remaining with its former owner. Mapes v. Neustadt, 197 Okla. 581, 173 P.2d 442 (1946).

3. Mineral Rights in the Red River - same.

III-A-1 - HABENDUM CLAUSE - GENERALLY

TEXAS

1. Oil and gas is owned in fee simple and an "unless" form oil and gas lease (the most frequently used), is a conveyance of a fee simple determinable in the oil and gas. Stephens County v. Mid-Kansas Oil & Gas Company, 113 Tex. 160, 254 S.W. 290 (1923), 29 A.L.R. 566. The Habendum or Term Clause of the lease establishes the period for which the lease rights will extend. Normally the term is divided into two distinct terms: the primary term and the secondary term. The primary term is that fixed term of years in the lease during which the Lessee has the option, but not the obligation, to pay delay rentals and/or explore for and produce oil and gas. At the expiration of the primary term, the lease terminates as a matter of law unless there is actual production, or a contractual substitute for production such as drilling operations, or payment of shut-in gas royalty. Skelly Oil Company v. Harris, 163 Tex. 92, 352 S.W.2d 950 (1962), 15 O&GR 653.

2. One well, producing in paying quantities on the land covered by the lease, or on land pooled with the lease, will continue the lease as to all land covered by the lease and as to all depths, unless the lease itself contains a provision requiring partial termination of the lease even if production is obtained (sometimes called a Pugh Clause). W.T. Waggoner Estate v. Sigler Oil Co., 118 Tex. 509, 19 S.W.2d 27 (1929) and Rogers v. Ricane, 772 S.W.2d 76 (Tex. 1989).

   Many leases now contain special provisions requiring partial termination, either horizontally or vertically, after production has been obtained. Vertical termination describes lands located outside a proration unit. Horizontal termination refers to the lease terminating as to certain depths, usually defined as all depths below the producing formation or total depth, or termination as to all non-producing formations, which leaves the Lessee only with the producing formation.

3. Texas has no statute which requires either vertical or horizontal termination. All partial termination of a lease must be created by the lease itself.

4. Texas has no statute requiring the recording of an affidavit confirming obtaining production in paying quantities.

5. Texas has no statute requiring that a release of an expired lease be recorded within a stated time.

Hemingway - Sec. 1.1, 1.3, 6.1, 7.13(C), 8.10, 8.12
Kuntz - Sec. 26.2
Summers - Sec. 61, 106, 132, 165, 299, 461, 532, 553, 583, 652, 962
W & M - Sec. 203.3, 210, 618, 825, 953

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1. Same. State ex. rel. Commissioners of the Land Office v. Carter Oil Co., 336 P.2d 1086 (1959), 10 O&GR 790; Shields v. Moffitt, 683 P.2d 530 (Okla. 1984) 81 O&GR 151; and Rich v. Doneghey, 177 P. 86 (Okla. 1918), 3 A.L.R. 352.

2. Same. Wilds v. Universal Resources Corp., 662 P.2d 303 (Okla. 1983), 76 O&GR 291; McClain v. Harper, 244 P.2d 301, (Okla. 1952), 1 O&GR 872.

3. The "Statutory Pugh Clause" provides that a lease executed after May 27, 1977 will expire 90 days after the primary term has expired to the extent the land covered by the lease exceeds a drilling and spacing unit of 160 acres or more in size. 52 O.S. Sec. 87.1(b).

4. Same.

5. Oklahoma Statute - Title 41, Section 40 requires that a lessee, or his successor, release a lease within 30 days after receipt of lessor's written demand.

Summers - Sec. 61, 104, 135, 232, 239, 242, 293, 300, 303, 373, 396, 400, 532, 588, 959, 962
W & M - Sec. 209, 416, 680, 812, 947, 954

III-A-2 - PRODUCTION IN "PAYING QUANTITIES"

TEXAS

1. If production of oil or gas is obtained, the lease will continue as long as the well produces in "paying quantities." This term means that the well produces a sufficient amount of oil or gas so that when same is sold, the Lessee realizes a profit above the cost of lifting or producing the oil or gas. Since the cost of drilling and completing the well are not considered, it is possible for the well to never pay out the cost of drilling and for the enterprise as a whole to be unprofitable, and yet the well produces in "paying quantities." Garcia v. King, 139 Tex. 578, 164 S.W.2d 509 (1942). The case of Clifton v. Koontz, 160 Tex. 82, 325 S.W.2d 684 (1959), 10 O&GR 1109, 79 A.L.R.2d 774, and 43 ALR 3rd 8 modified this rule in the case of a marginal well, to be:

   > Whether or not, under the relevant circumstances, a reasonable prudent operator would, for the purpose of making a profit and not merely for speculation, continue to operate a well in the manner in which the well in question was operated.

   Some of the relevant factors would be:

   a. the depletion of the reservoir and the price for which the lessee is able to sell his produce;

   b. the relative profitableness of other wells in the area;

   c. the operating and marketing cost of the lease;

   d. Lessee's net profit;

   e. the lease provisions;

   f. a reasonable period of time under the circumstances; and

   g. whether or not the Lessee is holding the lease merely for speculative purposes.

   Thus, the Garcia v. King rule (factors c and d) was incorporated as part of the Clifton v. Koontz rule.

2. In Texas, "Lessee's net profit" (factor d above) consists of all income received for the contractual working interest of the original lease. This constitutes all income less only the royalty. To determine the "Lessee's operating and marketing

cost" (factor c above), all drilling expenses are excluded as well as all depreciation for all equipment used in drilling. Clifton v. Koontz, supra. Lifting and produc-tion costs are generally held to include:

> labor costs of pumpers and others operating equipment on the lease, day-to-day power and supplies; severance taxes; license and permit fees; replacement and repair of producing equipment, maintenance and repair of roads, entrances, and gates; and electricity and telephone costs. Hemingway, Sec. 6.4.

In Texas, actual depreciation of producing equipment (not drilling equipment) and administrative expenses attributable to the well in question must also be deducted. Skelly Oil Company v. Archer, 356 S.W.2d 774 (Tex. 1962) 16 O&GR 650 and Bales v. Delhi-Taylor Oil Corporation, 362 S.W.2d 388 (Tex. Civ. App.-San Antonio 1962, writ ref'd n.r.e.), 17 O&GR 811.

Hemingway - Sec. 6.4, 6.4(A), 8.3
Kuntz - Sec. 26.5 and 26.7
Summers - Sec. 293, 298, 306, 395, 433, 512, 955, 993
W & M - Sec. 301, 334.6, 604.6, 815, 845.6, 874.1

OKLAHOMA

1. In Oklahoma, the discovery of hydrocarbons which are capable of production in paying quantities will satisfy the requirement that there be "production" at the end of the primary term, as long as a diligent effort is being made to market the gas as acquired under the implied covenant to market. McVicker v. Horn, Robinson & Nathan, 322 P.2d 410 (Okla. 1958), 8 O&GR 951. In Texas, actual production is needed to hold the lease by production, while the Oklahoma rule is more lenient.

2. The term "production in paying quantities" means that the lessee must produce in quantities sufficient to yield a return, however small, in excess of "lifting expense", even though the drilling and completion costs might never be recovered. Stewart v. Amerada Hess Corp. 604 P. 2d 854 (Okla. 1979), 65 O&GR 530.

   Items that have been held directly related to lifting costs are:

   a. royalties payable to the Lessor;
   b. salaries paid to pumpers;
   c. cost of electricity;
   d. cost of operating pumps;
   e. cost of supervision;
   f. cost of repairs;
   g. cost of telephone; and
   h. other incidental operating expenses.

   Stewart v. Amerada Hess Corp., supra.

   Stewart also held that depreciation of equipment used in lifting operations is regarded as a production expense and may be considered in determining whether a well is producing in paying quantities.

Summers - Secs. 299, 306, 400, 411, 412, 604.1

III-A-3 - HABENDUM CLAUSE - SHUT-IN GAS ROYALTY

TEXAS

1. The lease will expire as a matter of law at the end of the primary term, unless the lease is actually producing oil or gas in paying quantities, as distinguished from only a discovery of oil and/or gas, Garcia v. King, 139 Tex. 578, 164 S.W.2d 509 (1942), or unless the lease contains a "well completion clause" which permits a well commenced during the primary term to be completed after the expiration of the primary term. Rogers v. Osborne, 152 Tex. 540, 261 S.W.2d 311 (1953). The lease may contain other contractual substitutes for production for the lease to continue into the secondary term. Freeman v. Magnolia Petroleum Co., 141 Tex. 274, 171 S.W.2d 339 (1943).

2. One of the contractual substitutes for actual production is the payment of a shut-in gas royalty. A shut-in gas royalty payment is normally due within 60 or 90 days from when the well is completed. If the shut-in gas royalty payment is not paid in the proper amount, within the stated time, or to the proper parties, and the lease is not otherwise maintained by some other provision, then the lease terminates as a matter of law. Gulf Oil Corporation v. Reid, 337 S.W.2d 267 (Tex. 1960), 12 O&GR 1159. However, the payment of shut-in gas royalty can be made a covenant to the lease, not a condition. See III-B-1, infra.

3. The amount of the shut-in gas royalty is, historically, $1.00 per net acre. However, recently the amount of shut-in gas royalty has been negotiated to be more than $1.00 per net acre. Shut-in gas royalty, being a substitute for actual production, is paid to the royalty owners, if different than the mineral owners. Morriss v. First National Bank of Mission, 249 S.W.2d 269, (Tex. Civ. App. - San Antonio 1952, writ ref'd n.r.e.), 1 O&GR 1371.

   BEWARE - Some old lease forms provide that shut-in royalty may be paid only on wells "producing gas only." However, it is common knowledge within the industry that most gas wells will produce some liquid condensate. For a well to be classified as a "gas well" in Texas the well must produce "...more than 100,000 cubic feet of gas to each barrel of oil from the same producing horizon...." Section 86.002(5) (NRC). Vernon v. Union Oil Company of California, 270 F.2d 441 (5th Cir. Tex., 1959) and at 273 F.2d 178 (5th Cir. Tex., 1960) holds that it would not be proper to maintain a lease by the payment of shut-in royalties if it was reasonable to operate a properly classified gas well solely for the production of liquid components which themselves produced in paying quantities. More recent lease forms avoid this confusion by permitting shut-in royalties to be paid where the well produces gas and gas condensate, or gas liquids.

Hemingway - Sec. 6.4, 6.4(A), 6.5, 6.6-6.9, 7.13(B)
Kuntz - Sec. 4, 5, 6
Summers - Sec. 165, 293, 298, 300, 306, 400, 411, 412, 416, 604, 955
W & M - Sec. 334.6, 604.6, 618.1, 632, 736, 842.1

OKLAHOMA

1. Contra. Oklahoma does not require that there be actual production, or a contractual substitute therefore, at the end of the primary term. Oklahoma requires only that there be a discovery of hydrocarbons capable of commercial production during the primary term for the lease to continue into the secondary term. The Lessee has an implied covenant to market any gas as soon as possible. McVicker v. Horn, Robinson & Nathan, 322 P.2d 410 (Okla. 1958), 8 O&GR 951.

   If oil or gas is discovered by the end of the primary term the lease is held by production if the lessee is making a diligent effort to sell the hydrocarbons. As such, the need for a shut-in clause in Oklahoma to prolong the lease is not nearly as important as in Texas. McVicker v. Horn, Robinson & Nathan, 322 P.2d 410 (Okla. 1958), 8 O&GR 951.

2. Contra. Failure to make shut-in gas royalty payments in the right amount or by the due date will not cause a lease to terminate. However, the Lessee still owes the debt created by the unpaid shut-in gas royalty and the Lessor could sue to recover the debt. Gard v. Kaiser, 582 P.2d 1311 (Okla. 1978), 61 O&GR 394.

3. Same.

III-A-4 - HABENDUM CLAUSE - TEMPORARY CESSATION OF PRODUCTION

TEXAS

1. Even if the creating instrument does not provide, if there is a temporary cessation of production due to mechanical problems in the secondary term the lease or term mineral or royalty interest will not terminate for a reasonable time if the Lessee is making reasonable good faith efforts to restore production. Whether a cessation of production is temporary is a question of fact that will depend on the individual circumstances. Watson v. Rochmill, 137 Tex. 565, 155 S.W.2d 783 (1941), 137 A.L.R. 1032 and Amoco Production Co. v. Braslau, 561 S.W.2d 805 (Tex. 1978).

2. To avoid this uncertainty, most leases contain a "cessation of production" clause which defines the length of time the lease continues without additional reworking or drilling operations. These clauses are strictly construed against the Lessee but usually allow 60 or 90 days within which additional operations must commence. Samano v. Sun Oil Company, 621 S.W.2d 580 (Tex. 1981).

   Hemingway - Sec. 6.4(B)
   Kuntz - Sec. 26.14
   Summers - Sec. 226, 301, 305, 306, 349, 470, 599, 955
   W & M - Sec. 334.8, 604, 604.7, 615.1

OKLAHOMA

1. Same. Cotner v. Warren, 330 P.2d 217 (Okla. 1958), 9 O&GR 706.

2. Same. French v. Tenneco Oil Co., 725 P.2d 275 (Okla. 1980), 90 O&GR 97.

III-B-1 - DELAY RENTAL - GENERALLY

TEXAS

1. The usual "unless" lease form is interpreted to mean that the lease will terminate on any anniversary date of the lease "unless" the lessee:

    a. conducts "operations" (as defined infra - III-B-2) for the drilling of a well on that date; or

    b. pays a rental payment to the lessor on or before that date; or

    c. is actually producing oil or gas or has paid a shut-in gas royalty payment on or before said date.

    Humble Oil & Refining Company v. Mullican, 144 Tex. 609, 192 S.W.2d 770 (1946).

2. Texas, like a majority of jurisdictions, views the "unless" clause as creating a limitation or condition upon the estate of the lessee, which will terminate automatically by its own terms in the event the lessee does not strictly comply with the delay rental clause and other clauses which create conditions, not convenants. W. T. Waggoner Estate v. Sigler Oil Co., 118 Tex. 509, 19 S.W.2d 27 (1929). Texas permits few excuses for making a faulty delay rental payment. Being cautious, I list only:

    a. Confusion or ambiguity caused by the lessor. Humble Oil & Refining Co. v. Harrison, 146 Tex. 216, 205 S.W.2d 355 (1947); and

    b. Repudiation of the lease by lessor, such as filing suit claiming the lease has expired, NRG Explanatory, Inc. v. Rauch, 671 S.W.2d 649 (Tex. App. - Austin 1984, writ ref'd n.r.e.), 81 O&GR 400, or preventing lessee's entry upon the leased premises, see III-B-2-2 infra.

    The only cure for making a faulty delay rental payment is ratification, more correctly called reviving the expired lease. Reserve Petroleum Company v. Hodge, 147 Tex. 115, 213 S.W.2d 456 (1948), 7 A.L.R. 2d 288.

3. In order to protect itself against an improper payment of delay rentals when the lessee was attempting in good faith to make a proper payment, lessees have begun to include, within the delay rental clause itself, a specific savings clause such as the following:

> If Lessee shall, on or before any anniversary date, make a bona fide attempt to pay or deposit rental to a Lessor entitled thereto according to Lessor's records or to a Lessor who, prior to such attempted payment or deposit, has given Lessee notice, in accordance with subsequent provisions of this lease, of his right to receive rental, and if such payment or deposit shall be ineffective or erroneous in any regard, Lessee shall be unconditionally obligated to pay to such Lessor the rental properly payable for the rental period involved, and this lease shall not terminate but shall be maintained in the same manner as if such erroneous or ineffective rental payment or deposit had been properly made, provided that the erroneous or ineffective rental payment or deposit be corrected within thirty (30) days after receipt by Lessee of written notice from such Lessor of such error accompanied by such instruments as are necessary to enable Lessee to make proper payment.
> Kincaid v. Gulf Oil Corporation, 675 S.W.2d 250 (Tex. App. - San Antonio 1984, writ ref'd n.r.e.) 83 O&GR 356.

Similar language could be utilized to change other leasehold provisions, such as shut-in gas royalty, from conditions to covenants and thus avoid accidental lease termination.

Hemingway - Sec. 2.3, 6.3, 6.3(A)&(B)&(E), 7.8
Kuntz - Sec. 27.4, 29.2, 36.3, 36.4, 36.5
Summers - Sec. 218, 342, 343, 344, 348, 452, 585.1
W & M - Sec. 312, 340.04, 601.3, 606.2, 686.4

OKLAHOMA

1. Same. Wilds v. Universal Resources Corp., 662 P.2d 303 (Okla. 1983), 76 O&GR 291.

2. Regardless of the lease form, Oklahoma courts have allowed a lease not to terminate when the check was mailed on or before the anniversary date or where a clerical error by the depository bank did not result in a timely deposit. Oldfield v. Gypsy Oil Co., 123 Okla. 293, 253 P. 298 (1927). Equitable relief from termination has been permitted where the mistake was by an independent agency, not under the supervision and control of the lessee, and was not due to the mistake of an agent or employee of the lessee in the performance of his duties while acting under the supervision and direction of the lessee. Knight v. Yoakum, 338 P.2d 1075 (Okla. 1959), 10 O&GR 970.

   Other decisions providing equitable excuses include:

   a. The depositing of delay rentals in the depository to the credit of all lessors. Superior Oil v. Jackson, 250 P. 2d 23 (1952), 10 O&GR 1730;

   b. The postal authorities delivering the check to the wrong bank in the same town. Oldfield v. Gypsy Oil and Gas Co., 123 Okla. 293, 253 P.2d 298 (1927);

   c. Depository bank failed to deposit check until after the due date. Brazell v. Soucek, 130 Okla. 204, 266 P. 442 (1928).

3. In the case of Lewis v. Grininger, 179 P.2d 463 (Okla. 1947), the Oklahoma Supreme Court did not give validity to a provision in an oil and gas lease that failure or neglect to pay delay rentals when due did not operate to terminate the lease until lessor gave notice of the failure to pay delay rentals, and which also provided the lessee with ten days to correct the ommission. The Court held that this provision was contrary to the delay rental provision and that any conflict would be construed most strongly against the lessee.

III-B-2 - DEFINITION OF "OPERATIONS"

TEXAS

1. Unless the term "operations" is defined differently in the lease, "commencement of drilling operations" means, as a minimum, conducting some type of surface operation required for the drilling and completion of the well. This activity can be determined objectively. Peterson v. Robinson Oil and Gas Co., 356 S.W.2d 217 (Tex. Civ App.-Houston [First Dist.] 1962, no writ history), 16 O&GR 440. BEWARE - some lease forms will define "operations" to mean actual drilling with a rig capable of drilling to total depth. A subjective requirement is that the Lessee has in good faith planned for and is capable of continuing the remaining operations in a reasonable and timely fashion. Texas Pacific Coal & Oil Co. v. Barker, 117 Tex. 418, 6 S.W.2d 1031 (1928), 60 A.L.R. 936.

2. Sometimes a Lessor/surface owner or surface tenant will physically prevent a Lessee from gaining entry to the leased property. This problem occurs most often at the end of the primary term and frequently occurs when the Lessor/surface owner has agreed to execute another lease when the base lease expires. Such activity by the Lessor or surface owner will excuse performance by the Lessee and the primary term of the base lease is usually extended for a reasonable time by the court. This rule is called the Obstruction Doctrine or the Lockout Rule. Gilbert v. Smedley, 612 S.W.2d 270 (Tex. Civ. App.-Ft. Worth 1981, writ ref'd n.r.e.), 69 O&GR 312.

Hemingway - Sec. 6.7, 8.3(A), 8.4-8.10
Kuntz - Sec. 26.14, 32.3, 36.4
Summers - Sec. 293, 300.1, 301, 349, 996
W & M - Sec. 604.7, 606.1, 618.1, 683.1, 825.2, 885.2

OKLAHOMA

1. Same. Wilds v. Universal Resources Corp., 662 P.2d 303 (Okla. 1983), 76 O&GR 291.

2. If the lessor or surface tenant obstructs the lessee's operations, courts will generally excuse diligent commencement operations if the operations were conducted in good faith and would have continued except for the obstruction. 21st Century Inv. Co. v. Pine, 734 P.2d 834 (Okla. Ct. App. 1986), 92 O&GR 597.

   When the lessee of an oil and gas lease is ready, willing and able to develop the premises and proceed with due diligence, an attack upon lessee's title by the lessor will relieve the lessee of all duty to further proceed with drilling operations during the continuance of the attack, and the lessee is entitled to a reasonable time within which to proceed with drilling operations after the final disposal of the suit questioning title. Jones v. Moore, 338 P.2d 872 (Okla. 1959), 10 O&GR 963.

III-C - POOLING

TEXAS - Voluntary

1. Definition - Pooling is defined as bringing together two or more oil and gas leases covering two or more separately owned tracts of land for the purpose of accumulating sufficient surface acres to enable the drilling parties to create a sufficiently large proration unit so that the Railroad Commission of the State of Texas will grant to them a full allowable for the unit production of oil and/or gas.

2. Designation of Unit - While Texas has the Mineral Interest Pooling Act (MIPA), Natural Resources Code, Sec. 102.001 et seq., which authorizes the Texas Railroad Commission to forcibly pool two or more leases (a detailed discussion of which is beyond the scope of this article), most units are formed by exercising the voluntary pooling clause provided in most oil and gas lease forms. Normally, all leasehold owners of record are required to execute a Designation of Unit and same should be recorded prior to the expiration of the primary term of the first non-drillsite lease to expire. Sauder v. Frye, 613 S.W.2d 63 (Tex. Civ. App.-Fort Worth 1981, no writ history), 69 O&GR 147, 15 A.L.R.3rd 899. Once properly pooled, drilling operations or production upon one lease will be considered drilling operations or production upon all leases pooled.

3. Nonparticipating Royalty Owner - An oil and gas lease executed by the owner of the executive right covers the nonparticipating royalty in said tract for all purposes except pooling. Brown v. Smith, 141 Tex. 425, 174 S.W.2d 43 (1943). A nonparticipating royalty owner must either ratify the lease covering his interest or ratify the designation of unit for his nonparticipating royalty interest to be pooled into the unit. Montgomerv v. Rittersbacher, 424 S.W.2d 210 (Tex. 1968), 27 O&GR 774. If a nonparticipating royalty owner has ratified neither the lease nor the unit by the time drilling operations commence, then the nonparticipating royalty owner can wait and determine the location of the drillsite. If the drillsite is on his land, then the nonparticipating royalty owner can refuse to ratify and he will be entitled to receive a royalty that is not spread throughout the unit. Montgomery v. Rittersbacher, supra. However, if the drillsite is not on his tract, the nonparticipating royalty owner can, after the well has been drilled and completed, unilaterally ratify his lease or the designation of unit and thus be entitled to receive his proportionate part of the royalty from the unit production from the date of ratification. Ruiz v. Martin, 559

S.W.2d 839 (Tex. Civ. App.-San Antonio 1979, writ ref'd n.r.e.), 60 O&GR 128.

4a. Unleased Mineral Owner - If an unleased mineral owner owns an undivided mineral interest in the drillsite tract, then he is entitled to receive his proportionate part of 8/8 of production after said production has repayed the drilling parties their cost for land work, drilling, testing, completing, equipping and operating the unit well until payout. Cox v. Davison, 397 S.W.2d 200 (Tex. 1965), 24 O&GR 128. If the unleased mineral co-tenant is in a non-drillsite tract which has been pooled with the drillsite tract, then the unleased mineral co-tenant is not entitled to any part of production. Superior Oil Co. v. Roberts, 398 S.W.2d 276 (Tex. 1966), 24 O&GR 77 and Hunt Oil Co. v. Moore, 656 S.W.2d 634 (Tex. Civ. App.-Tyler 1983, writ ref'd n.r.e.), 79 O&GR 576.

b. BEWARE - Sunac Petroleum Corp. v. Parkes, 416 S.W. 2d 798, (Tex. 1967), 26 O&GR 689 confirmed the following disaster. Several leases, totalling 640 acres, were timely pooled for a prospective gas well. The unit well, however, was completed as an oil well, not a gas well, after the primary terms of all leases had expired. Within the time frame permitted by the additional drilling clause and by the dry hole clause, the operator commenced additional drilling operations on the 160 acre tract covered by the lease in question and completed same as an oil well. Approximately a year after the completion of the oil well on the 160 acre tract, the Lessor questioned whether or not the lease had been maintained in force during the period from the expiration of the primary term until drilling operations were commenced on the 160 acre tract. The Texas Supreme Court held that the additional drilling clause in this lease covered only the well drilling through the primary term of the lease, not additional wells, and that the dry hole clause in the lease did not cover the unit well, which was a producing oil well, not a "dry hole" as normally understood, and not a gas well, as intended. Thus, the lease in question, and inferentially the other non-drillsite leases that were pooled for gas, terminated when the unit well for the gas unit was completed as an oil well.

LESSON - The harsh result caused by the Court's strict construction of the lease in question could be avoided, it appears, only by drafting an additional drilling clause which covers new wells in addition to the well drilling through the primary term, and a dry hole clause which covers a completed well which is of a different type than the contemplated well for which the leases were pooled.

5. In Texas, when discussing pooling leases and permitting wells, there is much confusion in discussing "units" because there are at least six types of "units." I provide over-simplified definitions of these units (references to Rules are to the Rules of the Texas Railroad Commission):

   a. Voluntary Pooled Unit - bringing together two or more oil and gas leases covering two or more separately owned tracts of land for the purpose of drilling a well, as discussed at paragraphs 1 and 2 above. The size of the pooled unit may, but is not required to, correspond to the proration unit size for the field. The pooled unit is created by a Designation of Unit, as discussed at paragraph 2 above, but is designated to the Commission with the drilling application and completion papers by Form P-12 which lists the interests that are pooled as well as those tracts which contain non-pooled interests.

   b. Force Pooled Unit - formed by an Order of the Railroad Commission pursuant to Sections 102.001-102.112, Natural Resources Code (MIPA) only after notice and hearing. Such units correspond to an individual proration unit and are limited to a specific reservoir.

   c. Fieldwide Units - are usually formed to conduct enhanced recovery operations pursuant to Sections 101.002-101.052, Natural Resources Code. Said units can cover an entire field or a portion of a field. There is no forced fieldwide unitization in Texas.

   d. Drilling unit - is the area prescribed (means required) by the applicable spacing regulations for the granting of a drilling permit from the Railroad Commission. It is designated by Form W-1 (Application for Drilling Permit) with plat attached. The purpose is to show the Commission that there is sufficient unassigned acreage from the property to satisfy the Density Rule for the applicable reservoir. A drilling unit normally has no title significance. Rule 38, the Statewide Density Rule, is 40 acres.

   e. Spacing Unit - not a geographic area but a requirement that a well be no closer to lease lines, property lines, subdivision lines or other wells than required by the rules. Rule 37, the Statewide Spacing Rule, provides that wells shall be no closer than 467 feet from lease, property or subdivision lines and no nearer than 1,200 feet to any wells completed in or drilling to the same reservoir.

f. Proration Unit - determined upon completion of well to designate actual acreage assigned to well for proration purposes in order to obtain allowable (the volume of hydrocarbons such well is authorized to produce). It is designated by Form P-15 and plat, which are filed with completion papers when special field rules have been adopted with acreage as a factor in the allocation formula (acreage is a factor in the allocation formula for nearly every well). The well need not be in the center and proration units need not be square. Proration units can be amended at any time by the filing of an Amended Form P-15.

There are no proration units where there are no special field rules or where the allocation formula does not include acreage as a factor. Absent special provisions in private oil and gas agreements, proration units have no title significance in and of themselves and do not determine the manner in which production is allocated among the mineral interest owners. An obvious exception to this rule is a "proration unit" earned by a farmoutee or lessee pursuant to a retained acreage or a continuous development provision.

If the acreage attributed to a proration unit is not sufficient to obtain a full allowable, then the allowable is proportionately reduced.

The Statewide Rules identified above apply in the absence of Special Field Rules. The issue of obtaining, amending and working within Railroad Commission Rules is a subject much too broad to be covered in this paper.

Hemingway - Sec. 2.2(D), 5.1, 5.1(B)&(C), 7.13, 7.13(B)
Kuntz - Sec. 48.3
Summers - Sec. 37, 138, 599, 606.1, 611, 612, 952, 956, 963,

964, 967, 970, 976, 996
W & M - Sec. 224.3, 339.2, 504.1, 505.2, 670.8, 709, 921.16, 925.1

OKLAHOMA - Forced

1. The voluntary pooling clause is seldom used in Oklahoma because the Oklahoma Corporation Commission can establish drilling and spacing units which supersede the voluntary units. To avoid the possibility of subsequent changes in his unit, the Lessee normally applies to the Commission to establish these units. Hladik v. Lee, 541 P.2d 196 (Okla. 1975), 53 O&GR 45; Nisbet v. Midwest Oil Corporation, 451 P.2d 687 (Okla. 1968), 32 O&GR 547.

2a. Normally, a drilling and spacing unit is established before a well is drilled by showing that the unit is underlain by a prospective common source of supply and that the prospective well would effectively and efficiently drain the proposed unit preventing waste and protecting correlative rights. 52 Okla. Stat. Sec. 87.1.

b. An applicant who desires to have a tract of land spaced must make an application before the Corporation Commission. After notice and a hearing, the Corporation Commission has the power to establish drilling and spacing units of approximately uniform size covering a formation or common source of supply. 52 O.S. 87.1(d). This is usually done prior to the drilling of a well. The formation of a drilling and spacing unit is a prerequisite to obtaining a force pooling order. Gulfstream Petroleum Corp. v. Layden, 632 P.2d 376 (Okla. 1981), 71 O&GR 66.

c. Once a drilling and spacing unit is established, the amount of leasehold that will be held by production into the secondary term is limited by statute. In the case of a spacing unit 160 acres or more in size, no oil and gas leasehold interest outside the spacing unit may be held by production more than 90 days beyond the expiration of the primary term. 52 Okla. Stat. Sec. 87.1(b). This limitation only extends to leases taken after May 25, 1977, the effective date of the act. Wickham v. Gulf Oil Company, 623 P.2d 613 (Okla. 1981), 71 O&GR 399.

3. A drilling and spacing unit established by the Corporation Commission essentially "pools" the royalty owners so that they share in the revenues from any well in that unit. 52 O.S. Sec. 87.1; See also Shell Oil Co. v. Corporation Commission, 389 P.2d 951 (Okla. 1963), 20 O&GR 841 (the "Blanchard Decision").

If a governmental section of 640 acres is spaced for gas and the unit well is completed as an oil well, then the royalty is paid on its spaced 640-acre basis, maintaining all leases until such time as spacing is changed, if ever. Meredith v. Corporation Commission, 368 P.2d 828 (Okla. 1961), 16 O&GR 618.

Upon application, notice and hearing, the Corporation Commission also has the authority to:

a. change the size of the drilling and spacing unit; and/or
b. permit additional wells to be drilled within the unit (usually called "increased density" wells).

52 O.S. 87.1(d); Union Oil Company v. Brown, 641 P.2d 1106 (Okla. 1981), 72 O&GR 340.

4. A force pooling order is normally obtained where the unleased mineral owners and working interest cotenants cannot agree on a development plan, or where there are unlocatable mineral owners or working interest cotenants. The force pooling order determines:

a. the operator;
b. the dry hole costs;
c. the completed well costs;
d. the elections for a lessee/unleased mineral owner to sell/lease its interest or participate in drilling a well.

The order also creates the operator's lien rights as to any unpaid drilling and operating costs. Assuming all unleased mineral owners and all lessees have been made parties to the force pooling proceeding, then one of the results of the force pooling order is that there will be no unleased mineral owners and no lessees within the unit who are not bound by the force pooling order.

5. Oklahomans are not confused by the use of the term "unit", which normally means a drilling and spacing unit. The drilling and spacing order provides essentially the same provisions as contained in Texas' field rules.

Hemingway - Sec. 6.4(A), 7.4(E), 7.13(D)
Kuntz - 77.3
Summers - Sec. 84, 104, 298, 299, 306, 414, 959, 960, 962,

973, 977
W & M - Sec. 604.6, 951, 953, 973.3, 980.4

III-D - GAS ROYALTY CALCULATIONS AND PAYMENT OF INTEREST

TEXAS

1. If the lease contains a "market value" gas royalty clause, the gas royalty is calculated on the "fair market value" of the gas from that field as of the date of production, not the date of the lease or the date Lessee executed a gas sales contract. Thus, the fair market price for royalty paid by the Lessee may be greater than the contract price received by the Lessee for the gas sold pursuant to its gas sales contract. Texas Oil and Gas Corp. v. Vela, 429 S.W.2d 866 (Tex. 1968), 29 O&GR 121 and Exxon Corp. v. Middleton, 613 S.W.2d 240 (Tex. 1981), 69 O&GR 115, 10 A.L.R. 4th 712.

2. The Lessee has an implied obligation to obtain a fair market price for the gas sold, whether the royalty is paid pursuant to a "proceeds" royalty clause or a "market value" royalty clause. Amoco Production Company v. First Baptist Church of Pyote, 579 S.W.2d 280 (Tex. Civ. App.-El Paso 1979) writ ref'd n.r.e., per curiam, at 611 S.W.2d 610 (Tex. 1980), 67 O&GR 590.

3. Texas has not adopted the "Blanchard Decision" (See corresponding Oklahoma paragraph 3). Thus, in Texas, royalty is paid pursuant to the "tract allocation method." This means that a royalty owner does not receive any royalty unless his Lessee is actually marketing gas. If there is a split stream resulting in different gas prices, a royalty owner's royalty will be based upon the price received by his Lessee, Puckett v. First National Bank of Midland, 702 S.W.2d 232 (Tex. Civ. App.-Eastland 1985, writ ref'd n.r.e.), 90 O&GR 144, unless the Lessee has breached its implied duty to market gas in good faith by entering into a gas sales contract which provides for less than a fair market price for the gas sold. See Amoco Production Company v. First Baptist Church of Pyote, supra, where the lease contained a "proceeds" type royalty clause, not a "market value" royalty clause.

4. By statute, the operator is required to distribute funds to the interest owners within 120 days after the end of the first month of the first sale, and subsequently within 60 days after the end of each calendar month where oil is produced or within 90 days after the end of each calendar month in which gas is produced. Failure to timely pay these sums results in interest being due at "the rate charged on loans to depository institutions by the New York Federal Reserve Bank, unless a different rate of interest is specified in a written agreement" between the parties. The payment of interest is

avoided if the failure to pay is because of a title dispute or title question or requirement. An owner can file suit if he has not been paid and then collect his funds plus interest, costs and attorneys fees if he prevails. Natural Resources Code Sec. 91.401 etc.

5. Sec. 9.319 of the Texas Business and Commerce Code creates a security interest in favor of all interest owners (they become secured parties) to secure the payment to them by the first purchaser of oil or gas to pay the purchase price. A "signed writing" operates to give the interest owner a security agreement and the security interest is perfected automatically without the filing of a financing statement.

6. Texas does not have a comparable statute or rule.

Hemingway - Sec. 7.2-7.12, 8.9

Kuntz - Sec. 48.3
Summers - Sec. 398, 399, 400, 415, 416, 589, 590, 761, 962, 973, 1144
W & M - Sec. 334.8, 650.3, 682.4, 705, 856.3, 951

OKLAHOMA

1. Gas royalty is calculated on a contract price received for the gas sold by the Lessee, regardless of whether the lease contains a market value, market proceeds, or market price royalty provision. Tara Petroleum Corp. v. Hughey, 630 P.2d 1269 (Okla. 1981), 71 O&GR 386.

2. Same. The Lessee has an implied obligation to obtain a fair market price for the gas. A fair price should reflect market value at the time. See Tara Petroleum Corp. v. Hughey, 630 P.2d 1269 (Okla. 1981), 71 O&GR 386.

3. If a drilling and spacing unit has been established by the Oklahoma Corporation Commission, any party producing gas must pay all royalty owners in the unit a 1/8th royalty on any production, but the producing party is only responsible for paying any excess royalties above that 1/8th level to its own lessors. Shell Oil Co. v. Corporation Commission, 389 P.2d 951 (Okla. 1963), 20 O&GR 841, (the "Blanchard Decision"). Essentially, the 1/8th royalty is "Blanchardized" or shared by all royalty owners in the unit, and excess royalties are only received when the royalty owner's lessee is producing.

   However, effective October 18, 1985, Senate Bill 160 was enacted which makes the producing party liable for paying all royalty owners in the unit the full royalty on the face of the lease. This legislation will only apply prospectively to gas purchase contracts executed after the effective date of the legislation. See Panhandle Eastern Pipeline Company et al, v. State, U.S.D.C. West. Dist. Okla. No. CIV-85-2659-P (July 15, 1988). S.B. 160 is codified in the provisions of 52 O.S. Sec. 87.1.

4. By statute, the operator is required to distribute funds to the interest owners within six months of the date of first sale, or within 60 days of the end of the month the oil or gas is produced. Failure to timely pay these sums results in interest being due at a rate of 12% if title is clear, or if title defects are present, interest is payable at 6%. An owner can file suit if he has not been paid and can collect his royalties, interest, costs and attorney fees if he prevails. However, the owner cannot force the cancellation of the lease for failure to receive payment. 52 Okla. Stat. Sec. 540.

5. Effective June 7, 1988, the owner of an interest in a well in Oklahoma will have the ability to file an Oil & Gas Owners Lien pursuant to 52 Okla. Stat. Sec. 548. A notice of lien

needs to be filed within 90 days of the time payment is due under 52 Okla. Stat. Sec. 540, and a certified copy of the lien needs to be sent to the purchaser. This lien will apply to the oil or gas or proceeds therefrom, and actions to foreclose on the lien must be taken within a one year period or it expires. This statute was enacted to give the mineral owner and working interest owners the ability to create a perfected security interest in the proceeds from a well in which they have an interest.

6. Under Oklahoma statutes and Corporation Commission rules, each uncontracted owner in a natural gas well is entitled to share in the revenues from other parties' gas contracts. OCC-OGR rule 6-100 et seq. A contracted party must agree to revenue share with the other owners unless a private contract exists governing gas balancing.

Summers - Sec. 84, 104, 589, 962, 973

IV - SEISMIC ACTIVITY

TEXAS

1. An unleased mineral owner, a mineral lessor, or a mineral lessee, not the surface owner, owns the right to conduct or to authorize seismic tests for the presence of oil or gas. Gulf Oil Corporation v. Whitaker, 252 F.2d 157 (5th Cir. Tex. 1958), 9 O&GR 543.

2. If the granting clause of a lease conveys the exclusive right to explore to the lessee, then the mineral lessor no longer retains any geophysical rights. Wilson v. Texas Company, 237 S.W.2d 649 (Tex. Civ. App.-Fort Worth 1951, writ ref'd n.r.e.) but articulated better at Mustang Production Company v. Texaco, 549 F.Supp. 432 (D. Kan. 1982) 74 O&GR 462, affirmed at 754 F.2d 892 (10th Cir. Kan. 1985) 83 O&GR 502.

3. If a trespasser demonstrates that oil and/or gas is not present in commercial amounts, then the owner(s) of the exploratory rights can sue and recover damages resulting from said disclosure. The measure of damages would be the loss of the value to lease, which would be primarily the lost bonus. Humble Oil and Refining Company v. Kishi, 276 S.W.190 (Tex. Comm. App. 1925), set aside on other grounds at 291 S.W.538 (Tex. Comm. App. 1927) and later appealed at 299 S.W.687 (Tex. Civ. App.-Beaumont 1927, writ ref'd).

Hemingway - Sec. 4.1, 4.1(A)
Kuntz - Sec. 12.10

Summers - Sec. 21, 25, 25.1, 78.1, 652, 659, 660
W & M - Sec. 218.5, 226, 231.1, 316.3, 407.2, 512.2, 613.5

OKLAHOMA

1. Same. Anschutz Corp. v. Sanders, 734 P.2d 1290 (Okla. 1987), 93 O&GR 147.

2. Same. Whether the lessee has the exclusive rights to conduct seismic exploration depends upon the language in the oil and gas lease. Roye Realty v. Southern Seismic, 711 P.2d 946 (Okla. Ct. App. 1985), 87 O&GR 361.

3. Oklahoma has not decided the issue of damages for subsurface trespass. It is likely that the damages for subsurface trespass would be same as Texas. See Ohio Oil Co. v. Sharp, 135 F.2d 303 (10th Cir. 1943)

V - SURFACE DAMAGES

TEXAS

1. There is no common law or statutory duty to pay damages to the surface owner for drilling operations. A person who seeks to recover from the lessee for damages to the surface must prove either specific acts of negligence or that more of the land was used by the lessee than was reasonably necessary. Humble Oil and Refining Company v. Williams, 420 S.W.2d 133 (Tex. 1967), 27 O&GR 202. Also, there is no common law duty to restore the surface after drilling operations have terminated to the condition the surface was in prior to drilling operations. Warren Petroleum Corp. v. Monzingo, 157 Tex. 479, 304 S.W.2d, 362 (1954), 7 O&GR 1108, 65 A.L.R.2d 1352. However, it is customary to pay the surface owner damages, or at least reach an agreement with the surface owner as to the amount of damages, prior to entering the property for drilling operations.

2. An oil and gas lease impliedly conveys to the lessee the right to use all of the oil, gas, water, soil, etc. that is reasonably necessary to carry out the lessee's operations under the lease, including secondary recovery operations such as water flooding, Sun Oil Company v. Whitaker, 483 S.W.2d 808 (Tex. 1972), 42 O&GR 256, unless the operations benefit other lands, Robinson v. Robbins Petroleum Corporation, 501 S.W.2d 865 (Tex. 1973), 46 O&GR 348.

3. If the surface owner of his surface lessee uses force to prevent Lessee's agents from entering the property, then the Lessee can obtain a temporary restraining order from the district court in that county against the complaining party and thus commence his operations prior to a scheduled hearing before the court. Usually, the court will enter a temporary or permanent injunction against the surface owner or his lessee to prevent him from interfering with drilling operations. The surface owner can also be liable to the lessee for damages. Ball v. Dillard, 602 S.W.2d 521 (Tex. 1980), 67 O&GR 69.

4. The surface use of a Lessee must accommodate, if reasonably possible, the prior use of the surface owner. Getty Oil Company v. Jones, 470 S.W.2d 618 (Tex. 1971), 39 O&GR 657, 53 A.L.R. 3rd 1. For example, if the surface owner has a rotating type irrigation unit, the Lessee should attempt to install surface equipment for production that would not interfere with the irrigation unit.

   Hemingway - Sec. 1.2, 4.1(A)

Kuntz - Sec. 26.14
Summers - Sec. 133, 652, 976
W & M - Sec. 218, 219.6, 656.3, 822.2, 877.3

OKLAHOMA

1. Contra. The Oklahoma Surface Damage Act (52 O.S. 318.1 - 318.9) requires a Lessee to pay a surface owner for damages and provides the following procedure:

   a. The Lessee must notify the surface owner in writing of his intent to commence operations and institute good faith negotiations as to damages. If the parties enter into a written contract settling damages, the Lessee can enter the property immediately and commence operations.

   b. If the surface owner and Lessee do not reach agreement, then the Lessee must file a petition for the appointment of appraisers in the district court before he can enter the property. After a hearing the court subsequently determines the damages, unless one party requests a jury trial.

   c. Failure to abide by the Surface Damage Act can result in treble damages being awarded to the surface owner.

   The Surface Damage Act does not apply to seismic exploration in Oklahoma. Anschutz Corp. v. Sanders, 734 P.2d 1290 (Okla. 1987), 93 O&GR 147.

   The Surface Damage Act does not require that the surface be restored.

2. Same. Wilcox Oil Company v. Lawson, 341 P. 2d 591 (Okla. 1959).

3. The filing of a petition under the Surface Damages Act authorizes the petitioner to enter the drilling site. 52 O.S. 318.5. The lessee can enforce his right to enter by obtaining a Temporary Restraining Order or Injunction. The surface owner may be liable to the lessee for damages.

4. Oklahoma has not adopted the Accomodation Doctrine. After the enactment of the Surface Damage Act, there does not appear to be any limit on the right to use the surface.

VI - PATENTS

TEXAS

1. If a patent is issued by the State of Texas before September 1, 1895, the State owns no mineral or royalty interest in said land because the State, through a series of statutory and constitutional relinquishments, has surrendered the minerals to the owners of the lands sold, their successors and assigns.

2. Relinquishment Act of 1919 (now Natural Resources Code, Sec. 52.171-52.189)

   a. This act applies only to public free school land and asylum land sold with a mineral classification or mineral reservation between September 1, 1895 and August 21, 1931.
   b. The "owner of the soil" is the agent of the State for the purpose of leasing oil and gas. A State lease form must be obtained from the General Land Office.
   c. If the surface owner leases land for oil and gas, the surface owner and the state share equally in the bonus, delay rental, royalty and other considerations.

3. Sales Act of 1931 (now Natural Resources Code Sec. 51.054)

   a. This Act applies after August 21, 1931 (some attorneys argue for May 29, 1931) and supersedes the Relinquishment Act of 1919.
   b. If land is classified as mineral, then the State has reserved a nonparticipating royalty of "1/8 of all sulfur and other mineral substances from which sulfur may be derived or produced and 1/16 of all other minerals" including oil and gas.

4. Effective June 19, 1983, the Sales Act of 1931 was amended to permit the State to reserve "not less than" 1/8 of all sulfur and 1/16 of all other minerals. The State usually reserves all minerals.

5. See II-K-3 supra for the leasing procedure for Relinquishment Act and Sales Act Lands.

Hemingway - Sec. 2.5(C), 5.7(E)
Summers - Sec. 165, 860
W & M - Sec. 303.9

OKLAHOMA

1. If a Patent was issued by the United States of America, or any of the Indian tribes, the minerals were also granted. If a Patent was issued prior to 1933, the State did not reserve any part of the mineral estate.

2. As to any land granted by the United States of America to Oklahoma pursuant to the Enabling Act subsequent to 1933, if the Commission of the Land Office determined that the lands were valuable for oil and gas purposes, then the Commission had the authority to reserve mineral rights in its Patent. 64 O.S. Sec. 282.

3. All lands foreclosed upon by the Commissioners of the Land Office can be resold by the Commission. In such sale, the Commissioners must reserve 50% of the mineral rights. 64 O.S. Sec. 96.

VII - RECORDING RULES

TEXAS

1. An oil and gas lease is a conveyance of real property, not personal property, and the execution thereof constitutes the conveyance of a fee simple determinable in the oil and gas described therein. Stephens County v. Mid-Kansas Oil and Gas Company, 113 Tex. 160, 254 S.W. 290 (1923).

2. An oil and gas lease, an assignment of a lease, or any conveyance of a mineral interest that is not recorded in the county where the minerals are located is void as to:

   a. a creditor or a subsequent purchaser who;

   b. pays a valuable consideration without notice,

      unless the instrument has been acknowledged or proved and filed for record as required by law.

   An unrecorded instrument is binding on:

   a. a party to the instrument;

   b. the parties' heirs; and

   c. a subsequent purchaser who does not pay a valuable consideration or who has notice of the instrument.

   The above paragraphs summarize Texas Property Code, Sec. 13.001, which identifies the types of "conveyances" that must be recorded or they will be declared void as to creditors and subsequent purchasers who pay value and do not have "notice."

3. Because there may be title risks that do not arise from a "conveyance", the protection of Sec. 13.001 is limited. The equitable doctrine of "bona fide purchaser" (hereinafter referred to as BFP) provides greater protection. In order for a grantee to be a BFP and prevail over a prior equitable claim, the grantee must:

   a. acquire a recordable interest;

   b. pay value;

   c. be in good faith; and

   d. be without "notice" of the prior claim.

Both Sec. 13.001 and the BFP doctrine require a person claiming their benefit to be "without notice" of the prior claim of the contesting party. There are two kinds of "notice":

a. the notice provided by the County Records, generally called "constructive notice," means that a purchaser and creditor have notice imputed to them of every recital, reference, reservation and provision of every instrument in their chain of title, and of every unrecorded instrument that is referred to in their chain of title.

b. "inquiry notice" means that the purchaser or creditor has actual knowledge of facts which would lead a reasonable person to inquire further, the most common example being the possession of the land by an adverse claimant or by his tenant.

Westland Oil Development Corporation v. Gulf Oil Corporation, 637 S.W.2d 903 (Tex. 1982), 73 O&GR 359, as expanded in MBank Abilene, N.A. v. Westwood Energy, Inc., 723 S.W.2d 246 (Tex.App.-Eastland 1986, (no writ history), where the Bank's lien was held to be second in priority to a prior lien contained in an unrecorded operating agreement referred to in an assignment of leases recorded prior to the recording of the Bank's security instruments covering the same leases.

4. Neither Sec. 13.001 nor the BFP doctrine can protect a grantee from void instruments or some voidable instruments, such as:

a. Forgery - a forged instrument is void and is a nullity, as if it never existed. All persons claiming under a forged instrument own nothing, no matter how innocent they were or how much consideration they paid. Texas Osage Cooperative Royalty Pool, Inc. v. Cruze, 191 S.W.2d 47 (Tex. Civ. App.-Austin 1945, no writ);

b. Mistaken identity - the execution of an instrument by grantor having the same name as the owner of the land conveys no interest and is void. Blocker v. Davis, 241 S.W.2d 698 (Tex. Civ. App.-Ft. Worth 1951, writ ref'd n.r.e.)

c. Agent without authority

d. Minority - an instrument executed by a minor is voidable by him until a reasonable time after the minor reaches majority. Prudential Building & Loan Assn. v. Shaw, 26 S.W.2d 168 (Tex. Com. App. 1936) re-hearing overruled at

119 Tex. 240, 27 S.W.2d 157 (1930).

e. Incapacity - an instrument executed by a person lacking mental capacity to contract is, like that of a minor, voidable. Neill v. Pure Oil Company, 101 S.W.2d 402 (Tex. Civ. App.-Dallas 1937, writ ref'd), 3 O&GR 419.

5. Generally, instruments can be made effective at, before, or subsequent to the date actually signed. However, in the unusual instance where a grantor conveys the same property twice, then the Texas rule is "first in time, not first recorded, is right" because Sec. 13.001 is a "notice" type statute, as opposed to a "race" statute. In Texas, the first purchaser can protect himself from a subsequent purchaser for value who is without notice only by recording his conveyance or taking possession of the property before the subsequent purchase occurs. A later recording will not assist the first purchaser even if he records before the subsequent purchaser's conveyance is recorded. The statute protects the subsequent purchaser without notice regardless of when he records. Houston Oil Company v.

Kimball, 103 Tex. 94, 122 S.W. 533 and 124 S.W. 85 (1910). The burden of proof is upon the subsequent purchaser to prove, by evidence outside the recitals in his conveyance, that he purchased for a valuable consideration and without notice of the previous conveyance. Watkins v. Edwards, 23 Tex. 443 (1859) and Turner v. Cochran, 94 Tex. 480, 61 S.W.923 (1901).

Also, see Sec. 814 et seq - Texas Land Titles by Lange, supra.

Hemingway - Sec. 1.1, 1.3, 6.1
Kuntz - Sec. 22.6
Summers - Sec. 543, 553, 996
W & M - Sec. 203.3, 210.3, 432.1

OKLAHOMA

1. Although an oil and gas lease is a hybrid estate in Oklahoma, with attributes of both real and personal property, for recording purposes, a lease is treated as real property. Davis v. Lewis, 187 Okla. 91, 100 P.2d 994 (1940)

2. Same. 16 O.S. Sec. 15; Barker v. British American Oil Producing Co., 208 Okla. 426, 256 P.2d 807 (1953), 2 O&GR 976.

3. Same. Tenneco Oil Co. v. Humble Oil & Refining Co., 449 P.2d 264 (1969), 33 O&GR 143.

4. Same.

   a. Forgery. A forged deed is void, and even though recorded in due form, is ineffectual as a muniment of title, even as to good faith purchasers for value. Parduhn v. Rodman, 201 Okla. 242, 204 P.2d 869 (1949).

   b. Same.

   c. Same. See Section II-D above.

   d. Same. See Section II-I above.

   e. Same. See Section II-I above.

5. Generally, instruments can be made effective at, before, or subsequent to the date actually signed. However, if there is a constructive notice problem, then the "first recorded is right", if the Purchaser is without notice, actual or constructive, of a prior grantee. Barker v. British American Oil Producing Co., 208 Okla. 426, 256 P.2d 807 (1953), 2 O&GR 976.

VIII - CONVEYANCING PRINCIPLES

TEXAS

1. Duhig Rule (overconveyance) - If a warranty deed reserves a specific interest without acknowledging a prior reserved mineral or royalty interest, then, in the event all mineral or royalty owners can not be made whole, the Grantee of the deed is made whole at the Grantor's expense. Duhig v. Peavey Moore Lumber Company, 135 Tex. 503, 144 S.W.2d 878 (1940). If, however, both the Grantor and the Grantee are mutually mistaken as to the legal effect of the deed in question, as opposed to a mutual mistake of fact, then equity will permit reformation of the deed to correct the mistake of law. McClung v. Lawrence, 430 S.W.2d 179 (Tex. 1968)

2. "Interest conveyed" or land "described" - If a conveyance reserves an interest in the interest conveyed, the interest reserved is proportionately reduced by the interest conveyed. However, if the interest reserved is in the land described, the reserved interest is not proportionately reduced by the interest conveyed. For example, if a Grantor owns a 1/2 interest in the minerals in a tract, conveys said 1/2 interest reserving a 1/4 mineral interest in the land described, the Grantor has reserved a 1/4 mineral interest. On the other hand, if the deed conveys a 1/2 mineral interest but reserves a 1/4 mineral interest in the land (or interest) conveyed, then the Grantor only reserves 1/4 of 1/2, or a 1/8 mineral interest. Averyt v. Grand, Inc., 717 S.W.2d 891 (Tex. 1986)

3. Large Nonparticipating Royalty - It is possible, in creating a nonparticipating royalty interest, to create a very large interest, such as a "1/2 royalty interest," which would be be 1/2 of 8/8 of the gross production of oil and gas. Gavenda v. Strata Energy, Inc., 705 S.W.2d 690 (Tex. 1986) 88 O&GR 586. Usually, the intention is to create a nonparticipating royalty of "1/2 of the royalty."

4. Conveyance excepting road, railroad right of way etc. (the "strip and gore" doctrine) - A conveyance which excepts a right of way such as a road, railroad right of way, etc., conveys to the Grantee all interest the Grantor might own in said strip, and does not reserve to the Grantor any rights to said strip, unless the instrument expressly reserves the minerals in the strip to the Grantor. Melton v. Davis, 443 S.W.2d 605 (Tex. Civ. App.- Tyler 1969, writ ref'd n.r.e.)

5. Mineral Acres or Royalty Acres - A conveyance of mineral acres or royalty acres will be strictly interpreted, even if the

number of acres in the tract is more or less than originally understood. For example, a conveyance of 25/200 mineral acres where the land actually contained 226.8 acres, not 200 acres, conveyed a 25/200 interest rather than a 25/226.8 interest in the minerals. Woods v. Simms, 154 Tex. 59, 273 S.W.2d 617 (1954). However, in Texas it is not common for a conveyance to be exclusively in mineral or royalty acres.

6a. Legal description - the writing must contain within itself, or by reference to some other existing writing, the means or data by which the land can be identified. It is not necessary that the deed should contain a full description as will enable the land to be determined without extrinsic evidence. Morrow v. Shotwell, 477 S.W.2d 538 (Tex. 1972).

b. It has long been the rule in Texas that a deed, (or an assignment) purporting to convey all lands owned by the Grantor/Assignor in the state or in a named county is a sufficient description to effect a conveyance, and thus, when recorded, constitutes constructive notice to subsequent purchasers. Texas Consolidated Oils v. Bartels, 270 S.W.2d 708 (Tex. Civ. App. - Eastland 1954, writ ref'd.). This rule was confirmed in U.S. Enterprises, Inc. v. Dauley, 535 S.W.2d 623 (Tex. 1976) at Page 628.

BEWARE - it is particularly difficult to draft concise general rules that completely and accurately describe what constitutes a sufficient legal description. If you are in doubt as to the sufficiency of a particular legal description, you should get a written opinion from a title attorney.

Hemingway - Sec. 3.1(C), 3.2(C)&(E), 7.8, 9.1
Kuntz - Sec. 14.5
Summers - Sec. 133, 134, 590, 601, 606
W & M - Sec. 221.2, 311, 317, 320.2, 340, 505, 704.5

OKLAHOMA

1. Same. Birmingham v. McCoy, 358 P.2d 824 (Okla. 1960), 15 O&GR 486.

2. Oklahoma courts have ruled that in the event of ambiguous deeds, the cardinal rule is to discern the true intent of the parties, considering the instrument itself, and viewing it in the light of the circumstances existing at the time of its execution. Dwelle v. Greenshields, 305 P.2d 1038 (Okla. 1956).

3. Oklahoma has held that where a stated fractional interest in oil and gas is described as a "royalty" interest, and further where a lease is outstanding at the time the deed is executed, the interest may be classified as a nonparticipating royalty interest and not a mineral interest. Colonial Royalties v. Keener, 266 P.2d 467 (Okla. 1953), 3 O&GR 445.

4. Same. A warranty deed conveying a tract of land less a right-of-way conveys the tract subject to the right-of-way estate. Jennings v. Amerada Petroleum Corporation, 66 P.2d 1069 (1937). However, a mineral deed which clearly excepted a small right-of-way tract was held not to have conveyed the minerals underlying the right-of-way tract. Continental Oil Co. v. Patchell, 198 Okla. 614, 180 P.2d 825 (1947).

5. A conveyance of an acre amount was held to be controlling over the same fractional interest. In Wade v. Roberts, 346 P.2d 727 (Okla. 1959), 11 O&GR 529, the court construed a deed to a riparian tract which reserved..."an undivided 5/32 interest amounting to an undivided five (5) acre interest in mineral rights..." The court gave credence to the recitation of five acres, even though 5/32 of tract amounted to more than seven acres.

6a. Legal description - the description in deed must be so certain as to enable land to be identified. Arbuckle Realty Trust v. Southern Rock Asphalt Co., 189 Okla. 304, 116 P.2d 912 (1941).

b. Although courts in Oklahoma have never ruled on the question of a broad description such as "all land in Roger Mills County", it is the author's opinion that the conveyance would be valid between the parties, but would not be descriptive enough so as to constitute constructive notice.

Hemingway - Sec. 3.1(C), 3.2(D)
Summers - Sec. 133, 134, 373, 581, 599, 604, 606

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