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Open-File Report 86-3S

Mineral Law Program

A. L. Sage, III

1986

The Mississippi Mineral Resources Institute
University, Mississippi 38677

FINAL TECHNICAL

REPORT

MINERAL LAW PROGRAM

MISSISSIPPI LAW RESEARCH INSTITUTE

LAW CENTER

UNIVERSITY OF MISSISSIPPI

A.L. SAGE, III

PRINCIPAL INVESTIGATOR

MMRI GRANT NUMBER 86-3S

FY 1986

Final Technical Report

Attached hereto are the results of the research and publications for MMRI Project 86-3S, the Mineral Law Program conducted under the auspices of the Mississippi Law Research Institute of the Law Center, University of Mississippi. Principal Investigator of the Mineral Law Program is A.L. Sage, III. The Mississippi Mineral Resources Institute provides funding for student researchers, travel and commodities.

The past year saw the publication of the first and second issues of the Mineral Law Update, and completion of research and writing for the third issue. The third issue is currently being printed, but the material to be published is attached.

Also completed during the past project year was a report on geothermal energy development. This report identifies the initial legal considerations facing the developer of geothermal energy, i.e., acquiring rights to such resources, regulatory regimes governing development and taxing production or energy from the resource. Research in this area will be continued in the 1987 project, and will examine in greater detail the acquisition of rights to geothermal energy and the various regulations affecting development. The taxation of geothermal energy production must be reexamined because of the new tax reform act.

LEGAL ASPECTS OF THE DEVELOPMENT OF GEOTHERMAL ENERGY

MINERAL LAW PROGRAM

MISSISSIPPI LAW RESEARCH INSTITUTE

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UNIVERSITY OF MISSISSIPPI

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MMRI GRANT NUMBER 86-3S

FY 1986

LEGAL ASPECTS OF THE DEVELOPMENT

OF GEOTHERMAL ENERGY

Introduction

To a large extent, the legal problems encountered in the development of geothermal resources are inherent in the resource itself. There are the standard regulations that apply to the operation of a public utility and which impact the exploitation of any natural resource. Yet, geothermal resource development will involve novel legal questions which do not affect other energy sources. Because of the unique nature of geothermal resources, it is necessary to understand the resource itself before the inherent legal issues can be identified and addressed.

Although the variety of heat sources for geothermal energy production number around five,[1] the sources themselves are scattered throughout the world. Each individual source is significantly influenced by local geography.[2] The scientific and engineering techniques will therefore vary from site to site, but the legal problems may be common to the general type of geothermal energy source (dependent of course upon the law of the local jurisdiction). Thus this discussion of geothermal energy will be general in nature.

Geothermal energy comes from the earth's natural radioactivity.[3] This radioactivity becomes heat, which is energy in motion.[4] The earth's mantle, which is that part of the planet lying between two to thirty miles below the earth's surface, has a temperature of 2,200°F.[5] Because of the difference in

temperatures between the earth's surface (the crust) and the earth's mantle and because heat moves from hot to cold, the heat seeks its way to the earth's surface.[g] There are certain areas of the earth's crust which allow a higher than normal flow of heat to the earth's surface.[7]

Although the ultimate source of geothermal energy is heat, it is necessary for a resource to transport the heat from the reservoir below the earth's crust to the site where it is to be used.[g] A geothermal resource then becomes the combination of heat and a heat transfer medium.[9] The heat itself is not a substance, it is only a form of energy.[10] The substance is what is necessary to transfer the heat to the earth's surface.[11]

Of the variety of heat sources for geothermal energy production, only the hydrothermal convection system has commercial potential for the general production of electricity.[12] In this system, underground water comes into contact with hot rocks.[13] The underground water becomes heated and is carried to the surface by the groundwater itself.[14] When pressure is relieved from the hot water, it is "flashed" into steam to drive a conventional steam turbine.[15] Electric power generation requires that these reservoirs have temperatures in excess of 300°.[15]

INTRODUCTION

1. "Geothermal Resources for the Small Developer", 3 J. Contemp. L, 241, 242 (1977). The types listed are vapor dominated systems, hot water systems, geopressurized reservoir systems, and hot-dry rock systems. There appears to be no uniformly recognized classification system, and indeed many articles fail to recognize the existence of geothermal energy from the volcanic activity on the ocean floor.

2. Root, "Technical Overview of Geothermal Resources", 13 Land and Water L. Rev. 9, 22 (1977).

3. Olpin and Turlock, "Water That is Not Water", 13 Land and Water L. Rev. 391, 394-395 (1978).

4. Naumann, "Form Over Function: The Law of Hot Water", 4 J. Energy L. and Pol'y 205, 206 (1983).

5. Id.

6. Id.

7. Id.

8. Root, supra note 2, at 24.

9. Id. at 10.

10. Olpin, Turlock, and Austin, "Geothermal Development and Western Water Law", 1979 Utah L. Rev. 773, 786.

11. Id. at 775.

12. Olpin and Turlock, supra note 3, at 393.

13. Brooks, "Legal Problems of the Geothermal Industry", 6 Nat. Resources J. 511, 515 (1966).

14. Id.

15. Id.

16. Naumann, supra note 4, at 205.

Acquiring the Rights to the Geothermal Resource

One of the major obstacles in the development of geothermal resources has been the risk inherent in acquiring valuable rights to the resource without a clear determination of ownership.[1] Traditionally, the extraction of energy resources has expanded our conception of property law.[2] Like any other natural resource, the exploitation of geothermal resources requires that some form of property right be established in the resource itself.[3] Thus, the threshold issue for any developer has been how to acquire the valuable rights to the geothermal resource.

In order to establish a property in the resource, it is necessary to characterize the resource. To a very large extent, the proper legal characterization must depend on the assessment of the individual resource. The very composition of the resource has created problems in classifying the geothermal resource, because the origin and structure of the geothermal reservoir will rarely be identifiable with any certainty.[4] Nonetheless, the state legislatures which have addressed the issue of property rights in the geothermal resource have done so in one of three ways: as a mineral, as a resource subject to state water law, and as *sui generis*.[5] For the most part, these classifications determine the system of ownership by assigning the resource to an existing state regulatory system.

The proprietorship issue involves two independent conflicts. The first conflict is between competing developers of the same geothermal reservoir. This conflict is resolved relatively easily by characterizing the resource and applying the applicable

rules of priority. The more problematical conflict is where there are competing resource users of the same heat transfer medium. This conflict is characterized by the interests of conventional water users competing with the interests of the geothermal developer whose geothermal resource relies on fluids to transfer the heat to the surface.

Turning first to the proprietorship of the actual geothermal resource, the legislative procedure in classifying the resource has generally been to assign geothermal development to an existing regulatory regime.[8] For the most part, these regimes have either been designed to regulate either minerals or water.[7] Compared to the regulatory purposes which gave rise to the regime, geothermal resources have very little in common. Thus, classification of the regime will to a large extent affect the ability of the developer to exploit the geothermal resource. To classify the resource as water will impede the development of geothermal energy.[8] On the other hand, developers and legislators encouraging the development of geothermal resources seek to characterize the resource as a mineral. Litigation concerning the geothermal resource has arisen where the mineral and surface estates have been severed prior to the recognition of the potential of geothermal development, and the surface owners have attempted to regain ownership of the geothermal resource.[9] The courts have held that the resource was a mineral and was thus severed from the surface owner's estate with the conveyance of the mineral estate.[10]

Where the resource is classified as water, the landowner cannot lease the resource.[11] State water law in the arid western states was designed to protect water and water rights.[12] In western states, ownership of water is based on the appropriation system.[13] That is, one who buys land takes it subject to the prior appropriation of water rights.[14]

The third source of classification is to define the resource as sui generis.[15] In general, this classification has done little to clear-up the confusion surrounding the characterization of the geothermal resources.[16]

The rights to the geothermal resource can be obtained by acquiring title to the reservoir or leasing the rights to the reservoir. Once ownership has been established, the development of the resource is constitutionally protected by the 5th Amendment, the due process clause, and the equal protection clause.[17] Besides leasing the resources from private landowners, the developer can also lease the resource from the federal government pursuant to the Geothermal Steam Act, 30 U.S.C. §1001 et seq. This act allows the Secretary of the Interior to lease public lands for geothermal development.[18] Not only lands owned by the federal government are subject to the act, but leasing is also permissible in lands where the federal government has conveyed the surface estate and reserved ownership of the mineral estate.[19] Indeed, the leasing of these resources entitles the lesser to construct power plants on the surface of property subject to a mineral reservation in favor of the federal government.[20]

The federal legislation was also established for the most part the terms of the lease between the developer and the Secretary of the Interior.[21] As to the leasing of private lands, the developer is free to define the terms of the lease with the owner subject to general contract principles.[22]

As previously stated, proprietorship may determine who has the rights to develop the resource, but it does not determine how state water laws apply to geothermal development. Thus, even if the resource is classified as a mineral, the appropriation system of water rights may prevent the developer from acquiring rights in the heat transfer medium. Even the Geothermal Steam Act, which reserved geothermal resources to the federal government, did not reserve water in all federal lands to energy production purposes.[23] However, once the federal government has actually leased the resource, state appropriation law no longer governs.[24]

Thus, any effort to acquire rights in a liquid-dominated geothermal resource must be pursued through a bifurcated approach. The developer must not only obtain a proprietary interest in the resource, but the developer must also secure the ability to use the transfer medium at the expense of competing users.

Acquiring the Rights to the Geothermal Resources

Notes

1. Geothermal Resources for the Small Developer, 3 J. Contemp. L. 241, 257(1977).

2. Zillman and Naumann, Geothermal Energy and National Energy Policy, 14 Nat. Resources Law. 589, 592 (1981).

3. Olpin, Turlock, and Austin, Geothermal Development and Western Water Law, 1979 Utah L. Rev. 773, 775.

4. Id. at 791-92.

5. Comment, Effect of Geothermal Classification on the Use and Development of Water, 33 Hastings L.J. 427, 445 (1983). see, e.g. Tex. Nat. Res. Code Ann. tit. 5, §141.002(4) (VernonSupp. 1986) (mineral); Wyo. Stat.Ann § 41-3-901(a) (ii) (1979) (resource subject to state water law) ; and Idaho Code §§42-4002(c), 47-1602 (1977) (resource neither mineral or water).

6. Olpin, Turlock, and Austin, supra, note 3, 797.

7. Id. at 805.

8. Id. at 810.

9. Id. at 798.

10. These decisions have for the most part dealt with legislation which has encouraged geothermal development but not defined the classification of the resource. See, e.g., United States v. Union Oil Co. of California, 549 F.2d 1271 (9th Cir. 1977) (reservation of mineral estate in lands patented under Stock Raising Homestead Act includes geothermal resource); Pariani v. Tate, 164 Cal. Rptr. 683 (Cal. Ct. App. 1980) (California legislation implied that geothermal resources were

mineral). Absent express contrary intent, a grant of minerals in or under the property included a grant of geothermal resources. Geothermal Kinetics, Inc. v. Union Oil Co, of California, 141 Cal. Rptr. 879 (Cal. Ct. App. 1977).

11. Olpin, Turlock, and Austin, supra note 3, 804.

12. Comment, supra note 5, at 431.

13. Id. at 432-433.

14. Id. at 433.

15. Olpin, Turlock, and Austin, supra note 3, at 806.

16. Id.

17. Parks v. Watson, 716 F. 2d 646 (9th Cir. 1983).

18. 30 U.S.C. §1082 (1982) .

19. 30 U.S.C. §1014 (1982).

20. Occidental Geothermal, Inc, v. Simmons, 543 F. Supp. 870 (N.D. Cal. 1982) .

21. See, 30 U.S.C. §1003 et seq.

22. For good discussions of the contents of a geothermal lease, see, Trower, Geothermal Leasing from the Developer's Point of View, 14 Nat. Resources Law. 665 (1981); Kitchen, Geothermal Leasing Practices, 13 Land and Water L. Rev. 25 (1977) . The importance of a "force majeure" clause in a geothermal lease is illustrated by the case of Gillespie v. Simpson, 588 P.2d, 810 (Colo. Ct. App. 1978).

23. United States v. City and County of Denver, 6 5 6 P. 2d, 33 (Colo. 1982) ; See also 30 U.S.C. §1021 (1982) .

24. United States v. City and County of Denver, 656 P.2d at 34.

Geothermal Development And Environmental Regulations

Once the rights to the geothermal resource have been obtained, the most significant area of government intervention in geothermal development will be through the enforcement of regulations designed to protect the environment. Although geothermal energy is less environmentally destructive than fossil fuels, nuclear energy and hydroelectric power, the development of geothermal energy production will have a serious impact on the environment.[1] Yet for the most part, the impact of geothermal energy on the environment will be localized and immediate.[2] Therefore, the nature of geothermal development will allow for on-site monitoring.[3]

The environmental effects of geothermal energy production may occur in four areas: air quality, noise, land conservation, and water quality.[4] The state regulations designed to protect the environment vary from state to state. Federal law on the other hand, is applicable to all geothermal development throughout the United States, but it exists at two different levels. No only are there environmental laws such as the Clean Air Act that apply to geothermal development wherever it occurs, but lands leased from the federal government are subject to all federal environmental laws regulating the use and development of federal lands.[5]

Even though exploratory drilling will effect the environment, the major impacts of geothermal development will begin once full field development has begun.[g] Turning first to the impact on air quality, a hydrothermal convection system will

emit hydrogen sulfide and particulate matter.[7] The federal standards for ambient air quality are established in the Clean Air Act.[8] The Act will probably require that technology be employed to reduce the adverse consequences of geothermal development on the quality of[9] the air. All states prohibit odor causing emissions.[10] Furthermore, civil liability may still be imposed under a common-law nuisance action in favor of neighboring landowners.[11] The nuisance action could be for the emissions, or even the increased humidity in the air which results from the operation of the hydrothermal system.[12]

Like air pollution, liability for noise pollution may be based on a common-law nuisance action. Noise pollution problems for the most part are special and localized, so that mufflers and current technology should be able to sufficiently contain the noise level.[13] Noise pollution will apparently be most serious when wells are bled dry so that the venting of large amounts of steam will produce a loud noise that may last for several days.[14] Once energy production begins, the noise level will be reduced.[15] Yet noise control will be a major component of any land use regulation.[16]

Of all the various regulatory systems, none is less uniform the local systems of land-use planning. As previously mentioned, geothermal development on federal lands will be regulated by various agencies of the federal government.[17] Likewise, geothermal development on state lands will be controlled by state land departments and state agencies. Development on private lands will be basically under the control of state agencies and local government. The two major techniques used to control the

development of geothermal energy will be land use planning (including the possibility of environmental impact assessment) and conventional land use controls.[18]

It will be the rare exception that an environmental impact assessment must be prepared for or by a local government.[19] State law will determine if the state government must do *so,* but the federal government is required to prepare one if the developer is engaged in more than usual use of federal lands.[20] The environmental impact statement must reflect that the decision-making process adequately considered the environmental consequences of geothermal development.[21]

Because geothermal development will of necessity occur in ares which are not densely populated, land use controls will be effected through the county governments.[22] These land use controls vary enormously, but the most effective instrumentality for land use planning is clearly the zoning ordinance.[23] The developer should try to obtain a conditional use permit in order to achieve the greatest flexibility in his development.[24]

Besides the generic land use regulations, potentially drastic environmental consequence exist independent of any regulatory body. Geothermal development may create two rather unique land use problems, seismic activity and land subsidence. Land subsidence may occur when hot-water is withdrawn faster than it is reinjected to complement the reservoir pressure.[25] Furthermore, because geothermal activity occurs in geologically unstable areas, temperature and pressure change may result in earthquakes unless fluids are reinjected into the aquifer[26]

Despite the slight possibility of earthquakes, the most serious environmental impact of geothermal development will be water pollution.[27] Clearly, a hydrothermal convection system will have serious water consequences, not only on water users, but on the water itself. This is due to the use of the water in the main heat transfer medium. Water quality will be protected by state law and the Federal Water Pollution Control Act.

Liquid waste must be reinjected into the ground after it has been used to produce energy.[28] This is the most serious environmental consequence of geothermal development, because it will affect the quality of the groundwater. Yet water pollution problems may also exist during the drilling phase because of blow-outs, erosion, or the injection of mud and other materials during drilling operations.[29] The Federal Water Pollution Control Act protects navigable waters, while state law may protect groundwater.[30] Federal law may apply to non-tributary groundwater through the Safe Drinking Water Act.[31]

Due to the localized nature of geothermal energy production, the most significant environmental regulations will be those imposed by the state. Federal law will have an impact on the development of geothermal energy on private lands, but even more significantly on federal lands. Thus, even though geothermal energy will be less destructive of the environment than other sources of energy, it will nonetheless mean that environmental problems are on indispensable part of geothermal development. Geothermal energy development will be affected significantly by the ability of federal and state government to draft a comprehensive and uniform regulatory scheme.[32]

GEOTHERMAL DEVELOPMENT AND ENVIRONMENTAL REGULATIONS

NOTES

1. Tarlock and Waller, Environmental. Overview of Geothermal Resource Development, 13 Land and Water L. Rev. 289 (1978)

2. Uranesh and Musick, Geothermal Resources: Conflicts Encountered by the Developer, 13 Land and Water L. Rev. 109, 115 (1978).

3. Id. at 121.

4. See, id. at 116.

5. 43 C.F.R. §3204.1(c)

6. Windrem and Marr, Environmental Problems and Geothermal Permitting, 14 Nat. Resources Law 675, 680 (1981).

7. Uranesh and Musick, supra note 2, at 119-20.

8. Windrem and Marr, supra note 6, at 680.

9. UraneshandMusick, supra note2, at119.

10. TarlockandWaller, supra note1, at322.

H. Id. at 320 .

12. UraneshandMusick, supra note2, at119.

13. TarlockandWaller, supra note1, at295.

14. Id.

15. UraneshandMusick, supra note2, at120.

16. TarlockandWaller, supra note1, at295.

17. Control over geothermal development on federal lands is exercised by the Bureau of Land Management, the United States Geological Survey, and the United States Forest Service. Id. at 296 .

18. Id.

19. Id. at 308.

20. Id. at 298. See also, 43 C.F.R. §3200.06. The case of Sierra Club v. Hathaway,, 579 F.2d 1162 (9th Cir. 1978) states that casual use of a Known Geothermal Resource Area in preparation for exploratory drilling does not require an environmental impact statement to be prepared.

21. Tarlock and Waller, supra note 1, at 302.

22. Id. at 307.

23. An example of the variety of local ordinances effecting geothermal development can be found in Imperial County, California, where a $50,000 indemnity bond is required for each well drilled, along with insurance coverage of $1,000,000 to indemnify the county for any tort liability. Id. at 309.

24. Id.

25. Uranesh and Musick, supra note 2, at 116.

26. Id.

27. Id. at 121-22.

28. Tarlock and Waller, supra note 1, at 313. Furthermore, all discharges must be pursuant to a permit issued by the Environmental Protection Agency or a state agency to which the EPA has properly delegated such authority. Id.

29. Id. at 293.

30. Id. at 311.

31. Id. at 317.

32. Id. at 324.

Taxation of Geothermal Resources

The taxation of the ownership of energy producing property and money received from the production of energy is a complex legislative and regulatory regime. This discussion will not be comprehensive in addressing the various techniques for taxing energy production. Instead, the goal of the discussion will be to identify specific sections of the Internal Revenue Code which apply to geothermal energy production and avoid the actual mechanisms of taxation.

At the outset, it is necessary to separate the Internal Revenue Code's treatment of geothermal energy production from its treatment of residential energy credits. What this discussion focuses on is the taxation of geothermal energy production for the transmission of electricity to consumers.

The origin for special tax treatment of geothermal energy production is the Energy Tax Act of 1978, which was designed to increase domestic energy production.[1] The taxation of geothermal resources is important in two areas, the allowance for percentage depletion and the rules for intangible drilling costs. The geothermal resource itself is defined for tax purposes under 26 U.S.C. § 613(e)(3).

Under 26 U.S.C. §263 (c) , a developer is allowed to either capitalize intangible drilling and development costs or to deduct these costs as expenses. These costs, if deducted, will be subsequently recaptured upon the disposition of the property under 26 U.S.C. §1254.

Although geothermal energy is not a depletable[1] resource, Congress has decided to give the taxpayer a depletion deduction upon the extraction and sale of the geothermal[2] resource. The taxpayer is allowed to take the greater of cost or percentage depletion.[3]

The tax code makes further mention of geothermal energy, but it does not give any special tax treatment. For example, the "at risk" rules of 26 U.S.C. §465 apply to geothermal exploration. Likewise, the developer should be able to use the investment tax credits available under 26 U.S.C. §48(a)(1).[4]

Thus, despite the complexities of the tax code, current tax recognition of geothermal energy production allows for special tax treatment. This in turn should further encourage the development of geothermal energy production.

TAXATION OF GEOTHERMAL RESOURCES

NOTES

1. Mu s c e 11 i, _The Taxation of Geothermal Energy Resources_, 19 Land and Water L. Rev. 25, 27 (1984).

2. Maxfield, _Income Taxation of Geothermal Resources_, 14 Nat. Resources Law. 687, 688 (1981).

3. Muscelli, _supra_ note 1, at 35.

4. _Id_. at 37.

FIRST NATIONAL BANK OF JACKSON V. PURSUE ENERGY CORPORATION

784 F. 2d 659 (C.A. 5 Miss. 1985)

The issue in this case is whether or not sulphur royalties were to be paid under the gas royalty paragraph of a mineral lease. On March 18 , 1973 , Dr. J.E. Wadlington executed an oil, gas, and mineral lease covering 310 acres of land in Rankin County. Dr. Wadlington's entire interest was transferred on October 9, 1980, to the First National Bank of Jackson, as trustee for the Dr. J.E. Wadlington Family Trust, and the lessee's interest was later conveyed or assigned to Pursue Energy Corporation (50% ownership), 3300 Corporation (25%) and Grace Petroleum Corporation (25%) . The property covered in this lease was included in a gas unit (designated as the D'Lo Royalties Unit No. 1) operated by Pursue with Grace and 3300 owning working interests.

The gas produced by Unit I was "sour gas", which contains hydrogen sulfide that must be removed to make the gas usable. However, this process also yields sulphur that is marketable. The Trust refused to sign a Sulphur Division Order where the lessee offered payment based upon a fixed royalty in the lease for "sulphur mined and marketed." The Trust contends that it should be paid through the one-eighth gas royalty provision. The district court granted summary judgment in favor of the Trust entitling it to the royalty based upon the one-eighth gas royalty provision.

However, the Fifth Circuit ruled that the provisions in the lease for payment of royalties was ambiguous as to whether the sulphur should be paid under one or the other of the above mentioned royalties. The court of appeals vacated the summary judgment and remanded for further proceedings. The court said that the primary question is whether "minerals separated from other substances should be paid for in the form that they eventually end up or in the form in which they are removed from the ground," and the lease does not answer this question. In its discussion, the Fifth Circuit distinguished a prior case, Scott Paper Co. v. Taslag, Inc., 638 F. 2d 790 (5th Cir. 1981), holding that "although we held that the more inclusive term 'gas and other gaseous substances' (as used in the lease in Scott Paper) suggests a specific intent to convey all components of the gas stream, we hold today only that the use of the word 'gas' does not convey this wide an interest".

SONAT EXPLORATION COMPANY V. MANN

785 F 2d 1232 (C.A. 5 Miss. 1986)

This case involved the determination of the legal effect, under Mississippi law, of the execution of an AFE (Authorization for Expenditure) by a non-operator who was not a party to the operating agreement covering the subject exploratory gas well. Sonat Exploration Company, the plaintiff, was the operator for the exploration and development of minerals in West Sandy Hook, a field which straddled the line between Louisiana and Mississippi. William D. Mann, at Sonat's request, committed his land (approximately a 2% interest) to a 640-acre gas drilling unit within the West Sandy Hook area. Mann was not asked to sign either the operating agreement or any other instrument ratifying or adopting that agreement, but he did sign four AFE ' s with the words "Accepted and Agreed" appearing immediately above Mann's signature. Sonat's representative said that it usually treated a working interest owner who signed an AFE, but not an operating agreement, as a party to the operating agreement. Therefore, Sonat sent Mann drilling reports, invoices and billing statements. Upon abandonment of the well, Mann refused to pay the amount that Sonat was billing him. From this, Sonat brought its complaint alleging that, by signing the AFE, Mann had created a binding promise to pay a stated share of drilling and completion costs.

The Fifth Circuit Court of Appeals affirmed the finding of the District Court for the Southern District of Mississippi that

the AFE ’ s executed by a nonoperator who was not a party to the operating agreement covering an exploratory gas well did not obligate him to pay drilling costs demanded by the operators. The court said that the AFE contained no language which could be taken as a promise by Mann to pay the costs and that there was no binding industry custom or practice involving the signing of an AFE by the owner of a working interest who had not signed or ratified the pertinent operating agreement. The Court found that an AFE was apparently "'an estimate of costs without binding effect in the industry.'"

Sonat also alleged on appeal that it had suffered a detriment as a consequence of Mann's misrepresentations. However, Sonat did not do anything it would not otherwise have done, particularly the things required by the operating agreement. Therefore, Sonat could not recover from Mann on the theory that it detrimentally relied on his promise to pay his share of the drilling expenses.

TRANSCONTINENTAL GAS PIPELINE CORPORATION V. STATE OIL AND GAS BOARD OF MISSISSIPPI AND COASTAL EXPLORATION, INC.

474 U.S. — , 88 L Ed 2d 732, 106 S Ct —

This case involves Mississippi Statewide Rule 48 , requiring an interstate pipeline to purchase gas from all the parties owning interests in a common gas pool, i.e., to ratably take such gas. The appellant, Transcontinental Gas Pipeline Corporation (Transco), is an interstate pipeline company which had contracted with Getty Oil Company, Tomlinson Interests, Inc., and Florida Exploration Company in 1978 to purchase natural gas from the Harper Sand gas pool lying in Marion County. With respect to Getty and Tomlinson, the owner-operators of their own wells in the common gas pool, Transco would purchase only Getty and Tomlinson's shares of the gas produced in their wells. As to Florida Exploration Company, Transco contracted to buy the entire output of its well, regardless of ownership. Transco also purchased gas on a noncontract basis from production shares of smaller owners (e.g., Coastal Exploration Inc.) in the Getty wells. But, in 1982, because of a significant drop in consumer demand and difficulty in selling its gas, Transco decided not to purchase gas from owners with whom it had not contracted. Getty cut back its production so that its wells produced only an amount of gas equal to its interests in the wells, thus depriving nonoperator owners (e.g., Coastal) of gas to sell.

Coastal filed a petition with the State Oil and Gas Board of Mississippi seeking enforcement of Rule 48 which requires gas

purchasers to purchase gas from the same source of supply without discrimination in favor of one producer against another. The Board found Transco in violation of Rule 48 and ordered it to start taking gas "ratably" (i.e., in proportion to the various owners' shares) from the gas pool and to purchase the gas under nondiscriminating conditions. The Circuit Court affirmed the Board's order, holding that the Board's authority was not preempted by the Natural Gas Act of 1938 (NGA) or the Natural Gas Policy Act of 1978 (NGPA), and that the amendment of the NGPA to prohibit FERC regulation of interstate sales of natural gas effectively overruled Northern Natural Gas Co. v. State Corporation Commission of Kansas, 372 U.S. 84, 9 L. Ed. 2d 601, 83 S. Ct. 646, which struck down a state regulation virtually identical to the Board's order on the ground that the state regulation was preempted by federal law. The Mississippi Supreme Court affirmed.

The U.S. Supreme Court, in a 5-4 decision, held that the Board's order is preempted by the NGA and NCPA because:

(1) following the standard used in Northern Natural, Rule 48 is in conflict with the comprehensive scheme of federal regulation of wholesales of natural gas in interstate commerce enacted by Congress in NGA;

(2) it directly undermines Congress' determination in the NGPA that the supply, the demand, and the price of high-cost gas be determined by market forces, and Congress, in removing from the Federal Energy Regulatory Commission (FERC) the power to regulate the wellhead sales of high-cost gas, did

so pursuant to such determination and not to give the states the power thus withdrawn from the FERC;

(3) it disturbs the uniformity of the federal regulatory scheme, since interstate pipelines will be forced to comply with varied state regulations of their purchasing practices; and

(4) it would have the effect of increasing the ultimate price to consumers.

COASTAL OIL AND GAS CORPORATION V. FEDERAL REGULATORY COMMISSION

782 F.2d 1249 (C.A.5th 1986)

This case involved the determination of whether natural gas is ''dedicated" to interstate commerce even when the underlying contracts for the interstate sale of gas contain a clause under which a producer is excused from connecting a well to the applicable interstate pipeline if such connection would be unprofitable. On November 1, 1958, Coastal Oil and Gas Corporation entered into a contract to sell natural gas to Florida Gas Transmission Company (FGT). The contract contained an "economic connection clause" as described above and it covered four specified offshore tracts in Aransas Bay, Aransas County, Texas.

Coastal made interstate sales to FGT from three tracts beginning in 1962. On July 29, 1965, Coastal began to make intrastate sales of natural gas from the fourth tract. These sales from the fourth tract were made despite indication in internal memoranda that Coastal even suspected that this gas had been "dedicated" for sale in interstate commerce.

At no time did Coastal file for abandonment with the commission as required by §7 (b) of the Natural Gas Act. According to §7(b), once gas is dedicated to interstate commerce, a seller may not cease interstate sales without obtaining permission from the Federal Energy Regulatory Commission (FERC) to abandon those sales.

Coastal argues that the 1958 contract never dedicated gas from the fourth tract in the first place and that the contract only dedicated gas produced from wells which could be economically connected to FGT’s pipeline. The well on the fourth tract could not be profitably connected to FGT’s system. In other words, Coastal claimed that the "economic connection clause" preconditioned the dedication and not merely the delivery.

The 5th Circuit affirmed FERC's ruling that the "economic connection clause" pertained only to the delivery of the gas and not to its dedication to interstate commerce. Therefore, in the absence of a Commission authorization of abandonment, the relevant gas remained dedicated. The court further discussed the meaning of dedication by stating that "dedication" does not effect a gift or sale of that gas, but only changes its regulatory status. Underlying sales contracts do not control the "dedication" determination. If "dedication" depended on contractual arrangements, producers and pipelines would be free to make arrangements that would circumvent the ratemaking and supply goals of the statute. The court ruled that a certificate of public convenience and necessity authorizing a producer (Coastal) to make interstate sales does not incorporate contract provisions inconsistent with the purposes of the Natural Gas Act (i.e., a contract provision which preconditions "dedication" on the economic feasibility of delivery).

However, the 5th Circuit reversed the Commission decision on the remedy imposed against Coastal. The Commission’s ruling

required Coastal to refund to FGT all the revenues received from the illegal intrastate sales. The court ruled that this constituted a "penalty", and therefore was an abuse of the Commission's discretion (since the Natural Gas Act did not give the Commission authority to impose civil penalties).

The remedies endorsed by the court involved restoring the status quo ante and preventing unjust enrichment of the wrongdoer. Two suggestions made to the Commission would be stripping Coastal of its profits in excess of what it would have made under the contract with FGT or ordering Coastal to pay to FGT the amount that FGT had to pay for replacement of the illegally diverted gas, plus interest.

SHOWS V. WATKINS

485 So. 2d 288 (Miss. 1986)

This case arises out of a boundary line dispute. In proceedings before the Chancery Court of Perry County, the widow and surviving children of Roland Shows, appellants on appeal, sought to have a quitclaim deed invalidated because the property conveyed was allegedly homestead and the deed executed by Roland Shows had not been joined by his widow. At trial the appellants, to prove adverse possession, presented evidence that for about twenty years Roland had exercised complete dominion and control over a four acre tract of land adjacent to his own land. While Roland did not have title to the land, he did fence it in along with his own property and made various uses of the property. Some of these uses were commercial, including entry into a gravel lease. In 1980 Roland conveyed the four acres to the Garners through the execution of a quitclaim deed. The Garners later conveyed the tract to the present appellees through the use of a general warranty deed. The chancellor ruled in the appellees favor stating that the appellants failed to show by clear and convincing evidence an intent of Roland contrary to that which was expressed by his quitclaim deed. Furthermore, the chancellor held that the quitclaim deed standing alone defeats the appellants claim of adverse possession. In addition, the chancellor held that the Garners (who were not joined as parties) were "persons needed for just adjudication" within Mississippi Rules of Civil Procedure , Rule 19. In spite of the failure to

join them, the chancellor still resolved the case against the appellants. On appeal the appellants argued two points: 1) Their predecessor in title, Roland, acquired title to the four acres by adverse possession contrary to the chancellor's ruling and 2) the disputed tract was part of the homestead of Roland and his present widow, thus the quitclaim deed from Roland to the Garners was void as to that land.

The Mississippi Supreme Court reversed the judgment of the chancellor in part, affirmed in part and remanded the case for further proceedings. On the issue of adverse possession the court noted that Miss. Code Ann. §15-1-7 (1972) sets out a ten year statute of limitations on actions to recover land. Furthermore, the court stated that Miss. Code Ann. §15-1-13 (1972) vest title in any person who adversely possesses land for ten years. The court cited Trotter v. Gaddis & McLaurin Inc., 452 So. 2d 453 (Miss. 1984) as indicative of the Mississippi case law on adverse possession. Trotter sets out six essential elements necessary for successful adverse possession. Generally, possession must be: 1) under a claim of right, 2) actual, 3) open, notorious, and visible, 4) exclusive, 5) continuous and uninterrupted for ten years, and 6) peaceful. The court reversed the chancellor's ruling by holding that Roland clearly successfully adversed possessed the four acre tract. In addition, the court upheld the chancellor's finding that the Garners were needed for just adjudication since the appellants sought to void a deed to which the Garners were a party and that if appellants were successful then the Garners would have

breached various covenants in the deed they issued the appellees. But the court reversed the chancellor's ruling on the merits of the homestead claim as premature. On remanding the case for joinder of parties necessary for adjudication and resolution of the homestead issue the court made note of several aspects of the law of homestead property. Citing Miss. Code Ann. §85-3-25 (1972) the court stated that in Mississippi homestead declaration is voluntary and not obligatory. Then relying heavily on 40 C.J.S. Homesteads §1 _et seq_. (1968) the court stated that absent a declaration of homestead there must be an intent to use the land as such, and that in jurisdictions where no declaration is required mere ownership and occupancy may be sufficient to establish a homestead. Citing one of the few Mississippi cases dealing with how a homestead is determined, _Horton v. Horton_, 48 So. 2d 850 (1950), the court stated that "an important fautor in determining homestead is the purpose and the use the property is put to." Stating that confusion might arise on the effect of title by adverse possession and commercial use of the property on determining whether it is homestead, the court again relied on C.J.S. Homesteads §§789(d), 36 (1974). Generally, title by adverse possession is equal to title acquired by a deed. On the issue of commercial use, court the usually looks to the principal use to which the property is subject. In addition, the court cited a Texas case, _Cline v. Henry_, 239 S.W. 2d 205 (Tex. Civ. App. 1951), with facts similar to the present case, and held that income producing property under a gravel lease does not by its nature alone make the property ineligible to be homestead.

ELF ACQUITAINE, INC. V. AMOCO PRODUCTION CO.

485 So. 2d 1023 (Miss. 1986)

Shubuta Oil Company had various oil, gas and mineral leases on 54,000 acres of land owned by United States Lumber Company. U.S. Lumber wanted to limit each lease to about 2,560 acres since the terms of the leases would allow production on any part of a tract to "hold" the entire tract. In negotiating these multiple leases these companies tried and for the most part succeeded in having each lease consist of adjoining tracts of land. To cover situations where they did not succeed the companies drafted a special provision. This provision provided that a lease may run indefinitely as long as there is production on the land or production on land contiguous thereto. On non-contiguous areas (any one or more areas of land which do not have any boundary line in common with any part of any other areas of land covered by the lease), this provision provided that the lease as to that noncontiguous area would terminate after a number of years if there was no production on that area. While most of the leases covered only contiguous areas the companies inserted this special provision in all of the leases. The parties in the present suit are the assignees of U.S. Lumber and Shubuta. Amoco, the successor in interest to U.S. Lumber, wished to terminate a lease as to a certain area. The only relationship this area had to the rest of the land covered by the same lease is that the lands touched at corners on a sectional map. Amoco wanted to characterize these areas as non-contiguous and thus terminate the

INEXCO OIL CO. V. THOMPSON, ALEXANDER & CREWS

630 F. Supp. 762 (S.O. Miss. 1986)

Plaintiff, Inexco Oil Company filed suit in the United States District Court for the Southern District of Mississippi seeking to establish legal malpractice in connection with an oil and gas title opinion prepared by one of the members of the defendant partnership. Plaintiff filed a motion for partial summary judgment on the issue of indemnity as to sums they expended in defense and settlement of a state court action involving the validity of a mineral lease on property which was the subject of the title opinion in question. The defendant was never a party in this state court action. Plaintiff contended that an attorney issuing a title opinion to a client indemnifies that client for any loss occurring to that client as a result of any undisclosed defect in the title. The defendant's cross-motion contended that as a matter of law the plaintiff's motion must fail.

In a memorandum opinion, the Court granted the defendant's cross-motion, holding that the plaintiff had failed to establish any right to indemnity. Following Mississippi law, the Court recognized that "a cause of action for non-contractual, implied indemnity arises only in favor of one who is secondarily liable by reason of indemnitor's primary liability to an injured party." In conclusion the Court held that since the plaintiff never contended that the defendant had any liability to anyone in the state court action on which they based their claim for indemnity

and since the plaintiff did not put forth any other basis for the claim then the claim for indemnity must fail as matter of law.

BAXTER PORTER & SONS V. VENTURE OIL CORP.

488 So. 2d 793 (Miss. 1986)

Venture Oil Corporation (Venture) and the James W. Harris Production Corp. (Harris Corp.) were closely held Mississippi corporations sharing the same office suite in Jackson. James Harris was president of both corporations and Wilbur Lilly was vice-president to both. Both men were on the board of directors of the two corporations. In 1981, Lilly made a verbal contract with the Porter Corporation (Porter), engaging Porter to clean out and redrill an old oil well in Jasper County. The permit for the well was obtained in the name of the Harris corporation. Porter worked on the well for six months in 1982 and received only $70,000.00 on a total billing of $621,836.08. In April 1982, Lilly sent Porter a hand written letter alleging that irreparable damage and poor work had been done by Porter. The letter also advised Porter that Venture had no title; interest or supervision of the well. When the outstanding account was not paid Porter sued and won a judgement against the Harris Corporation. The judgement was not paid and so the present suit was filed against Venture and Harris and Lilly individually. The dispute in this case centered around whether Lilly was acting for both Venture and Harris Corporations and whether Lilly had actual or apparent authority to bind both corporations. At the Trial, Lilly denied representing Venture, but two of Porter's

representatives testified that Lilly specifically directed them to bill Venture for the work. One of these representatives testified that Lilly was at first unsure which company should be billed but that Lilly later settled on Venture. Lilly's own daily drilling reports show the work at the well being done for both companies over different periods. Of the invoices submitted by Porter ten of these was submitted to Harris Corporations and the remainder to Venture. Evidence was also presented that dozer work done at the well site was billed to Venture with all the invoices being signed by Lilly. At the close of the trial Porter received a jury verdict against Venture and Lilly. The circut judge entered a judgement on the verdict in the amount of $554,640.00 but thereafter set aside the jury's verdict. The circut judge based his order on a finding that Porter's claim was barred by the statutes of frauds, Miss. Code Ann. §15-3-1 (1972), and that Lilly had no authority to bind Venture.

On appeal the Mississippi Supreme Court reversed the lower court's ruling and reinstated the jury's verdict in Porter favor. The Court reasoned that since there was credible evidence from which the jury could conclude that Lilly purported to act on behalf of and to bind Venture then the sole question was whether Lilly had express or apparent authority to bind Venture. On this issue the Court stated that a finding of apparent authority to bind Venture on Lilly's part would preclude any need to inquire into express authority. The Court adhered to the view expressed in O’Neal, Close Corporations (2d

ed.). Vol. II, §8.05, and held that an executive officer of a close corporation, in carrying on the usual business of such, has the same apparent authority as a partner in a partnership as against third persons who in good faith rely upon his representations. In addition the Court stated that the question of apparent authority was one to be resolved by the jury. In conclusion, the Court pointed out that it would have little sympathy for the position Lilly and the two corporations took. Furthermore, the Court stated that since the situation provided too many occasions for chicanery to expect relief in similar circumstances, it would be wise for corporations like Venture and Harris Corporations to avoid such predicaments by unequivocally notifing third parties precisely which corporation with whom they are dealing.

MALONE V. CELT OIL, INC.

485 So. 2d 145 (La. Ct. App. 2d 1986)

Appellants, survivors of Frankie Malone, transferred ownership of certain property by deeds dated October 2, 1970. At this time they also created and reserved for themselves a mineral servitude in the form of an undivided one-half mineral interest. In September 1980, about a month before this mineral servitude was to expire by prescription resulting from nonuse for ten years, a well was spudded on a site located on property unitized for the Haynesville interval with the property sold by plaintiffs with the reservation of a mineral servitude. The permit for this well was obtained to drill the Smackover interval. The well reached total depth in the Smackover interval on October 24, 1980, and was placed in production as a Smackover well on November 12, 1980. During the drilling of the well, various logs were run which also evaluated the shallower Haynesville formation. In March of 1981 production from the well ceased, and it was plugged back to the Haynesville interval and began production from that formation in April of 1981. Appellants then filed suit for recognition of their mineral servitude and an accounting and payment of royalities on the well. The appellants contended that the ten year prescription of non-use was interrupted by the spudding of the well and the fact that the operator expected to plug back to Haynesville formation should the Smackover prove

unproductive. But the trial Court ruled that this knowledge and intention, linked with the logging tests and actual plugging back did not amount to one continuous operation under Article 29 of the mineral code. The trial court held that the production completed from the Smackover ended that operation and that the later completion from the Haynesville was a separate operation and as such the prescription period was not interrupted.

On appeal the appellants argued that there were good faith operations sufficient to interrupt prescription since at the time the well was spudded in, the well site was unitized with other property for the Haynesville formation. According to LSA-R.S. 31:33, that operation, if it met the requisites for interruption, would interrupt prescription only as to that portion of the tract burdened by the servitude included in the unit provided such operations are for the discovery and production of minerals from the unitized zone. In defense the appellees contended that the well was started as a Smackover well and that no objective intent could be found to tie the well from the spudding to completion at total depth to any type of test of the Haynesville interval and, this being the case, an interruption took place under LSA-R.S. 31:29.

Reviewing the present appeal the Court affirmed the judgement of the trial court. The Court stated that the facts of this case fell somewhere between the facts of Matlock Oil Cor. V. Gerald, 263 So. 2d 413 (La. Ct. App. 2d 1972) and Bass Enterprises Production Co. v. Kiene, 437 So. 2d 940 (La. Ct.

App. 2d 1983). In <u>Matlock</u>, the well was simply drilled through a shallower sand to a deeper formation, and testing of the shallower sand never occurred. The plaintiffs in <u>Matlock</u> contended that this act of drilling through the shallower sand, in operations off the tracts which the servitude existed, interrupted the running of prescription and preserved their mineral servitudes. The <u>Matlock</u> court held "good faith" drilling means a bona fide attempt to obtain production from a certain formation. Finding no such attempt the <u>Matlock</u> court held that no interruption occurred. In <u>Bass</u> the <u>Matlock</u> discussion was distinguished. There a good faith attempt to obtain production from a shallower sand during the period of servitude was found. In <u>Bass</u> logging tests were performed while drilling through the shallower formation, and the well was later plugged back to that formation. The <u>Bass</u> court found that extreme efforts by the well operators in extensive testing and fracturing involving that single interval showed a continuous good faith operation to obtain production from the shallower formation. Looking at the distinctions in each case, the present court concluded that the trial court correctly found that drilling to the Smackover and subsequent recompletion and production from the Haynesville were not one single operation as contemplated by LSA-RS 31:29 and so no interruption occurred. Furthermore, the appellant court held that it was unnecessary to consider the issue of whether there was sufficient testing of the Haynesville sands to constitute a bona effort to obtain production from that interval because

such inquiry was precluded by a finding of no single continuous operation. In conclusion the court stated that the original spud date of the well did not interrupt the running of the prescription on the appellants mineral servitude.

SOUTHERN OIL AND GAS, INC. V, HALL

485 So. 2d 1066 (Miss. 1986)

The plaintiff, Southern Oil and Gas Company, had a minerai lease on Terence Hall and Dorothy Hall Thompson's property in Marion County. However, neither party to the lease was aware of a prior mineral lease covering the same lease.

The Mississippi Supreme Court held that the trial court was correct in finding that the plaintiff and defendant were acting under the mutual mistake of fact that the dependent's interest in the lease was not subject to a pre-existing lease and could be leased. The Court held that the chancellor was also correct in limiting the remedy, based upon mutual mistake, to rescission of the lease and repayment of the price paid by the Southern Oil.

HANS V. HANS,

482 So. 2d 117 (Miss. 1986)

This case stems irom a 1940 conveyance of forty acres in Jackson County, Mississippi. The conveyance was between two brothers and the deed was properly recorded. After the transfer of title, the grantor continued to occupy the land and subsequently made improvements to the land. Some twenty years later, closely following the death of the grantee, the grantor filed a suit to cancel a cloud on his title to the forty acres against the grantee’s heirs. In his suit the grantor contended that the grantee never paid for the land. In 1975 , after abandoning the aforementioned suit, the grantor attempted to cancel the 1940 conveyance by executing a correction deed deceasing the conveyance to one square foot of land. Five years later, the grantee’s heirs filed suit to quiet title and cancel a cloud on their title against the grantor. These heirs claimed title to the land through the 1940 deed and alleged that the grantor retained possession with the express permission of the grantee and his heirs. Meanwhile the grantor died and his widow succeded him in the suit. The widow countered that the deed was never delivered since it was in her possession; title had vested in her through adverse possession; and that the grantee’s heirs’ suit was barred by the ten year statute of limitations. Chancery Court proceedings resulted in findings that delivery of the deed had occurred; the grantor’s continued possession was the result of the grantee's express

permission; and that the action was barred by the statute of limitations. Thereafter, the chancellor cancelled the cloud and confirmed title in the grantee's heirs. On appeal, the grantor's widow, hereafter appellant, contended that the chancellor's finding of delivery of the deed was in error; that the 1940 transfer had never been paid for and so the deed was invalid; that the grantee's heirs' now appellees, action was barred by the statute of limitations; the chancellor had erred in finding no adverse possession on the part of the appellant and that the appellees' action was estopped or barred by laches or unjust enrichment.

The Mississippi Supreme Court affirmed the chancellor's decision. The court noted that the issue of delivery was the subject of conflicting evidence and contrary rebuttable presumptions. First, the possession of a deed by a grantor raises a presumption that the deed was not delivered, delivery being an essential element of a conveyance. Second, the recordation of a deed raises a presumption of its delivery, rebuttable by proof of nondelivery. The Court upheld the chancellor's holding that the appellees had rebutted the first presumption, while the appellant had fail to rebut the latter. Reinterating that a voluntary conveyance of land cannot be vacated at the instance of a grantor on the grounds that the conveyance was made without payment, the Court also pointed out that any attack on the 1940 deed was barred by the ten year statute of limitations. Turning to the question of whether the appellees' attack on the 1975 correction deed was barred by the

statute of limitations the Court held that the suit filed in 1980 was clearly within the ten year limit. On the issue of adverse possession the court noted that a grantor may adversely possess against his own grantee but where the relationship between the parties is close then proof of adverse possession is more difficult to establish than adverse possession between strangers. Furthermore the Court held that since the chancellor had substantial credible evidence on which to base his finding of permissive use thereby precluding adverse possession, his holding should stand. Citing Continental Oil Co. V. Walker, 117 So. 2d 333 (1960), the Court held that the doctrine of laches was no defense to the appellee's suit since the statute of limitations had not run on this action. In conclusion, the Court ruled that the appellant's theories of estoppel and unjust enrichment were precluded by a finding of permissive use.

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PITFALLS OF PREPARING DEEDS CONVEYING OIL AND GAS INTERESTS IN ALABAMA*

By Edward G. Hawkins

Alabama lawyers are more likely to be asked to prepare or to review a deed affecting oil and gas interests today than at any previous time. This sudden increase of oil and gas transactions results from the expansion of exploration and development activities for oil and gas across much of Alabama. Oil and gas deeds present peculiar problems, partly because of the many facets of an oil and gas transaction and partly because title defects involving the oil and gas mineral estate can be difficult to cure. This article highlights some of the problems and defects commonly occurring in mineral deeds and recommends measures that will aid lawyers in avoiding those drafting problems.

Mineral Deed - Royalty Deed

Before a lawyer can ensure a client has addressed all the aspects of a mineral or royalty conveyance, the lawyer must understand the various rights and privileges associated with the mineral estate.[1] Without that understanding, the lawyer cannot prepare instruments meeting the needs of the client and standing the scrutiny of time. A tempting drafting approach is to classify an interest as a "mineral interest" or a "royalty interest" and to adopt or modify someone else's form for a "mineral deed" or a "royalty deed." The prudent lawyer (the kind errors and omissions carriers like) uses those terms and possibly other's forms only with a solid understanding of the ramifications of each term. This enables the lawyer to recognize the parties' intentions and to determine what the parties may have overlooked. Merely using a form "mineral deed" or "royally deed" without first considering the various rights and privileges associated with a "mineral interest" and a "royalty interest" can produce results that neither party to the deed contemplated or desired.

The most important right of the mineral estate is the right to receive the minerals produced from that estate. This right can be split into concurrent interests, called "mineral interests," "royalty interests" or something else Unfortunately, deeds often contain ambiguous descriptions of the share of production that is being granted or reserved by the deed. Those ambiguities usually can be avoided by carefully determining what the share of production is lo be when. (1) the interest is subject to an oil and gas lease; and (2) the interest is *not* subject to an oil and gas lease. This determination is critical to the description of the interest. Only after making this preliminary determination should the lawyer begin to decide whether to use a "mineral interest" or "royalty interest" label in the deed description.[2]

In oil and gas deeds, a mineral interest and royalty interest in the same fraction can yield different shares of production. In this regard, an interest described as a one-eight "mineral interest" will yield its owner one-eighth of the oil and gas produced from the subject land *only* when the mineral interest is unleased. If the interest is leased, the owner of a one-eighth mineral interest normally receives one-eighth of the lessor's royalty, If, for example, the one-eighth mineral interest is burdened by a lease with a one-eighth royalty, the mineral interest owner will receive 1/64th of the production (1/8x1/8). On the other hand, a royalty interest described as "one-eighth of all oil, gas and other minerals produced" will entitle its owner to one-eighth of all oil and gas produced from the land burdened by that interest *whether* or not that land is leased.

Some types of royalty interest can also yield varying shares of production, depending upon the lease burdening the servient mineral estate. For example, a conveyance on one-half "of royally" would yield one-sixteenth of all oil and gas produced under an oil and gas lease with a one-eighth royalty.[3] If the oil and gas lease provided a one-quarter royalty, the one-half "of royalty" interest would yield one-eighth of all oil and gas produced under the lease. If the servient mineral interest was unleased, the "one-half of royalty" term would be ambiguous, because there would be no royalty to have.

Special attention must be paid to the grantee's share of production in a transfer of an interest ihat is burdened by an existing oil and gas lease Many deeds conveying a mineral interest burdened by an existing lease contain a "subject to" clause with language similar to the following

> "Said land now being under an oil and gas lease originally executed in favor of and now being held by il is understood and agreed that this sale is made subject to said lease, but covers and includes [fraction] of all oil royalty and gas rental or royalty due to be paid under the terms of said lease"[4]

The additional "subject to" clause is designed to assure that the right to receive royalties attributable to the mineral interest passes to the grantee named in the deed and to protect the grantor against a breach of warranty as to the existing oil and gas lease.[5] The clause, however, has caused some serious problems and has spawned a number of cases addressing those problems.[6] For instance, some courts have construed such deeds as having two independent grants, although it is apparent the parties intended only

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one grant. Other courts have increased the number of mineral acres conveyed by such deeds.

The "subject to" clause is not necessary to protect the grantor's warranties. Protecting the grantor against a breach of warranty could be better accomplished by clearly excepting the existing lease (and all other encumbrances) from the grantor's warranties. Likewise, the "subject to" clause is not needed to convey to the grantee royalties attributable to the grantee's mineral interest. Unaccrued royalties under a lease are an incident of the mineral estate and pass with the mineral estate unless otherwise previously conveyed or severed.[7]

Another problem caused by existing leases can arise when a producing well happens to be located on the lands encompassing the servient mineral estate. If there are accrued but unpaid royalties, the unpaid royalties require special attention because oil and gas become personal property once they are taken from the ground.® Since accrued but unpaid royalties are personal property, a normal grant of real property will not transfer them.[9] Therefore, to transfer accrued but unpaid royalties a separate grant of the accrued royalties must be included in the deed. The grant should specify a date and time for changing the payee of the accrued royalties. Accordingly, deeds frequently contain language such as:

> Royalties accruing on production runs occuring after [time] a m on the [day of month] day of [month], 198_____ , shall accrue to the credit of grantee.

Both problems that can arise in the transfer of a mineral interest burdened by an oil and gas lease with a producing well are avoided easily with the following approach;

(1) Show the existing lease as an exception from the grantor's warranties as follows:

> Grantor covenants, except as to an oil, gas and mineral lease dated [date], and recorded in [record reference], granted to [name of lessee] by [name of lessor], that Grantor is seized . ..;

and

(2) Show the transfer of accrued royalties with the following clause, used in addition to the basic granting clause:

> Grantor hereby sells, sets over, transfers and assigns unto Grantee all accrued but unpaid royalties on oil and gas produced after [time] a .m. on the [day of month] day of [month], 198_____, under the existing lease mentioned above that are attributable to the mineral interest conveyed herein to grantee and such accrued royalties shall be paid directly to grantee.

Another factor affecting the share of production is the costs that the interest is to bear Royalty interests typically are not charged with production or development costs.[10] On the other hand, mineral interests customarily bear their proportionate share of production and development costs.[11] Of course, once a mineral interest is burdened by an oil and gas lease, the terms of the lease govern the allocation of costs between the mineral interest owner and the lessee.

The second most important right of the mineral estate is the right to grant oil and gas leases. This is called the "executive right."[12] Usually, the owner of the mineral interest has the executive right and a royalty owner does not.[13]

Mineral owners sever the executive right for many reasons. For instance, they might sell a royalty interest in the mineral estate underlying their lands and thereby retain the executive right to control mineral operations on their remaining surface estate. Such landowners frequently have ongoing timber operations, residential subdivisions or other types of surface operations that would be interrupted by unrestricted drilling and producing operations. By retaining the executive right, the landowners can restrict and control the development activities on the surface lands. Other reasons to sever the executive right include consolidating control over leasing activities and ensuring that the royalty negotiated under an oil and gas lease is sufficiently large.

If the right to share in production is severed in any fashion from the executive right, the lawyer drafting the deed must consider a number of factors. First, who is to have the executive right? If the executive right is being severed through the grant of only a royalty interest, the owner of the mineral estate customarily would have the executive right.[14] If. however, the executive right is being severed from a mineral interest the lawyer must determine:

(1) Who will hold the executive right?
(2) Will that person represent and protect the interests of the owner of the non-executive interest?
(3) How will the executive right be exercised in the event of the death, incompetency or bankruptcy of the person holding the executive right?
(4) Are there safeguards against the unreasonable refusal of the executive to grant a lease?
(5) How long will the executive right be vested in a third party?
(6) If the executive right is to be vested in a third party for only a limited duration, what is the event that is to trigger the termination of the severed executive right and cause it to merge with the servient mineral interest?
(7) If the executive right is to be vested in a third party for an unlimited duration, who is to succeed to the executive right upon the death of the person appointed in the deed to exercise that right? Will the arrangement violate the rule against perpetuities?

The owner of the non-executive interest should be entitled to fair treatment by the holder of the executive right. Sometimes economic realities leave the holder of a non-executive interest, such as a royalty interest, unprotected. Consider the holder of an undivided one-fourth royalty interest, which would not have executive or development rights. Most oil companies buying leases rarely agree to a lease for a royally in excess of one-fourth. Therefore, any lease granted by the holder of the executive right probably would not yield any production royalties under the normal lease to the servient mineral estate burdened by the severed one-fourth royalty interest. Unless the holder of the executive right in such a case was offered an extremely high lease bonus, there would be no economic incentive for the executive to grant a lease. High bonuses normally prevail only in locations reasonably close to production or drilling activities. If the servient mineral estate was situated far from production or drilling activities, the bonus probably would be low. This could discourage the executive from leasing the land since the executive would have little economic incentive to lease. As this example illustrates, the lawyer must recognize the ramifications of the severed executive right and discuss them with a client seeking to create a non-executive interest.

The third most important right of the mineral estate is the right to receive lease bonus and rental payments. Normally the owner of the mineral estate receives these payments.[15] If payments are to be made to anyone other than the owner of the mineral estate, provisions must be made in the deed to that effect.

Another important right of the mineral estate is the right to explore the lands subservient to that estate and to develop those lands for oil and gas.[16] If the client wants to create a non-executive mineral interst, the lawyer must ensure that the executive right, the exploratory right and the development right vest in the same owner. Otherwise, the deed will create a contradiction: the person nominally having the power to lease would not have the powers to explore and develop, both of which are essential to the lessee. Such a situation invites judicial tampering with the deed.

Some landowners, who carve undivided mineral interests from their surface estates, have legitimate concerns about the disruption of their surface use by oil and gas operations Landowners with subdivisions, timber operations, industrial operations or any valuable surface activity can protect those activities by restricting the exploration and development easements incident to the mineral interests they are conveying. Such restrictions require careful drafting to protect the landowner and at the same time give the grantee an interest attractive to an oil company. Occasionally landowners incorporate surface damage covenants in mineral deeds. Again, care must be taken to prevent the covenant from destroying the commercial marketability of the grantee's interest.

Only after the parameters of the conveyance have been developed by considering the various factors mentioned above can the lawyer properly label the interests and draft the deed. Although the lawyer can prepare the deed without the aid of reference forms, most lawyers do not try to

re-invent the wheel and instead modify an existing form to fit the particular transaction that is involved. One reliable sourse of forms for this purpose is 6 W. SUMMERS, THE LAW OF OIL AND GAS §§1271, 1273-1290 (1967)

Mineral Acre - Fractional Grant Conflicts

Mineral deeds frequently contain two different descriptions of the mineral interest that the grantee hopes to acquire Different descriptions result when the granting clause describes the mineral interests as a fractional interest and another clause in the deed describes the interest as a certain number of mineral acres. Usually, the mineral acre description appears in an "intention clause,"[17] but occasionally it appears in a second granting clause in the same deed. Many purchasers insert the alternate "mineral acre" expression when the purchase price is based on the net mineral acres conveyed.[16] Describing the mineral interest by both fractions and mineral acres can render a deed ambiguous and give rise to serious consequences when:

(1) The deed conveys less than the entire mineral estate in a tract of land containing more or less area than the parties contemplated; or

(2) The deed conveys a mineral interest in multiple tracts of land and the grantor's title fails as to some of the tracts.

Recognizing the effects of the fractional formula and the mineral acre formula is important because the results of the two formulas can be significantly different. Consider a conveyance of an undivided one-eighth mineral interest in a quarter section surveyed according to the Rectangular Survey System.[19] If the quarter-section is regular and contains exactly 160 acres, the undivided one-eighth mineral interest would be equivalent to 20 mineral acres If the quarter-section is enlarged and contains 162 acres, the undivided one-eighth mineral interest would be equivalent to 20.25 mineral acres Correspondingly, if the quarter-section is diminished and contains only 158 mineral acres, the undivided one-eighth mineral interest would be equivalent to 19.75 mineral acres Only when the quarter section is regular will the factional description and the mineral acre description agree

As the examples show, the fractional formula yields a higher net interest for enlarged tracts and a lower net interest for diminished tracts On the other hand, the acreage formula yields the same interest regardless of the tract size, so long as there is sufficient title to fund the grant.

Conflicts between a fractional formula and an acreage formula can occur when

(1) Accretion enlarges a riparian tract.[20]

(2) An accurate survey reveals a size discrepancy in the tract,[21] or

(3) The grantor suffers a partial title failure.[22]

Courts generally resolve conflicts between a fractional formula and a mineral acre formula in one of three ways: (1) find the deed unambiguous and uphold the mineral acre formula; (2) find the deed unambiguous and uphold the fractional formula; or (3) find the deed ambiguous and admit extrinsic evidence to determine the parties' intent.[23] The approach adopted can significantly increase or reduce the interest For instance in *Wade v Roberts,* the Oklahoma Supreme Court considered facts where accretion added 15.26 acres to a 32-acre riparian tract.[24] The accretion led to a dispute over a reservation alternatively described as an undivided 5/32nd of the tract and as five undivided mineral acres Under the fractional formula, the grantor would have reserved 7,385 mineral acres, and under the mineral acre formula the grantor would have reserved only five mineral acres. The 2.385 mineral acre difference would be extremely significant if a prolific well was on the tract.

Another example of the conflicting results of the two formulas occurs when- (1) a grantor conveys mineral acres by warranty deed in one of several contiguous tracts owned by the grantor; and (2) the grantor suffers a partial title failure in that tract. In such instances, the mineral acre formula can lead to a replacement of title. For example, in *Crayton v. Phillips,* a Texas court held:

> The law is well settled that where one conveys by general warranty deed a specific number of undivided acres out of a large or several tracts of land, from which grantor has already conveyed a part, the deed conveys a grantee good title to his complement of acres out of the remainder of the land.[25]

Under a fractional formula, no replacement of title would occur, and the grantee's remedy under the breached warranty would be limited to money damages [26] In order to avoid the problems occurring when both a fractional formula and a mineral acre formula appear in the same deed for the same interest, the lawyer should choose one or the other and should *not* use both formulas to describe the same interest

Reservations and Prior Grants

Prior mineral reservations and grants can cause two types of common problems in mineral deeds. The first type of problem occurs when the grantor does not have sufficient title to convey the interest purportedly granted by the deed. The second problem arises when the deed mentions a prior reservation or conveyance that never happened These problems normally are created when the grantor has forgotten or never knew what transactions have occurred in his prior chain of title The lawyer drafting the deed usually does not have an accurate summary of prior mineral transactions and therefore must rely on the client to supply the facts necessary to draw the deed Both types of problems can produce results that at least one party, and sometimes both parties, to the deed never anticipated

The first type of problem is commonly called a *"Duhig"* problem in reference to the case of *Duhig* V *Peavy-Moore Lumber Co.,* 135 Tex. 503, 144 S.W.2d 878 (1940). A *Duhig* problem occurs when a grantor, who owns less than the entire mineral estate attempts to reserve an undivided mineral interest in a deed that otherwise purports to convey the entire fee simple interest in a tract of land. *Morgan v Roberts.* 434 So.2d 738 (Ala. 1983) is an example of such a problem.[27] In *Morgan,* the landowner previously had conveyed an undivided one-half mineral interest in the land to a third party. The landowner then reserved an undivided one-fourth mineral interest in a warranty deed purportedly conveying the entire fee simple interest to the grantee. The Alabama Supreme Court held that the attempted reservation of the one-fourth interest was contrary to the warranties in the deeds, which on its face conveyed the surface estate and an undivided three-fourths mineral interest The court held that the grantor kept nothing under the reservation and that the grantee received the entire undivided one-half mineral interest held by the grantor at the time of the execution and delivery of the deed.

The second type of problem occurs when a deed refers to a prior reservation or grant that, m fact, does not exist. For example, assume a grantor owns the entire mineral estate in, on and under his land. Also assume that, even though neither the grantor nor any of his predecessors had previously severed any portion of the mineral estate by conveyance or reservation, the grantor executes and delivers a warranty deed containing one of the following false recitals:

(1) "There are hereby excepted. . An undivided one-half *(½)* interest in and to the oil, gas and minerals lying in, under or upon . . same having been reserved to G. C. Coggin Company, Inc., in the certain deed . . "[28],or

(2) "Subject to one-half interest in mineral and oil rights as conveyed to Wm. Henderson"[29] or

(3) "SAVE AND EXCEPT an undivided three-fourths of the oil, gas and other minerals in, on and under [said land] . ., which minerals do not belong to grantors herein",[30] or

(4) "Except all minerals and mineral rights, heretofore sold and conveyed"[31]

The first example is *Union Oil Co. of Cal v. Colglazier,* 360 So.2d 965 (Ala. 1978). The others simply are instances where deeds have contained false recitations about prior mineral reservations or conveyances.

In *Colglazier.* the Alabama Supreme Court held the exception language clearly excepted the one-half mineral interest The fact that the recitation about the prior mineral reservation was false did not void the exception. The Alabama Supreme Court declined to decide in *Colglazier* whether the language quoted above was present in the deed solely to protect the grantor's warranties. Other courts had employed the warranty protection approach to permit the grantee to acquire the mineral interest mentioned in the exception language if that language was intended only to protect the grantor against a breach of warranty.[32] Since the Alabama Supreme Court left the door open to the warranty protection approach, the possibility

of confusion still remains with respect to erroneous recitations about prior mineral conveyances and reservations.

The lawyer drafting a mineral deed for the grantor can avoid both the *Duhig* and the false exception recitation problems by:

(1) Excepting any interest that the grantor wishes to retain in clear and unequivocal language of exception such as:

> Grantor hereby excepts from this conveyance an undivided [fraction] interest in all oil, gas and other minerals in, on and under [property] together with all and singular the rights and appurtenances. .. .

(2) Excepting the prior reservations or conveyances from the grantor's warranties as follows:

> Grantor covenants, except as to (all prior mineral reservations and conveyances], that Grantor is seized. . . .

This approach shifts the risk of prior mineral severances to the grantee. Where the grantee has paid consideration for a specified mineral interest, this approach is unsatisfactory and the warranty language should not contain a blanket exception of all prior mineral reservations and conveyances. If, however, the grantor is merely conveying all that the grantor owns to the grantee, the blanket exception is not objectionable.

Rule Against Perpetuities

Occasionally, an oil and gas transaction will involve the transfer of a future interest. Usually the future interest will be something that is to take effect after: (1) the termination of an existing oil and gas lease, which can remain in effect so long as oil and gas are produced from the leased premises; (2) the lapse of a specified term of years and the cessation of all paying oil and gas production; or (3) a well on the property has produced enough oil and gas to allow the operator to recoup its costs of drilling and completing the well. In each of these situations, the time that the future interest vests is uncertain. Further, the interest may not vest in the grantee for many years. Due to this uncertainty, the transfer easily can run afoul of the rule against perpetuities.

In *Earle v. International Paper Co.,* 429 So.2d 989 (Ala. 1983), the Alabama Supreme Court considered the application of the rule against perpetuities to a deed that left the grantor with an undivided one-half mineral interest for a period of 15 years and so long thereafter as oil, gas or minerals were being produced in paying quantities. The question in the case was whether the grantor or the grantee got the undivided one-half interst when the 15 year term elapsed and there was no mineral production. The grantor argued the rule against perpetuities voided the grantee's right to the one-half mineral interest, despite the parties' manifest intentions in the deed. The court sided with the grantee by finding that the grantor conveyed the entire fee simple estate to the grantee and *reserved* an undivided, defeasible one-half mineral interest, Since a reservation is technically a grant back to the grantor, the grantee held a possibility of reverter in the disputed one-half mineral interest. Although a possibility of reverter is a future interest,[33] it is not subject to the rule against perpetuities.[34]

Earle provides excellent guidance on how to avoid the disastrous effects of the rule against perpetuities. Simply grant everything to the grantee, and *reserve* the defeasible interest the grantor desires to retain The reservation clause should contain words of inheritance and should contain no words of exception.[35]

Roadways

A problem that can appear in deeds conveying rural land involves roads constructed along the governmental subdivision lines In such cases, the grantor usually holds fee title to the entire governmental subdivision involved in the conveyances. Sometimes, however, the deed description is based on a survey describing the tract boundary with reference to the edge of the road right-of-way rather than the true boundary, which may be the center of the public road. This practice leaves the grantor with title to the strip of land located between the true boundary and the edge of the road [36] As an illustration of the amount of land that can be involved in such strips, consider a quarter section of land with a 100-foot right-of-way situated on the quarter-section. In such a case, 3.03 acres would underlie the 50-foot portion of the right-of-way situated on the quarter-section [37] This vacancy normally is not significant when only the surface use is concerned, because the public road occupies the strip anyway. Nevertheless, the value of the minerals can cause the strip to become more valuable

Miscellaneous

Grantors frequently have their spouses join with them in mineral deeds When the grantor is reserving an interest in the deed, the reservation should be only in favor of the grantor and the grantor's heirs and assigns. Confusion can occur if the deed defines both the grantor and the spouse as "Grantors" when the reservation is in favor of the "Grantors, their heirs and assigns." In such a case, some question might arise as to whether the reservation vested an interest in the spouse. The Alabama Supreme Court of Civil Appeals held that the common law rule prohibiting reservations in favor of strangers to title prevented a spouse from acquiring an interest by reservation in *James v. Bell,* 419 So.2d 251 (Ala. Civ. App 1982). The Alabama Supreme Court, however, has not ruled on the question. In order to avoid the issue, deeds should not contain reservations in favor of a spouse who has no interest in the properly prior to the reservation. If the grantor wants the spouse to receive an interest in the property, he or she should make a specific and separate grant of that interest to the spouse.

Some mineral conveyances involving homestead properly do not contain homestead acknowledgments on the deeds. The lawyer should not overlook the requirement of Section 6-10-3 of the *Code of Alabama* (1975) that the spouse must join in all conveyances of homesteads and the deed must bear a valid acknowledgement of the spouse's signature.

A practical problem can arise when a grantor conveys a certain number of mineral acres situated in multiple tracts where the grantor retains other mineral interests. In such cases, a survey and a title search of all the multiple tracts are necessary to allocate the grantor's and the grantee's mineral interests across those tracts. If all those tracts are not included in the same drilling and production unit, the survey and the title search are impractical Consequently, such grantors and grantees may be forced to stipulate their interests in order to receive payments of royalties or production attributable to their interests. A grantee may want the grant of mineral acres spread across several tracts in order to benefit from the Texas replacement of title rule.[38] The grantee, however, should weigh the inconveniences such a grant can bring

Another problem can occur when the parties to a royalty trade express the interest as "royalty acres." In a footnote in *Dudley v Fridge,* 443 So.2d 1207, 1209 (Ala. 1983), the Alabama Supreme Court defined a royalty acre "as a 1/8 royalty in one mineral acre." Although that footnote now exists in Alabama case law, the term "royalty acre" still can be misleading For example, a 29.5 acre tract of land covered by an oil and gas lease with a one-fifth royalty constitutes 29.5 mineral acres. Using the definition of "royalty acre" adopted by the Alabama Supreme Court, however, there would be 47.2 royalty acres.[39] The 29.5 acre tract and the lease with a one-fifth royalty were present in the facts of *Thibodeaux v American Land & Exploration, Inc.,* 450 So.2d 990 (La. Ct. App. 1984), *cert. denied,* 458 So.2d 118 (La. 1984). The court in that case upheld the grant of royalty acres using the definition mentioned in the *Dudley* footnote against a landowner fraud attack. *Thibodeaux* illustrates the confusion that can result from using the term "royalty acres." It is too easy to assume that a lessor would have the same number of royalty acres as he has mineral acres under lease. For that reason, the lawyer must be extremely careful when facing a deed granting "royalty acres." □

FOOTNOTES

[1]The term "mineral estate" in the context of this article indicates the highest possible interest in oil and gas as opposed to lesser interests that may be created in those minerals and as opposed to interests in other minerals

[2]This article primarily discusses mineral and royalty interests. For discussions of other types of interests see H WILLIAMS & C MEYERS, OIL AND GAS LAW (1984) and W SUMMERS, THE LAW OF OIL AND GAS (1967)

[3]See *Texas Gulf Producing Co v. Griffith,* 218 Miss 109, 65 So 2d 834 (1953), 1 H WILLIAMS & C MEYERS, OIL AND GAS LAW §3031 (1984)

[4]2 H WILLIAMS & C MEYERS, OIL AND GAS LAW §340 at 224 6 (1984)

[5]2 H WILLIAMS & C MEYERS. OIL AND GAS LAW §340 (1984)

[6]See 2 H WILLIAMS & C MEYERS, OIL AND GAS LAW §340.1-3405 (1984)

[7]3A W SUMMERS, THE LAW OF OIL AND GAS §572 (1958)

81 H WILLIAMS & C MEYERS. OIL AND GAS LAW §3031 (1984)

[9]3A SUMMERS, *supra*

'°See *Mounger v Pittman,* 235 Miss 85, 108 So 2d 565 (1959)

"Id

[12]H WILLIAMS & C MEYERS. OIL AND GAS TERMS 293 (6th ed 1984)

'Westbrook v Ball. 222 Miss 788. 77 So 2d 274 (1955)

'«Id

[15] *M ounger v Pittman*

[16]See *Westbrook.* 1 H WILLIAMS & C MEYERS, OIL AND GAS LAW §303.4 (1984)

·7An example o(an "intention clause" is "The parties hereto intend lor 20 net mineral acres to be hereby conveyed "

1fiSee *Dudley* v *Fridge,* 443 So 2d 1207 (Ala 1983), *Thibodeaux v American Land & Exploration. Inc.* 450 So 2d 990 (La Ct App 1984). *cert denied.* 458 So 2d 118 (La 1984)

[19]See 2 Stat 324 (1805) (applied the Rectangular Survey System to United States lands south of Tennessee, which included what is now Alabama); C WHITE, A HISTORY OF THE RECTANGULAR SURVEY SYSTEM (1982).

[20]*Wade v Roberts.* 346 R2d 727 (Okla 1959)

^Governmental sections are rarely staked to contain exactly 640 acres For example, of the 36 sections contained in Township 7 North Range 5 East of St. Stephens Meridian in Alabama, only (our sections contain exactly 640 acres White, *supra.* note 19. at 84

[22]*Wilhams v Phillips Petroleum Co.* 453 F Supp 967 (S D Ala 1978), aff d. 614 F 2d 293 (5th Cir 1980)

231 H WILLIAMS & C MEYERS, OIL AND GAS LAW §320 2 (1984), *Wade v Roberts. Williams v Phillips Petroleum Co*

2'346 P2d 727 (Okla 1959)

[25]297 S W 888 (Tex Civ App — Austin), affd. 4 SW 2d 961 (Tex Comm'n App 1928, holding approved)

[26]*Wilhams v Phillips Petroleum Co*

27The Alabama Supreme Court adopted the Duhig principle in *Morgan v Roberts.* 434 So 2d 738 (Ala 1983), which adopted the holding in *Brannon v Varnado.* 234 Miss 466, 106 So 2d 386 (1958) *Brannon* is based on a line of Mississippi cases adopting Duhig

[26]*Umon Oil Co of Cal v Colglazier.* 360 So 2d 965. 967 (Ala 1978)

^*Wilson v Gerard.* 213 Miss 177, 182. 56 So 2d (1952) See also *Whitman v Harrison. 327* P2d 680 (Okla 1958), *United States v McKenzie County.* 187 F Supp 470 (D N D 1960) *affd sub nom.. Murray v United States.* 291 F 2d 161 (8th Čir 1961)

^*Pich v Lankford.* 157 Tex 335. 337, 302 S.W.2d 645, 646 (1957)

^'*Oldham v Fortner.* 221 Miss 732 , 736, 74 So 2d 824, 825 (1954)

[32]See *Whitman. McKenzie County*

33L SIMES. HANDBOOK OF THE LAW OF FUTURE INTERESTS (1966)

[34]*Earle*

[33]*Earle* turned on the distinction between a reservation and an exception If the disputed interest had been excepted from the grant, the grantee would have acquired a springing executory interest, which would have been subject to the rule against perpetuities The court construed the presence of words of inheritance in the reservation as an indication that the grantor intended to reserve and not to except the disputed interest

^*Standard Oil Co. v Milner* 275 Ala 104. 152 So 2d 431 (1962)

[37](50 feet)x(2640)/(43,560 sq feet per acre) = 3 03 acres

[33]*Crayton v Phillips*

[39]*(020 lease royalty)/(1/8 royalty) x (295 mineral acres) = 4720 royalty acres*

UNDERGROUND INJECTION CONTROL PROGRAM IN MISSISSIPPI

By Bill Stennett

Part C of the Safe Drinking Water Act (Pub. L 95-523 as amended by Pub L 96-502, 42 U S C 300F et seq.) promulgated the Underground Injection Control Program. The purpose of Part C was to establish a Federal-State system of regulation to assùre that drinking water sources, actual and potential, were not contaminated by the underground injection of pollutants. Through the establishment of this act and particularly the Underground Injection Control Program (UIC), Congress recognized that the underground injection of contaminants had clearly become an increasingly dangerous problem. Municipalities were engaging increasingly in the underground injection of sewage and other wastes. Industries were injecting dangerous industrial byproducts. Energy production companies were injecting unwanted brines brought to the surface during production. Government agencies were getting rid of waste problems by underground disposal methods. During the ten-year period 1961-1970, a test revealed that there were 130 outbreaks resulting in 46,374 illnesses and 20 deaths. Part C and the UIC program were intended to deal with the foregoing situation so far as they might endanger underground drinking water sources. The UIC program, simply stated, prohibits any underground injection, except as authorized by permit or rule issued under the guidelines of the program. The program states that no owner or operator shall construct, operate, maintain, convert, plug, abandon, or conduct any injection activity in a manner that allows the movement of fluid containing any contaminant into underground sources of drinking water An underground source of drinking water is defined as an aquifer with waler quality less than 10,000 milligrams per liter total dissolved solids and capable of yielding 2 gallons per minute of waler

The applicable UIC program for a state is either a state-administered program approved by the Environmental Protection Agency, or a federally-administered program promulgated by EPA Approval of a state program is based upon a determination by the administrator that the program meets the requirements of the Safe Drinking Act and the applicable provisions of the Code of Federal Regulations. A federally-administered program is established in those instances where the state has failed to submit a program for approval or where the submitted program does not meet the minimum statutory and regulatory requirements Historically, underground injection in Mississippi has been handled by the State Oil and Gas Board At the present time the state has a combination federally-administered and state-administered program. To understand this concept one must consider the different classifications of underground injection wells established by the UIC program

An injection well will fall into one of five categories. i e, Class I, II, III, IV, or V Class I wells are used to inject hazardous waste or other industrial and municipal fluids beneath the lowermost formation containing an underground source of drinking water within one quarter mile of the well bore Class II covers wells which inject fluids which are brought to the surface in connection with conventional oil or natural gas production or wells which inject fluids for the enhanced recovery of oil or natural gas. Class III wells are those which inject for extraction recovery of minerals including: 1) mining of sulphur by the Frasen process; 2) in situ production of uranium or other metals or; 3) solution mining of salts or potash Class IV wells are those used to dispose of hazardous or radioactive waste into or above a formation which contains an underground source of drinking water within one-fourth of a mile from the well. Also included in this category are wells which inject hazardous waste and cannot be definitely classified as either a Class I or a Class IV well Class V wells are those injection wells not included in Classes, I. II, III. or IV. In Mississippi the UIC program for Class, I, III, IV, and V wells is the program administered by the Mississippi Department of Natural Resources. The Class II UIC program for the state is administered by the Environmental Protection Agency, thus giving Mississippi a combination federal-state administered UIC program Because the majority of underground injection wells fall into the Class II category (at this time there are over 600 existing brine disposal wells in the state), the remainder of this article will focus on the general permit requirements of this class

The Class II category can be divided into two classes of injection wells which are: 1) new injection wells and 2) existing injection wells. Existing injection wells are those in existence before December 30, 1984, which were, and still are being used for injection These wells are authorized "by rule" to operate. Any injection well which began injection after December 30, 1984. is classified as a new injection well. New injection wells are not authorized by rule and must obtain a permit before construction.

There are two types of existing wells within the Class II category. These two types are those wells used for enhanced recovery and those wells used strictly for disposal. Existing enhanced recovery wells that were in existence before December 30, 1984, and are still being used as injecting wells are authorized by rule for the life of the well or project. There are two situations in which a well authorized by rule would have to be permitted. If the well is found to be unsafe insofar as underground sources of drinking water are concerned, the well operator will be required to obtain a permit. Secondly, the EPA has established certain inventory and reporting procedures for this classification, and if the operator fails to comply with these requirements of authorization by rule, he will have to apply for a permit It should be noted that once authorization by rule is lost, it cannot be reinstated and a permit will be required.

The second type of existing Class II wells is the category that is used strictly for the disposal of brine, i.e. produced water. The wells are authorized by rule for up to four years from December 30, 1984, and for any length of lime thereafter that it takes the EPA to act on the permit application

All existing brine disposal wells must apply for a permit before the four year deadline. The operator may apply for the permit at any time before the four years has expired. However, during this four year period the EPA will be "calling in" parts of the state at specified intervals to assure compliance with the permit program, and thus when an existing well operator is notified of an earlier date for his compliance, he must adhere to the earlier date. It should be noted that the EPA has already called in a salt waler injector in Heidelburg in Jasper County.

All new injection wells are to comply with permit regulations before doing any work. The term "new well" applies to conversion type wells (those wells which are to be converted from another use to an injection well) as well as to a newly constructed injection well. Before a new well may begin operations, the operator must contact the EPA and secure a permit application and a set of guidance documents which will describe information needed in the application. These forms may be obtained by writing:

United States
Environmental Protection Agency
Region IV
345 Courtland Street, NE
Atlanta, Georgia 30365

It should be noted that the regulations do not state a time period in which to apply for an application before production begins. However. EPA representatives stress that new well operators should apply as soon as possible. As a general proposition, representatives state that it can take from three to nine months after the initial application for the EPA to approve the operation of a well. The outside date of nine months would only occur in the event of some problem, but in no case would the period be less than two months Therefore, an operator certainly should not wait to apply a week before he expects to begin operation.

The EPA has also been granted the authority to terminate a permit or to deny a permit renewal application for any one of several reasons. Included are: 1) noncompliance by the operator with any condition of the permit, 2) the permittee's failure in the application or during the permit issuance process to disclose fully all relevant facts, or the permittee's misrepresentation of any relevant facts at any time, or 3) a determination that the permitted activity endangers human health or the environment and can only be regulated to acceptable levels by permit modification or termination

if a person is found to be operating an injection well not authorized by rule or without the proper permit, he will be in violation of the Safe Drinking Water Act and will be subject to penalties. For each violation a violator is subject to a civil penalty of not more than $5,000 for each day of such violation. If the violation is found to be willful, a criminal fine of not more than $10,000 for each day of such violation may be imposed in lieu of the civil penalty.

Further information on technical permit requirements and regulations can be found at 40 CFR 144 et seq. Also, the EPA can be contacted at the above mentioned address or by phone at (404) 881-3866.

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RECENT DECISIONS - MISSISSIPPI

Miller v. Lowery, 468 So. 2d 865 (Miss. 1985)

A conveyance of fee simple title to a tract of land by the appellant contained the following clause:

> Subject to the reservation of all oil, gas and other minerals in, on and under the above described land by prior grantors

There were no such reservations by any prior grantors. The appellant claimed that she intended to retain the mineral rights to the estate by this clause Her contention was that this clause operated to sever the mineral rights from the land

The Mississippi Supreme Court held that "subject to" language in a conveyance coupled with an actual prior reservation was considered the equivalent of reserving a mineral interest. The court states that it was overreaching to hold that "subject to" standing alone was the functional equivalent of reserving. Further, the clause had never been sufficient to reserve mineral rights without a formal severance. Accordingly, the court held that the clause merely operated to protect the grantor's warranty of title and was not sufficient to reserve mineral rights without a formal severance

Bill Stennett

Chapman v. *Chapman,* 473 So. 2d 467 (Miss. 1985)

James B. Chapman, Jr, filed suit in Hinds County against Brenda Chapman, his former wife, seeking to set aside a deed and remove cloud on title to certain property. In March, 1978, Mr. Chapman purchased the property and subsequently executed a warranty deed conveying the newly purchased property to himself and Mrs. Chapman as joint tenants with full rights of survivorship. The court found that there was no delivery of the deed to Mrs. Chapman as cograntee when Mr. Chapman instructed his attorney to retain the deed in his files until Chapman called for it or asked that it be recorded, in that the attorney became the agent for the husband as grantor. However, the court held that Mrs. Chapman was entitled to an equitable lien on the property in the absence of the effective delivery of the deed. The court found that Mrs. Chapman helped pay for the land in reliance on her husband's representation that she was joint owner: that she came into possession of a photocopy of the deed, which her husband had imprinted with a notary seal; and that she had suffered detriment in reliance on her joint ownership.

The court said it recognized that the Chancery Court could not transfer legal title, but that it could establish an equitable lien. The court remanded the case saying that the chancellor should take into account the one-half of the monthly payments the wife had been making.

Bill Stennett

Culbertson v. Dixie Oil Company, 467 So. 2d 952 (Miss. 1985)

Two oil leases executed in 1946 contained a primary term of ten years or as long as production continued Production continued under the leases from 1947 to 1969. Production ceased at that lime for the next thirty-two months In 1971 a suit was brought to declare that the 1946 leases had expired. A settlement was reached by which J.K. Pace acquired by quitclaim all of the leases on the tract of land. A court order was entered incorporating the settlement. Dixie Oil acquired the leases from Pace and brought the oil well back into production.

In 1978 the successors to the lessors of the 1946 leases took the position that the leases had expired because of termination of production and leased their interest in the property to Culbertson. The present lawsuit was begun by Dixie Oil Company to remove as clouds on their title the mineral leases to Culbertson. The trial court held that the 1971 court decree was res judicata on the question of the validity of the 1946 leases and as a result that Dixie Oil had clear title to the leasehold interest.

On appeal, the Mississippi Supreme Court reversed and remanded. The court held that the 1971 decree adjudicated nothing other than to recognize that the lawsuit had been settled as between Pace and the other litigants The court held that there had been no adjudication as to whether the leases were valid or invalid or whether they had expired due to non-production. The court also held that Dixie Oil, as complainant in the bill of complaint, had the burden of showing perfect title in itself. The case was remanded for further proceedings in the trial court.

Bill Stennett

Allgood v. *Allgood,* 473 So. 2d 416 (Miss. 1985)

This case involved a dispute between Aletha Allgood and her son over title to thirteen acres of land in Jasper County. The court found that actual title in the property was in Aletha Allgood's name but that she held title

in a constructive trust for her son. Findings of fact used by the court to reach its decision were: 1) the son, Hershel Allgood, had paid all sums owing under an installment note which was used to purchase the property; 2) he had paid all taxes owing with respect to the land from and after its purchase; 3) he had once listed the land with a realtor; and 4) he had received the bonus money from a mineral lease. In short, the court found that Hershel Allgood had exercised every right as the actual owner of the land and minerals and that, therefore, his mother was holding the property that Hershel had paid for as a constructive trustee

The court also dismissed Aletha's contention that she should retain title to the minerals because there was a separate mineral deed. The court found that the understanding Hershel had with his mother was that he would acquire title to the tract and the fact that there was no discussion regarding minerals could only be construed to mean that there was no understanding that the minerals would be excepted from the purchase. Accordingly, the court affirmed the trial court's decision that Aletha held title to the entire property subject to a resulting trust in favor of Hershel

Bill Stennett

Castle v. *Harkins and Co.,* 464 So. 2d 513 (Miss. 1985)

Craig Castle filed suit in Jefferson Davis County against Harkins and Co to establish his ownership of a full 1/64 royalty interest under a tract of land. Castle contended he was the owner of a royalty interest calculated as 1/64 of a whole of all oil, gas and other minerals in, on and under and to be produced as to the tract. The defendants contended that Castle was entitled only to an individual 1/64 of 1/2 of 1/8 royalty since their mutual predecessor in title owned only an undivided 1/2 interest in the oil, gas and minerals under said tract at the time of the disputed conveyance.

The Mississippi Supreme Court reversed and remanded the holding of the lower court, holding that the interest intended to be conveyed in the deed in question was a non-participating royalty interest calculated as 1/64 of the whole of all oil, gas and minerals and that the appellant, Castle, was now vested with that interest.

(The Court's reasoning does not seem to follow the language of the conveyance, and the Court itself seems to clearly state that the grantee would have received a 1/64 mineral interest The conveyance also states that the "vendee herein is to have 1/64th of all oil, gas and mineral *royalties* . " Emphasis added. The Court states that the parties' mutual predecessor in title intended to convey 1/4 of 1/16, that is, one-fourth of his royalty, but no where does the court cite facts for this conclusion. - Editor)

Bill Stennett

Johnson к *Black,* 469 So. 2d 88 (Miss. 1985)

Prior grantors of a tract of land in George County claimed that land by adverse possession from the record title holders. The Mississippi Supreme Court held that the claimant's evidence was wholly consistent with the lower court's finding that the claimant had shown, at best, continued permissive use. The court stated that possession with permission of the record title holder never has been sufficient to establish adverse possession and ripen into title in the adverse possessor no matter how long continued. Accordingly, the court affirmed the holding of the lower court that there had been no adverse possession.

Bill Stennett

Crosby - Miss. Resources, Ltd. v. Saga Petroleum, 767 F. 2d 143 (C.Ä. 5 Miss.1985)

Non-operating working interest owners in five gas wells located in Hancock County brought suit against Saga Petroleum, the operator of the wells, pursuant to operating agreements executed by each of the working interest owners. The working interest owners alleged that they were entitled to be compensated for profits subsequently obtained when a company formed by the operator (Saga Products) sold products it had refined from the condensate it had purchased from the operator. The non-operating owners' central contention was that Saga breached the operating agreements by accounting for the working interest owner's share of the condensate at the price paid at the wellhead rather than at the price Saga Products received for the refined petroleum products.

The Fifth Circuit Court of Appeals affirmed the finding of the District Court for the Southern District of Mississippi holding that under the agreement, the owners were entitled to no more than to be paid for the condensate, so that they got all they bargained for. The court held that where the price the owners received for their condensate was at least the market price prevailing in the field, they received all they were due under the agreements. The owners were not entitled to be compensated for a price subsequently obtained for refined products, even though, as plaintiffs contended, the sales might be considered shams, because the plaintiffs could prove no injury. The court rejected an argument that a joint venture existed, and that, therefore, Saga had a fiduciary duty to the non-operating owners. The agreements among the owners, including Saga, did not indicate an intent to share profits from the sale of refined products

Bill Stennett

VGS *v. United States Dept, of Energy,* 613 F. Supp. 243 (D.C. Miss. 1985)

The plaintiffs in this case sought a declaratory judgement that the Department of Energy had an unconditional and non-discretionary obligation to implement an order issued by the Federal Energy Regulatory Commission requiring DOE to restore to the plaintiffs an amount of money which DOE wrongfully required the plaintiffs to pay under the Crude Oil Entitlements Program.

The DOE asserted that a decision by the Office of Hearing and Appeals rendered the instant litigation moot. The Office of Hearing and Appeals announced that an appropriate portion of crude oil overcharge funds would be used to fund finally adjudicated "receive orders" such as that held by the plaintiffs. However, because of litigation concerning the termination of the entitlements program, payment of the "receive orders" would be placed in an interest hearing escrow account pending the outcome of the litigation.

The court held that the OHA order did not moot the plaintiff's claim. The court found that the plaintiffs adjudicated exceptions were not changed by a decontrol order, and thus they were entitled to a declaratory judgement that the DOE had an unconditional and non-discretionary obligation to implement the FERC order.

Bill Stennett

Hathorn v. Amoco Production Company 472 So. 2d 403 (Miss. 1985)

This case involves the rights of life tenants and remaindermen in leasing land for oil and gas development. On August 29, 1973, Sallie Clark had conveyed her property (in which she owned one-half the minerals) to Robert Burns and wife, reserving a life estate. On December 23, 1980, the Burns executed a lease to Amoco, reserving a 3/16 royalty. On June 2, 1981, Clark and the Burns sold their mineral interest to R C. Speights for a five year primary term That same day, Speights executed a lease to Hathorn, said lease having a one year primary term. It specifically stated that it covered Clark's life estate.

On August 20, 1981, the property was unitized to form a drilling unit for a well drilled by System Fuels, Inc. On October 12, 1981, Speights gave another one year lease to Hathorn, reserving a 1/4 royalty. The System Fuel well was completed as a producer in 1982. On May 3, 1982, Amoco assigned a part of its lease to System Fuels

The court discussed generally the relative rights of life tenants and remaindermen. The rule is that neither can lease or cause to be leased the interest of the other. A remainderman (Burns) could not give a lease that permits *immediate* exploration and production without the consent of the life tenant Similarly, the life tenant (Clark) cannot drill new wells or lease that right to others. They may give a joint lease and agree to a division of rents and royalties In the absence of an agreement, the life tenant is not entitled to any royalties, but only the income from such royalties

Amoco, the Burns' lessee, could not produce unless Mrs. Clark died during the term of its lease. Her life estate would then expire, and since Amoco had a lease of the remainder interest, it could proceed to explore and produce

The conveyance from Clark and the Burns to Speights was subject to Amoco's lease The court states that Speights' lease to Hathorn was only of the life estate While the facts given tell us that the first lease to Hathorn "covers the life estate," there is no indication that the second lease was so limited. The court appears to hold that only a life estate could be leased since a valid lease had been given on the remainder interest

When Speights bought from Mrs. Clark and the Burns, he took the life estate and the remainder, the latter being subject to the Amoco lease.

The court defined the rights and interests of the parties as follows:

Amoco and Systems Fuels, Inc. - A valid remainder interest in the 13/16ths working interest plus actual cost of drilling and production.

Speights - A3/16ths royalty and a 1/4 share in the interest income on a 13/16ths working interest of Amoco for the life of Sallie Clark.

Hathorn- A 3/4ths share of the interest on the 13/16thsworking interest of Amoco for the life of Sallie Clark

Amoco is not entitled to the use of the corpus of the 13/16ths working interest or any income from the investment of that sum until the death of Sallie Clark. All profits from that sum during the life of Sallie Clark belong to Speights and Hathorn to be divided as set out above. It is Amoco's duty to insure that the corpus of the 13/16ths working interest provides a fair rate of return for Speights and Hathorn whether it retains the 13/16ths and becomes personally liable for the interest or whether it invests that sum with a third party responsible for paying the interest.

Al Sage, M LU Editor

McLaurin v. Shell Western E. & P, Inc. 778 F. 2d 235 (5th Cir. 1985)

In this case, the plaintiffs allege that a lease to defendant should be cancelled because of defendant's failure to pay royalties to plaintiff McLaurin. Plaintiff McLaurin and three other heirs of one G S. McLaurin had given a lease that ultimately was assigned to defendant. A dispute developed concerning McLaurin's right to inherit, and a chancery court decree declared him not to be an heir of G.S McLaurin Newly discovered evidence of a marriage license as well as the recently passed statute on illegitimates' right to inherit resulted in a new suit and a decree which declared plaintiff a rightful heir

Plaintiffs' suit was based on the breach of an express covenant to pay royalties. The court held that, while the exact question had not been decided by the Mississippi Supreme Court, the law in Mississippi was that cancellation (i.e., forfeiture) should not be granted when money damages were an adequate remedy. In this case, an accounting and payment of the royalty due would fully compensate plaintiff, therefore the lease would not be cancelled

Al Sage, M LU Editor

Davis v. Clement, 468 So. 2d 58 (Miss. 1985)

The claimants asserted a claim of adverse possession to approximately 70 acres of land which lay adjacent to their property. The Mississippi Supreme Court found that the record revealed that all the plaintiffs really had to base their claim on was the existence of an old barbed wire fence which one of the plaintiffs had helped his grandfather patch and repair around the disputed land. There was no proof that the area had been "effectively" fenced for ten consecutive years. Proof of other acts of alleged adverse possession was vague as to dates, identity of parties involved and location. These acts included grazing cattle, cutting and planting timber and removing gravel. Also, the plaintiffs never attempted to place the disputed land on the tax roll in their names

The court affirmed the lower court's holding that the proof was insufficient to establish adverse possession The court reaffirmed the rule that sporadic and temporary activity on the property was not sufficient to give notice of an adverse claim.

Bill Stennett

RECENT DECISIONS - LOUISIANA*

James J. Bailey III, v. Franks Petroleum, Inc. 479 So. 2d 563 (La. App. 1Cir. 1985)

After leasing properly, Franks Petroleum sent a division order in 1972 to the trustee of the property which was incorrect. Scurlock then agreed to purchase the condensate and sent a division order to the trustee in 1973 perpetuating the error, but it was never signed. After an audit in 1980 showed no royalty checks were received, the plaintiffs, beneficiaries of the terminated trust, sent a letter to Franks asking what company should be remitting the royalty checks. On February 4, 1981, plaintiffs sent a formal demand letter to Franks, and on February 6 a check was sent. Plaintiffs then filed suit for additional royalties, attorneys fees and cancellation of the lease. The defendants asserted that the lease provided that the royalties could be paid in kind and were paid that way since the condensate was placed into storage tanks. The court concluded that it was inconceivable that the lessee would retain possession of the plaintiffs' portion for an unlimited amount of time and interpreted the lease to require payments. The court further noted that the defendants' acts were not willful, but only negligent even though a long period of time had elapsed. Additionally, the lease was not cancelled since the first letter concerning the company did not fully comply with R.S. 31:137.

Transworld Drilling Company v. Texas General Petroleum Corporation, 480 So. 2d 323 (La. App. 4 Cir 1985)

The defendant assigned to the intervenors a 1/2 interest in a State mineral lease which was not approved by the State Mineral Board or recorded until after the plaintiff filed suit to enforce an oil well lien on the lease and recorded a lis pendens. After obtaining a judgement, the intervenors sought to halt the judicial sale alleging that constructive notice was insufficient to deprive them of their property rights. The court concluded that R.S 30:128 expressly requires assignments of state leases to be approved by the State Mineral Board in order to be valid Since this was not done until after suit was filed, the intervenors had no interest in the lease, and a third person who purchases property from one against whom a hs pendens is recorded takes the property subject to the claim and need not be made a party to the pending action.

The Louisiana Land and Exploration Company v. Texaco, Inc. 478 So. 2d 926 (La. App. 4 Cir 1985)

Leases provided that the royalty payments were to be based on the value of the gas produced, creating a dispute as to whether the value should be determined under Section 105 or Section 109 of the NGPA The defendant had entered into warranty contracts prior to 1978 allowing it to fulfill its obligations from any source available. It contended Section 105 was applicable which limited the maximum lawful price of gas sold under an existing contract to be that which the gas was subject to under the terms of the contract in 1978. The plaintiff asserted that its gas was not "subject to" any contract since the defendant could use gas from other reserves. The court concluded that because of the flexibility of the warranty contracts, even though the gas may not have been economically committed or sold under a contract it was not subject to any contract specifying a source of gas, and accordingly Section 109 governed

First Financial Bank, F.S.B. v. Johnson 477 So. 2d 1267 (La. App. Cir. 1985)

Property, purchased and registered on the public records in the name of James Johnson, was mortgaged in favor of the plaintiff bank in the name of James J. Johnson. Johnson then sold the property to the defendant bank who subsequently sold the property with a mortgage to a third person after the mortgage certificate reflected no encumbrances in the name of James Johnson. When the plaintiff bank foreclosed, the defendant bank

intervened on the ground that the first mortgage was inferior since it was allegedly improperly drawn in the name of James J. Johnson. The appellate court rendered judgment in favor of the defendant bank concluding that a mortgagee is entitled to rely on the Public Records Doctrine, is free of any duty to search the records for name variations, and properly relied on the name of James Johnson as the record owner.

Comment

This case, involving the public record doctrine, holds that, at least in the case of a mortgage, a third party is not on notice of a prior encumbrance if the mortgagor's name is not *exactly* the same as the name in which title to the encumbered property is vested. This case deserves considerable study and attention for, although dealing with mortgages, its holdings might be extended to require that oil and gas leases had best be taken in the exact name in which title is vested in the mineral lessor or the same will be ineffective as to subsequent lessees of the mineral lessor, regardless of the actual knowledge of such subsequent lessees.

Molero v. Bass
477 So. 2d 931 (La. App. 4 Cir. 1985)

The plaintiff, as executrix, filed suit for overriding royalty payments due the deceased under a contract which provided for the assignment if the assignor obtained leases from the State of Louisiana or other owners within a particular area and time period The issue at trial was whether the contract covered all leases, including those obtained by assignment, or only leases acquired from landowners. The appellate court held that the trial court was erroneous for applying the "ejusdem generis" rule of interpretation since this was an "oil and gas" contract, and it was more relevant to apply the plainly intended meaning of the petroleum industry, Farmouts are such a common means of acquiring leases that this method should have been excluded. Consequently, the contract referred to all owners of a lease and was not limited to landowners. Although suit was not filed for 14 years, it had not prescribed since actions for real rights are subject to 30 years prescription

Allen v. *Horne*
478 So. 2d 671 (La. App. 2 Cir. 1985)

The lessor appealed a judgement rejecting his demands for partial cancellation of a mineral lease on 22 acres due to the failure of the lessee to prudently develop the leased property. The Court of Appeal noted that whether a mineral lessee develops leased property as a "reasonably prudent operator" under La. R.S. 31:122 is a question of fact to be determined by a consideration of the following factors:

"Geological data, number and location of wells drilled on the leased property and adjoining property, productive capacity of producing wells, costs of drilling operations as compared with profits, time interval between completion of the last well and the demand for additional operations, and the acreage involved in the disputed lease"

The court considered testimony of applellant's expert rejected by the trial court but affirmed the trial court's rejection of cancellation of the lease where seven producing wells existed on the 22 acres based on expert testimony offered by Appellee opining that Appellant's expert did not accurately consider costs of drilling, one well would adequately drain five acres and each additional well would drop production. The court held appellant failed to show by a preponderance the grounds for cancellation considering all expert testimony and noted that evidence that other independent drillers offered to lease and drill without firm commitments was not sufficient grounds for reversal of its decision.

Jardell v. *Hillin Oil Company*
476 So. 2d 1118 (La. App. 3 Cir. 1985)

The plaintiffs seek to cancel a mineral lease for failure to commence reworking operations within 90 days of the cessation of production as required by the lease. Production ceased on June 17. 1981, with a suspected tubing failure; it was resumed in December During the period that followed the cessation, the operator repaired the salt water disposal lines and pumping unit and cleaned the leased site. Nothing was officially done to repair the tubing until October, although some evidence showed a pressure test was performed some time in September. The court followed earlier jurisprudence which refused to give a comprehensive definition to "reworking" and determined that each case must depend upon its own facts. In the present case the court concluded that the work performed within the 90 days would not be considered part of a workover where a well ceased production due to holes in the tubing and held in favor of the plaintiffs.

Nunez v. Wainoco Oil & Gas Company
477 So. 2d 1149 (La. App. 1 Cir. 1985)

The plaintiff's unleased property was included in a compulsory undrilled unit. A well was then drilled on leased land, but bottomed on the plaintiff's unleased property located within the unit. The plaintiff supported the creation of the unit and participated in the drilling of the well as a working interest owner. The well was designated as the unit well and later confirmed as the unit well after a public hearing. Prior to the confirmation, the plaintiff filed this suit to require the removal of the well alleging subsurface trespass. Both sides moved for summary judgment and the court granted a partial summary judgment in favor of the defendants allowing them to continue production and limiting the plaintiff's recovery to damages if he prevailed. The appellate court determined that for more than 25 years the Commissioner of Conservation has designated unit well locations by reference to Statewide Order 29-E rather than attempting to pinpoint the exact surface locations (R.S. 30:9C); therefore, he was within his authority to designate a unit well at the location in question. However, the Commissioner does not have the authority to authorize drilling on or under unleased property. According, the court reversed the judgment as it applied to the limitation of damages.

Shell Oil Company к. *Pitman*
476 So. 2d 1031 (La. App. 3 Cir. 1985)

The Smith Group entered into a mineral lease with Shell in 1934. Subsequently, the Smith Group sold portions of their undivided royalty interest to the McSpadden Group. Two units were formed on land covered by the original lease. Unit D included the northern portion which is completely traversed by a waterway. Unit E is south of and contiguous to Unit D. Production was obtained in Unit D in 1954 with all wells located north of the waterway. Production from Unit E began in 1960. This concursus proceeding was filed in 1982 when the Smith Group contended that the royalty interest they sold had prescribed for non-use as to the parts lying south of the waterway. They alleged that the waterway was navigable and title was vested in the state, therefore, the contiguity was destroyed. After reviewing the evidence submitted by the Smith Group, the court determined that they failed to meet their burden of proving the existence or navigability of the waterway in 1812 or its present navigability at the time of trial. Accordingly, since the entire width of the waterway was not found to be navigable, prescription had not occurred.

Comment-

Mineral Servitudes ("Mineral Interests" under Common Law) do not prescribe with the interests reverting to the surface owner if production is obtained anywhere on a contiguous tract of land. This case involves the issue of whether or not production on a portion of a tract north of a river tolls prescription on lands located south of the river, a noncontiguous tract //the bed and bottom of the river is owned by the State of Louisiana The State's title depends on whether or not the river is now or was in the past a navigable stream. The primary discussion in the case involves the factual determination of whether or not the river in question was navigable at the time the Stale of Louisiana entered the Union or subsequent thereto; if so, then the State owns the bed and bottom of the river and the two tracts in question are not contiguous one to the other

'These Louisiana decisions have been briefed by the Louisiana Mineral Law Service, Mineral Law Institute, Room 328, Law Center, Louisiana State University, and reprinted here with permission (See Editor's Note) Comments are by Russ Grant, of Hughes Eastern Petroleum, Inc., Jackson, Mississippi.

Succession of Miller v. Moss, 479 So. 2d 1035 (La. App. 3 Cir. 1985)

This case involves application of the Louisiana Uniform Probate law to a will denied probate in another state and a determination of penalties and attorney's fees in a concursus proceeding. The first issue apparently is one of first impression in Louisiana.

John Miller died intestate in 1978 in New Mexico, survived by his widow and an adopted daughter, Lucy Moss A handwritten will was denied probate in New Mexico because it did not meet formal requirements of New Mexico law. Mrs Miller was appointed administratrix of the estate. At the time of his death Mr. Miller owned an undivided one-eighth (1/8) interest in real property in Calcasieu Parish upon which was a producing well operated by Robert Mosbacher. Mosbacher made royally payments to Mrs. Miller as administratrix of Mr. Miller's estate.

Although Ms. Moss made several claims to the royalties, Mosbacher continued to send them to Mrs. Miller as administratrix of the estate. On July 15, 1980, a judgement of possession was signed placing Ms Moss in possession of assets of the estate

In 1982, Ms. Moss sued Mosbacher, claiming all funds in his hands attributable to Miller's estate Mosbacher convoked a concursus proceeding, alleging Mrs. Miller's interest. Both Moss and Miller answered by claiming ownership of the funds.

Mrs. Miller filed a petition in the succession proceeding opened by Ms Moss, asking that the olographic will denied probate in New Mexico be admitted to probate in Louisiana. She asked to be declared owner of the disposable portion of Miller's estate. Ms Moss filed Exceptions of Res Judicata and No Cause of Action. The trial court overruled the first exception and reserved the second for trial on the merits. The succession proceeding was consolidated with Ms. Moss' suit against Mosbacher.

The trial court admitted the will to probate. The testamentary disposition of the estate was reduced as an excessive donation. The original judgment of possession was amended to place Ms. Moss in possession of the forced portion or a one-third (1/3) of the undivided one-eighth (1/8) interest Mrs Miller was put in possession of the disposable portion or two-thirds (2/3) of the one-eighth (1/8) interest. The exception of no cause of action was denied.

Ms Moss[1] claim against Mosbacher was denied and the court found that Mosbacher had followed a reasonable procedure in making royalty payments.

Ms. Moss appealed and the appeals court affirmed. First, the appeals court deferred to the trial court's capacity to evaluate live witnesses in determining a dispute concerning handwriting authenticity in favor of the will. The court then held that the will was a valid olographic will under Louisiana law. There would have been no question as to its admission to probate if there had been no attempt to admit it in New Mexico. The court staled that the law of the state where real property is located is the controlling law. Moss' contention that the Uniform Probate Law applied was rejected, the court stating that it applies to wills *accepted* for probate in foreign jurisdictions. Apparently, a will not accepted for probate does not fall under the Uniform Probate Law, and therefore a prior judgement in another state has no effect on a decision to admit a will to probate in Louisiana. *See.* La. R.S. 9:2421-2425 and La. C.C. art. 1588.

In upholding the trial court's denial of Ms. Moss' claim to the royalties held by Mosbacher, the court stated Mosbacher properly retained the funds, then later properly deposited them in the registry of the court The law makes no provision for interest or penalty while the stake remains in the hands of a stakeholder. The court also upheld the denial of penalties and attorney's fees, stating the Mosbacher has responded within thirty (30) days with a reasonable cause for non-payment of the funds. *See,* La R.S 31:137 *et seq.*

Al Sage

Massie v. Inexco Oil Co. 614 F. Supp. 880 (D.C. La. 1985)

Massie, lessor, sued his lessee, Inexco, for partially cancellation of an oil and gas lease containing the following language:

> XXXIII. Notwithstanding anything to the contrary herein contained, any acreage which may be held by Lessee, its successors or assigns, at the end of the primary term by the production of oil, gas or other hydrocarbon minerals under the terms and conditions provided in this lease shall be held only to a depth of one hundred (100) feel below the stratigraphic equivalent of the base of lhe deepest horizon from which Lessee, its successors or assigns, shall have established production of oil, gas or other hydrocarbon minerals in paying quantities during the primary term. Lessor reserves all oil, gas and other hydrocarbon minerals below the aforesaid depth after the end of the primary term of this lease, and this lease shall terminate as to all lower depths.

The lease also contained typical continuous drilling clauses, the time period set at ninety (90) days.

The parties stipulated that one well had been completed as a producer, two other attempts were abandoned and a fourth well, on adjacent property, was completed as a producer This latter well was unitized, and part of the production (46.72681%) attributed to the lease. The first well was completed during the primary term, the second begun before the expiration of the primary term and the third and fourth begun afterwards.

Plaintiff had demanded that Inexco release all lands below a depth of 13,548 feet - 100 feel below the depth of the sand in the first completion (the MMS No. 3). Inexco refused, but did release the portion of the lease outside the two units and below 100 feet below the depth of the second completion (the Broussard No. 4)

Although not readily apparent from the case, the property in dispute is that underlying the two completed wells between 13,548 feel and 100 feet below the deepest producing horizon (not specified) of the Broussard well. The plaintiff's argument, not articulated by the Court, is that the depth restriction clause overrides the continuous operation clause at the end of the primary term as to depths below 100 feel of any producing depth At that point the entire lease would be still be maintainable by continuous operations but not below 100 feet below the deepest producing depth.

The defendant's argument is that the depth restriction clause applies only to acreage held by production and not that held by continuous operations. (The lease did contain a Pugh clause, although the reader is not so informed.) The defendant's interpretation would hold the land outside the producing units by virtue of continuous operations, but would provide for release of depths below 100 feet below the producing formations under the two units.

The lease was the product of extensive negotiations between the parties, and the Court apparently agreed that the plaintiff had better negotiators. However the Court may have misinterpreted the provision The court states that if there is no production at the end of the primary term, lhe lessee could keep alive the entire lease, to all depths, by continuous operations. In other words, the lessee would have been better off if it had not completed a well on the property.

The plaintiff's interpretation. in a situation where there had been no production at the end of the primary term, is that the depth restriction would completely override the continuous operations clause, and cancel the lease as to all depths 100 feel below zero feel. This interpretation is based on the argument that the second sentence in paragraph XXXIII is independent of the first In this situation the lease effectively would be cancelled.

The court slated that the lessee had the right to explore the leased premises within the depth restriction under the continuous operations provision, but decreed the cancellation of the lease as to lower depths and ordered an accounting.

(Editor's Note: The editor extends thanks to Judy Schott, New Orleans, one of the plaintiff's lawyers, for aiding in understanding this case. There are several crucial facts not mentioned in the decision. She was also helpful in explaining the positions of the parties. The case is on appeal to the Fifth Circuit.)

Al Sage, MLU Editor

RECENT LEGISLATION - LOUISIANA*

ACT 242 (Kimball el al) Changes the standard for the forced removal or burial of pipelines and associated structures located on state waterbottoms from "safety and hazard" factors to "undue interference with other uses of state waterbottoms"; deletes the state safety jurisdiction over interstate pipelines pursuant to federal regulations.

ACT 250 (Kimball) Provides that the assistant secretary of the Department of Natural Resources shall have authority to regulate natural gas distribution companies with respect to gas pipeline safety; creates the Gas Pipeline Safety Fund which will be financed by a $12/per mile annual fee for safety and odorization inspections.

ACT 281 (Kelly) Creates the Abandoned Mine Reclamation Fund to provide funds for the reclamation of abandoned mine lands and water areas; provides for funding and expenditures; provides for administration by the Department of Natural Resources Office of Conservation in compliance with the U.S. Surface Mining Control and Reclamation Act of 1977.

ACT 325 (LaBorde et al) Eliminates the previously required recordation of actual mineral exploration agreements and allows filing of a simpler statement with notice of where the full agreement can be found.

ACT 621 (Sittig) Exempts propane and other liquefied petroleum gases used for farm purposes from state sales and use taxes. Effective July 1, 1986.

ACT 622 (Sittig) Exempts butane, propane, and other liquefied petroleum gases used in residential cooking and heating from state sales and use taxes Effective July 1, 1986.

ACT 815 (Kimball) Creates the Mineral Conservation Fund to be used for the promoting and research of oil, gas, and mineral conservation matters; provides that up to a maximum of $2 million in mineral lease application, conservation, and processing fees will be deposited in the fund.

ACT 861 (LaBorde) makes the Department of Natural Resources an indispensable party in all law suits concerning land or waterbottoms under its jurisdiction.

ACT 917 (Leach) Creates the Agricultural Industry Incentive Fund to provide incenlive payments to gasohol producers; establishes the Agricultural Industrial Board within the Department of Agriculture to administer the fund; ties the amount of incentive payments to the amount of funds derived from taxes on gasohol; establishes preference for use of domestic agricultural products.

ACT 949 (Hudson et al) Establishes the Louisiana Education Quality Trust Fund as a permanent trust financed by the money received from the Federal Government for mineral production activity on the outer continental shelf After $600 million is deposited into the fund, $50 million shall be credited to the Coastal Environment Protection Fund.

ACT 980 (Lauricella et al) Decreases the application fee for a mineral lease on state land from $300 to $200, but makes the fee non-refundable

ACT 1015 (M. Hebert) Requires the Department of Natural Resources Office of Conservation to adopt rules and regulations prohibiting oil and gas well operators from preventing Department of Wildlife and Fisheries agents from enforcing any provision of Title 56 (wildlife and fisheries laws); provides for license denial or revocation upon violation.

Resolutions

HCR 88 (F. Thompson) Creates a 15 member La. Advisory Commission on Agri-fuels to study and advise the state legislative and executive branches on the development of agri-fuels.

SCR 100 (Nunez) Requests that Congress use its resources to study the foreign crude oil industry and the extent to which it is subsidized and to study the impact of foreign-subsidized refined products on the U.S. refining industry

SCR 104 (Nunez) Expresses legislative intent that oil refinery waste gas shall be valued at 52' per thousand cubic feet for purposes of sales and use taxation

SCR 118 (Nunez) Requests the Department of Natural Resources to study the current natural gas market and report to the House and Senate Natural Resources committees, prior to the 1986 Regular Session, on opportunities and problems

SCR 119 (Nunez) Continues the La. Energy Development Committee and increases its membership from 18 to 21 The Committee is to provide advice to the state on energy policy and issues

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RECENT DECISIONS - ALABAMA
Cater v. Coxwell
479 So. 2d 1181 (Ala. 1985)

This case involves the exempt property and allowances article of the Alabama Probate Code. Ala. Code §§ 43-8-110-114 (1975).

John Knight died testate, leaving a widow and four children. His widow died intestate approximately three months after his death. Mr Knight's will was probated shortly after his widow's death. It left his wife a life estate in their home and furnishings, with remainder over, plus the residue of the estate, to one child. The other children attempted by this suit to have the court declare that Mrs. Knight's estate is entitled to the homestead and exempt property allowances provided by the probate code

The Alabama court, noting a decision to the contrary in Montana, held that the allowances are elective and that a surviving spouse must exercise this right during his or her lifetime. Therefore, this right was not vested in Mrs. Knight's estate and it cannot be claimed after her death.

A.L. Sage, MLU Editor

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AN ANALYSIS OF FORCE POOLING/RISK COMPENSATION LAW IN MISSISSIPPI

By Michael P. Mills*

Mississippi historically ranks among the top len oil and gas producing states in the United States. The oil and gas industry is a major contributor of jobs and capital in Mississippi; oil and gas severance taxes are annually the fifth or sixth major source of tax revenue in our state This ranking does not include spin-off tax revenues from oil and gas production such as corporate and personal income taxes, sales taxes, and other secondary sources of revenue Thus, it is important to the economic well-being of this state that we strive to provide a stable and competitive environment for the production of oil, gas and other minerals in Mississippi. The major contribution from the 1984 Mississippi Legislature toward sustaining a stable business climate for the oil and gas industry was the passage of House Bill 324, now codified as Section 53-3-7 of the Mississippi Code of 1972, as amended. House Bill 324 is a revision of the former force-pooling law in Mississippi and represents an attempt to protect the rights of all parties to share in the economics of oil and gas production in this state

This writer suspects that most laymen are only vaguely familiar with the concept of force-pooling Therefore, a short discussion of the history and some of the terms of oil and gas production is in order.

Modern oil and gas production in the United States began in Pennsylvania in the late 1800's Obviously, the early wildcatters did not have access to our modern geological and seismological data and equipment. The courts had even less insight into the nature and essence of oil and gas production. The early courts compared the fugitive nature of oil and gas with ferae naturae. Simply stated, the courts attempted to apply the same laws to oil and gas which they applied to wild animals and water. This logic produced the "Rule of Capture": if the wild animal was on a landowner's property, it wasn't his until he captured it.

The Rule of Capture is unsuited to modern oil and gas development A thorough understanding of modern reservoir mechanics clearly contravenes the Rule of Capture. We now know that drill-site production actually drains surrounding lands, in addition to the immediate drill-site location.

The Rule of Capture also failed to compensate for other physical dynamics of oil and gas production. Successful oil and gas production is directly related to the pressure beneath the earth's surface which helps to "push" the oil and gas to the surface Oil and gas deposits are trapped in subterranean faults, which may be conceptually compared to a balloon The more holes that are placed in Ihe balloon (or fault), the quicker the pressure will be released. If the pressure is released too quickly, the producer will leave a majority of the valuable oil and gas in the ground, never to be recovered. Consequently, many of the early Pennsylvania and Texas oil fields never reached their potential due to over-production.

Prior to the adoption in Mississippi of conservation laws, the Rule of Capture was in effect. Since there was no spacing of oil and gas wells, wasteful drilling damaged our resources. To prevent wasteful production, our legislature adopted the first conservation laws in the 1930's. I like to think that these laws are designed to implement the philosophy of my oil and gas professor, Tom Mason, of the University of Mississippi Law School;

> These statutes are designed to encourage by rule of law the recovery of oil and gas in the most efficient and profitable manner, balancing and protecting the interests of the mineral owner, the lessees and the public.

Oil and gas wells are drilled by operators who must petition the State Oil and Gas Board to obtain a permit to drill a well. In pursuance of prudent and effective production, the Board will establish the boundaries of the proposed well unit This procedure is known as spacing. Most oil wells receive an 80 acres spacing, while gas wells are generally given a 640 acres spacing. The spacing may vary depending on production capabilities, geology or other factors. The acreage determined by the Board will is known as the unit.

Let us presume that our operator has received a permit to drill a 640 acres gas unit He must now determine the owners of the oil, gas and other minerals in the unit. The mineral owners will not necessarily be the surface owners. Additionally, all of the mineral owners within the unit will probably not lease to the same lessor oil company. Finally, there may be unleased acreage in the unit. Typically, a number of different companies and mineral owners will have varying percentages of ownership within the unit The lessors and unleased mineral owners are collectively known as the "working interest" owners in the unit. Hopefully, each working interest owner will agree to participate in his proportionate share of the cost of drilling the unit Since the oil and gas board has the authority to establish the boundaries of the units drilled, the Board actually determines who the operator's partners will be.

There are numerous reasons why a working interest owner would choose not to participate in the drilling of an oil and gas well Many speculators will buy leases in a unit as an investment. Often, the speculators, known as "free-riders," never have any intention of participating in the cost of drilling the well. Under the prior law in Mississippi, they could buy a lease, refuse to participate in the cost of drilling the well and allow themselves to be

(Continued on page 5)

TRANSCONTINENTAL GAS PIPELINE CORPORATION V. STATE OIL AND GAS BOARD 457 So. 2d 1298 (1984)

Until 1978 and the passage of the National Gas Policy Act (NGPA), prices of wellhead sales of natural gas in interstate commerce were regulated by the Federal Energy Regulatory Commission (FERC) under authority of the Natural Gas Act of 1938. Under the NGPA certain gas was "deregulated," that is, it was no longer subject to price regulation by FERC. The primary issue of this case is whether or not NGPA "continues in effect this federal preemption with respect to wellhead sales of *deregulated* natural gas."457 So. 2d at 1304 (emphasis by the Court).

At the heart of the case is the issue of drainage and the Oil and Gas Board's (Board) Rule 48; "Each person now or hereafter engaged in the business of purchasing oil or gas from owners, operators, or producers shall purchase without discrimination in favor of one owner, operator, or producer against another in the same common source of supply." While it is difficult to briefly summarize the facts, suffice it to state that Transcontinental (Transco) in May, 1982, had begun to buy gas belonging to certain "non-contract producers", i.e. those with whom it did not have a gas purchase contract. However, it continued to buy the gas of non-contract producers from another operator, this because of certain provisions of the latter's contract with Transco. Although the gas fields being operated by the different operators had been separately designated - the Greens Creek Field and the East Morgantown Field - both the Board and the Court found that the Harper Sand formation from which the gas was being produced in both fields underlay both fields. To be more accurate, there was only one "pool" and production from one field would "drain" the other.

Getty Oil Company (Getty) and Florida Exploration Company (Florida) operated at least six wells producing from the Harper Sand. There were many other interest owners who did not have contracts, but whose gas was purchased by Transco under contracts with one of the above operators. (There were other operators who had contracts with Transco but these are not discussed beyond a representative listing).

Due to the "gas glut", Transco began to cut back on purchases of the gas of non-contract producers in 1982. The cutbacks included such gas from the Getty and Tomlinson wells, but not the Florida wells. Transco offered these producers a contract, but some refused because the terms included a significant price decrease, a price adjustment or "market-out" clause, and the nomination of a single seller's representative for each well. The outcome was the reduction in the rate of production in these wells to rates below the maximum efficient rate of flow of the wells. The Florida wells continued to be produced at their respective allowables.

This situation produced two results. Some owners could produce more than their just and equitable share of production from the pool, and others would have more difficulty in producing since pressure would be lowered.

Coastal Exploration, Inc. (Coastal) filed a petition with the Board asking that Transco be ordered to comply with Rule 48 by ratably taking gas and purchasing without discrimination in favor of the operators, Getty and Tomlinson. The Board, by Order No. 409-82, so directed Transco. Transco appealed to circuit court which upheld the Board's order.

The Court's opinion consists of the rejection of three of Transco's arguments and agreement with one. The three arguments rejected concern the validity or constitutionality of Rule 48, the statutory authority of the Board to promulgate the rule, and alleged errors in the Board's hearing of the case. The argument accepted was that the Board lacked the authority to regulate prices or proscribe price discrimination.

Only the first rejected argument is of real significance and it is four-pronged. Transco argued that Rule 48 was invalid because it violated the Supremacy Clause and the "negative" Commerce Clause of the U.S. Constitution and the Due Process Clause of the Fourteenth Amendment of the Constitution. The due process argument consists of two of the four prongs: the void-for-vagueness doctrine and the prohibition against taking of property without compensation. These two theories receive little attention from the Court, and to shorten what is fast becoming long-winded, will reseive no attention here.

The Supremacy Clause, in effect, prohibits state regulation in an area which has been pre-empted by federal law. Pre-emption can be found by explicit federal enactments on the subject, such pervasive regulation of the area that federal regulation is obviously intended or a decision that the subject or area not be regulated at all.

Since the gas in question was deregulated by the NGPA, the Court essentially held that there was no longer any federal regulation of the area and that the state was free to regulate deregulated gas under the ratably taken provisions of Rule 48. Prior to the NGPA, federal regulation under the NGA, through FERC, pre-empted Rule 48.

The reason for the deregulation of gas under the NGPA was that artificially low prices had discouraged gas production for interstate sales. The intent of the NGPA was that certain gas never be subjected to regulation, and "that message is decisive of the pre-emption issue in the case." 457 So. 2d at 1316. Although FERC retained regulatory authority if wellhead prices were passed through to consumers, the Court found that such authority was triggered by a regulatory finding that such prices resulted from fraud and collusion. However, though a price may ultimately be determined to be excessive by FERC, this had no bearing on whether the price was just and reasonable between the pipeline and producers, the real issue here.

The Court then turned to the "negative" pre-emption issue, that is, whether the decision not to regulate certain gas prices has as much pre-emptive force as a decision to regulate. This would seem to be the heart of the entire case since the intent of the NGPA was to remove federal regulatory authority over certain gas sales. The reason behind this decision is that the *national* interest dictates uninhibited production of natural gas, although the consumer would eventually pay the price for an assured adequate supply.

The Court answered this argument by slating it would have been simple for Congress, if such was its intent, to prohibit state regulation of natural gas production, and the subsequent wellhead sales of such gas. Therefore, the purpose of the NGPA, must have been to remove only federal regulation and thus state regulation is not pre-empted.

In considering the "negative" Commerce Clause, the Court discussed briefly the development of a grant of authority to Congress to regulate interstate commerce into a barrier to the enforcement of laws which favor in-state interests, hence the "negative" Commerce Clause. Noting that the contemporary test requires a balancing of the effects of a law on interstate commerce against the local benefits, the Court considers the impact of ratable taking and the supposed local benefit of Rule 48.

The impact of requiring ratable taking would be higher gas prices, but the Court states that this is a result of gas deregulation. Further, higher consumer prices in other states is in itself not sufficient to invalidate a state law or regulation. The argument that more gas has to be taken from Mississippi than Louisiana or Texas is fallacious since both of these slates have ratable taking regulations in effect. The burden, said the Court, is on Transco rather than interstate commerce; it made its bed, now it must lie in it. Its own contract requires it to ratably take gas, since the contract is the only thing that requires it to take at all.

The problems here centered around Transco's take or pay provisions. Since it must pay for the gas it contracted for, it is now in the position of paying for nothing, or paying (something) for all. The Court declined "to relieve a party to a freely negotiated contract of the burdens of a provision which becomes more onerous than had originally been anticipated," 457 So. 2d at 1322.

All this led the Court to hold that there is no impermissible burden on commerce. Thus, it rejected Transco's argument that the Board should have issued a ratable production order rather than a ratable take order This, Transco argued, would have been a less discriminatory alternative, a consideration required by the contemporary balancing test for interstate commerce cases. (The Court did noi explain what a ratable production order would do.) The Court states that first it must be found that the regulation in question produced an unreasonable burden on commerce, and the only unreasonable burden is on Transco - not all interstate pipelines - because of a bad business decision.

The Court next discussed an argument that Rule 48 is void for vagueness. The Court replied that although the rule may be written in general terms, the terms have clear meanings and are susceptible of providing sufficient guidance to the intent of the rule.

Transco also argued that Order No. 409-82 was a taking of property without adequate compensation The Court did not discuss Transco's theory

(Continued on page 5)

DEFINITION OF "OTHER MINERALS": *NOSER И UNITED STATES STEEL CORP.* BY PHIL JARRELL* 676 S.W. 2d (Texas 1984)

The Texas Supreme Court decision in 1984 in the case of *Moser v. U.S. Steel* may shed new light in the area of the meaning of the term "other minerals" However, before looking at *Moser*, it would be helpful to explore the background of earlier Texas decisions in this area.

Kuntz's "manner of enjoyment" test formed the basis for same of the earlier Texas decisions. This test is based upon the general intent of the parties when no specific intent is evidenced in the language of the instrument Kuntz suggested that when no qualifying language is present courts considering general grants or reservations should look at the general intent of the parties This intent can be detailed by approaching the purpose of the mineral grant or reservation in terms of the manner of enjoyment that each party can reasonably expect from his estate. Generally, an owner's enjoyment of a mineral estate is through the extraction of valuable minerals. The enjoyment of a surface estate is not through the extraction of valuable minerals.

The Texas Supreme Court first adopted a variation of Kuntz's "manner of enjoyment test" in the decision of *Acker v. Gwinn,* 464 S.W. 2d 348 (Texas 1971) In *Acker* an interest in iron ore was conveyed by a deed of "an undivided 7r interest in all oil, gas and other mineral in and under" a specific tract of land. The court held that the iron ore remained with the surface estate The substance could only be removed by a process that would destroy the surface estate. Since the removal of the iron ore would effectively destroy the surface, the court rationalized that the parties could not have intended iron ore to be included in the covenyance Thus *Acker* appears to have formulated a "surface destruction test" to determine what is included in the term "other minerals".

The *Acker* test was further discussed in *Peed I (Peed* v *Wylie)* 554 S.W 2d 169 (Texas 1977) and *Peed II (Peed v. Wylie)* 557 SW. 2d 743 (Texas 1980) In *Peed* I and II, the grantor reserved a one-fourth interest in "all oil, gas and other minerals on or under the land". The issue was whether or not this language covered coal and lignite. In *Peed I* the court applied the substantial surface destruction test and remanded the case to lower court for a factual determination of the depth of the lignite. The trial court held for the mineral owners but the appellate court reversed and held for the surface owners. Thus, the situation came before the Texas Supreme Court again in *Peed II*. The Court at this time modified its decision in *Peed I* and held that a substance near the surface, such as coal or lignite, is a part of the surface estate if it is shown that any reasonable method of production, at the time of conveyance or anytime thereafter would consume, deplete or destroy the surface.

After *Peed II,* the surface owner in Texas appeared to have two ways to prove ownership to valuable substances that he at or near the surface First, if a surface owner can prove that the valuable substance lies at the surface, i.e, at a depth shallow enough that it must have been contemplated that its removal would be by a surface destructive method, then he could win on a summary judgement and would own the mineral at whatever depth it is found. If the surface owner failed to meet this burden, then he could at trial show proof that any reasonable method of extracting the valuable substance found within 200 feet of the surface would substantially destroy the surface If he is successful at trial, he will retain ownership of that mineral at whatever depth it may be found

The latest development in this area of oil and gas law occurred in *Moser,* a suit to quiet title to an interest in uranium ore. The task facing the Court was to determine whether uranium was included in a reservation or conveyance of "oil, gas, and other minerals" The Mosers, plaintiffs, and the Gefferts, defendants, own neighboring tracts of land in Live Oak County Prior to 1949, the boundary between the Moser's land and that of the Gefferts was a winding road. In 1949, the road was straightened and, as a result, no longer represented the true boundary between the two ranches The new road separated a 6.77 acre tract of the Geffert ranch on the Moser's side of the road and a 6.42 acre tract of the Moser ranch on the Gefferts side of the road. To avoid crossing the highway to reach their tracts, the Moser's predecessor in title and the Geffert's executed similar deeds conveying lhe surface states of the isolated tracts to the other party. The 1949 deeds contain identical language reserving:

> [A]ll of the oil, gas and other minerals of every kind and character, in, on, under and that may be produced from said tract of land, together with all necessary and convenient easements for the purpose of exploring for, mining, drilling, producing and transporting oil, gas or any of said minerals

Substantial quantities of uranium were discovered on the 6.77 acre tract. The Mosers, as surface owners of the 6.77 acre tract, sued the Gefferts to establish ownership of the uranium. The Gefferts, as owners of the mineral estate under the 6.77 acre tract, counterclaimed to establish that uranium is one of the "other minerals" reserved from the coveyance of the surface.

The trial court in Moser held that based on *Peed I* that the uranium was part of the mineral estate retained by the Gefferts in the 1949 deed. The Mosers appealed to the court of civil appeals, which held the *Peed II* should govern and affirmed the judgement of the trial court. The Texas Supreme Court noted that under the *Acker* and *Peed* test, it could not be determined from a grant or reservation alone who owned an unnamed substance and concluded that determining ownership of minerals under these tests had resulted in title uncerlamty.The court wenl on to abandon, "in the case of uranium," the *Acker* and *Peed* approach to determining ownership of "other minerals" and held that title to uranium is held by the owner of the mineral estate as a matter of law. The court also held that a severance of minerals in an oil, gas and other minerals clause includes all substances within the ordinary and natural meaning of that word "whether their presence or value is known at the time of severance" Uranium is a mineral within the ordinary and natural meaning of the word minerals and in *Moser* was retained in the Gefferts' conveyance of the 6.77 acre tract to the Mosers However, the court emphasized, that it would continue to adhere to its past decisions which held that the certain substances such as limestone, near surface lignite and coal, shale and gravel belong to the surface estate as a matter of law.

Once the court concluded that the mineral owner had title to the uramium, it then dealt with the issue of reasonable use of the surface estate by the mineral owners. The court held that when dealing with the rights of a mineral owner who has taken title by a grant or reservation of an unnamed substance, such as the uranium, the liability of the mineral owner must include compensation to the surface owner for surface destruction. A mineral interest owner's right to use of the surface is not affected and would be governed by lhe "due regard" or "accomodation" doctrine, when the surface owner is also making use of the surface and such use is incompatible with mineral extraction.

When dealing with named substances, the Court stated that the prior rules of liability applied. Thus, a mineral owner would be liable for only negligently inflicted damage to, or excessive use of, the surface This was logical because of the obvious expectations involved as to surface use.

As a result of *Moser,* uranium and any other substance within the ordinary and natural meaning of the term " mineral" whether their presence or value is known al the time of the severance, is included in the mineral estate as a matter of law. Undoubtedly, lhe confusion in area of titles as a result of *Acker* and *Peed* should clear up considerably Now the confusion will center around the "ordinary and natural meaning of the term mineral"

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RECENT MISSISSIPPI CASES

SEISMIC PETROLEUM SERVICES, INC. V. RYAN 450 So. 2d 437 (1984)

This case is a trespass case involving the running of a seismic line across appellee's property. Statutory and punitive damages were awarded by the lower court for the cutting of trees by the seismic crew. This summary is included because the case illustrates the necessity to obtain a landowner's permission for a seismic survey of his property.

The evidence showed that the seismic company had requested Ryan's permission to run the survey. Ryan responded by authorizing entry on his property to determine the location of the line, but told the seismic company not to actually run the line without further permission. Ryan then discovered the crew on his property actually running the line and sent his son to warn them not to continue. The crew apparently came back on the property and continued their work. Ryan's son sent a deputy sheriff to the site, and the deputy arrested two workers. Subsequently, the deputy received another complaint and discovered additional work had been done.

At the trial, the seismic company's vice-president testified that it thought it had verbal permission to enter the property. Conflicting testimony was introduced as to the number, type and value of the trees cut the seismic crew The jury awarded $180.00 actual damages for the trees cut, $3,300 statutory damages (60 trees at $55.00 per tree) and $12,500 in punitive damages

On the issue of good faith in the seismic crew's entry onto the property, the Court staled the seismic company must show its trespass was not wilfull or resulted from wantoness or recklessness. The Court held that the evidence was overwhelming that the trespass was wilfull. The plaintiff was not required to show wilfullness to recover the statutory penally, only that the trees were cut without the owner's permission. Since the trespass was wilfull, Ryan was also entitled to have submitted to the jury the issue of punitive damages. The statutory remedy is not exclusive, and the jury's award of punitive damages was affirmed.

GADD V. STONE 459 So. 2d 773 (1984)

This recent adverse possession case illustrates the difficulties that sometimes arise with "boundary" fences There are situations in which a fence is correctly deemed a "flag of possession," but generally those situations occur when a fence is built by the party asserting adverse possession and it *encloses* property of his neighbor. In this case the fence was built east of the actual boundary line (the opinion says west, but the survey in the appendix shows it east of the boundary line) to allow a road to be built on higher ground The fence thus became a pasture fence, not a boundary fence. The fence was built by the appellant's predecessor in title, off the true boundary line as a courtesy to appellee's predecessor in title. Thus the appellee's predecessor in title did not enclose the land with the fence

The opinion also discusses briefly the basic elements of adverse possession, and the Court held that the appellee's possession did not meet the test. The doctrine of adverse possession requires that possession must be "actual, adverse, hostile, exclusive, peaceful, uninterrupted and continuous, under claim of ownership, open, notorious, and visible for the statutory period of ten years." 459 So. 2d at 774

The property in dispute was a road which had been jointly used by the parties until 1980, shortly before suit was filed The Court held that possession was "joint or scrambling," and thus not exclusive. 459 So. 2d at 774 Also, the evidence showed that at the time the appellees became aware of the true boundary, the appellants removed the fence and told appellees to keep using the road The Court held that the appellees' possession was permissive until the dispute arose in 1980.

Since the fence was not a true "boundary" fence and the appellee's possession of the property in dispule did not fulfill all the elements of adverse possession, the case was reversed and rendered.

BOURN V. TOMLINSON INTERESTS, INC. 456 So. 2d 747 (1984)

Appellants had sued, asserting a one-sixteenth royalty by virtue of reservation in a mineral deed purporting to convey "an undivided fifteen-sixteenths (15/16) interest in, and to add of all oil, gas and other minerals" in certain land in Lawrence County. This deed was given by appellants' predecessors in title, who had also previously conveyed an undivided one-half mineral interest in the same property.

The Court upheld the lower court's ruling that the attempted one-sixteenth reservation was ineffective. The grantor's interest was only one-half at the time of the conveyance in which the reservation was purportedly made. The reservation, if given effect, would leave the second grantee nothing. (There apparently was a producing well on the property, presumably the royalty paid was one-eight). The Court held that "when grantor conveys by warranty a greater mineral interest than he actually owns, any attempted reservation will first be applied to the overextended fraction of the interest " 456 So. 2d at 749.

COVINGTON COUNTY V. PAGE 456 So. 2d 739 (1984)

This case involved a title dispute to forty acres in Covington County. The county asserted title through a foreclosure in 1913. The appellees claimed the land through a tax sale in 1921. In 1940 the county had given a quitclaim deed to appellees' predecessor in title. For each of the sixty-eight years from the tax sale to the date of the trial, the county had collected taxes on the property. In the interim, the only claim to title made by the county was a 1975 oil and gas lease to Union Oil

The Court did not decide the case on the the validity of either of the parties claims to title to the property, but stated that the doctrine of equitable estoppel was applicable. It recited the three elements of the doctrine: "(1) belief and reliance on some representation; (2) change of position as result thereof; and (3) detriment or prejudice caused by the change of position." 456 So. 2d at 741

The Court first held that the doctrine could be used as a defense against the county's assertion of title. The collection of taxes and its assertion in the quitclaim deed that it claimed no interest in the property were sufficient representations that were relied upon by others. The appellees and their predecessors in title had acted on these representations lo their detriment. The county therefore was estopped to assert any claim to the property

The Court also rejected the argument that the quitclaim deed violated section 95 of the Mississippi Constitution which prohibits transfers of land for insufficient consideration. The Court stated that the county asserted that it had no interest at all in the property thus the land was not "donated" in violation of the Constitution.

RECENT LEGISLATION - LOUISIANA*

ACT 201 Provides the state with authority to sell natural gas in-kind gas, permits the Mineral Board to set the sale price for in-kind gas; provides that in-kind gas will be used for bona fide human needs

ACT302 Provides that each mineral lease entered into by the Mineral Board identify the leased land by section, township, and range, whenever ascertainable.

ACT303 Provides that a mineral lease must include the lessee's complete address; makes lessee responsible for informing lessor of any subsequent address changes, provides for making the Secretary of Slate the lessee's agent when lessee is unable to be reached by certified mail.

ACT345 Provides for determination of costs and cost recovery for owners within pooled units; provides for risk charges, limits risk charges to tracts subject to an oil, gas, and mineral lease; provides that production expenses and risk charges shall not apply to royalty portions, effective date of 1/1/85

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An Analysis . . .

(Continued from page 1)

force-pooled. If ihe well was a dry hole, the free-rider lost only the bonus and delay rentals which he had paid to the mineral owner. If the well produced, the free-rider would come "back-in" after the well had produced 100% of the production attributable to the nonconsenting owner's interest in the unit. There was no risk compensation or penalty provided for the operator and the other paying interest owners.

In addition to the free-riders, other working interest owners have reasons for not participating in a drilling venture. Most of the leases in the Black Warrior Basin, with which I am familiar, are on a common lease form known as the Producers 88. These leases generally hold that production on any part of the leased lands will hold the full lease intact beyond its primary term. Thus, if a lease covers 100 acres and 10 acres of the lease are in a drilling unit, production or operations in the drilled unit will hold the entire lease. Consequently, there may be no incentive for the producing oil company to drill an adjacent well covering the additional 90 acres. The mineral owner would thus receive royalty payments on only the 10 acres in production and he would be unable to lease his remaining 90 acres to another oil company In this situation, the lessor's oil company, with an existing producing well, could control adjacent acres and prevent other companies from drilling wells off setting the producing well.

House Bill 324 provides the operator with an alternative means of forcing the nonconsenting working interest owners to share in the risks of drilling wells in Mississippi. This bill also provides a greater incentive for operators to drill off-set wells since the nonconsenting owners will face a greater penalty if they choose not to participate House Bill 324 leaves the former force-pooling procedure intact but provides "alternate charges" if certain prerequisites are met The alternate charges provided by the new statute include:

- 100% of the cost of operating the well;
- 100% of newly acquired surface equipment beyond the well head connections;
- 250% of the cost of drilling, re-working, deepening, plugging back, testing and completing the well.

In the event that the well is a dry hole, then the nonconsenting owners will not be penalized. The alternate charges must come out of production from the drilled unit.

The former force-pooling statute did not provide for payment of production to the lessor royalty owner. The new statute protects the royalty owner up to a 3/16th royalty. In the event of production, the operator, or purchaser, of production, must pay the lessor of any "leased interest" the royalty provided for in such lease up to 3/16th unless there is a reasonable question as to the merchantability of the title. This clause was added to House Bill 324 to compensate the royalty owner whose lessee refused to participate.

The operator must meet certain prerequisites before he may force-pool an interest in a unit. Prior to filing a petition to force-pool a nonconsenting interest, the operator must make a good faith effort to negotiate with each nonconsenting owner to have such owner's interest voluntarily pooled in the unit The operator must determine the address of each nonconsenting owner and notify such nonconsenting owner of the names of all owners who have voluntarily agreed to the intergration. The operator must also give written notice of the proposed operation, specifying certain relevant information, to the nonconsenting owner. Further, the operator must offer each nonconsenting owner the opportunity to lease or farmout on reasonable terms or participate in the developmental cost of the well. In the event that a nonconsenting owner is force-pooled, such owner has 20 days after the pooling order is filed for record to elect to participate voluntarily in the unit.

Prior to seeking a force-pooling order, a majority of the drilling interest owners in a proposed unit must voluntarily consent in order to file for alternate charges In the event an order for alternate charges is issued, operations must commence within 180 days.

The new bill also contains provisions to protect the nonconsenting owner from exorbitant costs The pooling order issued by the oil and gas board must provide that the well be drilled on a competitive contract negotiated on an arms length basis. Additionally, the operator may not seek alternate charges on more than two drilling units, when such units are offsets to one another. The operator may not seek alternate charges on an additional unit until he has drilled, tested and completed the first two wells as producers or dry holes, or, if one or both of those wells are not drilled, until the well permits have expired. This part of the statute is designed to prevent an operator from drilling a discovery well and then force-pooling the nonconsenting owners on three or more additional units at the same time. It was the legislature's intent to allow each nonconsenting owner a reasonable amount of time to compile relevant facts and information before deciding on whether to participate in further development.

House Bill 324 represents an enlightened attempt in the Mississippi Legislature to fairly protect the rights of both the lessor and lessee in mineral exploration in Mississippi. It is hoped that the new force-pooling statute will make Mississippi more competitive with our neighbors in encouraging outside businesses to invest their exploration capital in our state.

"Michael R Mills is a state representative from Aberdeen where he practices law. He was the House floor manager for HB 324.

Transcontinental . . .

(Continued from page 2)

other than to say that Transco argued that the Board's action was an arbitrary and unreasonable exercise of the police power. The Court disagreed with Transco, basing its holding on the rule that a taking is unlawful if it bears no reasonable relation to a legitimate governmental purpose or is otherwise arbitrary. It stated that the state has a completely legitimate interest, the protection of the correlative rights of oil and gas owners. Therefore there was no taking of property.

The statutory authority of the Board to promulgate Rule 48 was also attacked. The Court holds that it is clear from a reading of the Oil and Gas Conservation Act, § 53-1-1 *et. seq.,* that the legislature expressly gave the Board the authority to promulgate regulations such as Rule 48. Morever, the Court held that the Board has implied authority to make regulations to carry out statutory mandates. The freedom to contract is not unqualified and is subject to the police power of the state. Thus, Transco's right to contract with only part of the owners of the various interests is subject to the power of the state to require it to take gas ratably from each of the owners. Taking ratably means taking on a pro-rata basis according to the percentage of takes from that producer the highest percentage of whose interest Transco takes.

However, the Court agreed with Transco on the power of the Board to fix a price for gas it must take under Rule 48. While it is not clear from the order if the Board attempted to require Transco to purchase gas without discrimination as to price, the order was broad enough that the Court felt it necessary to answer this question. Although the Court felt it beyond question that the state could authorize the Board to set prices, it did not find sufficient authorization granted to the Board.

It held that Transco can not offer a totally unreasonable price because that is not ratably taking. Transco must offer in good faith reasonable terms, relating to prevailing market and other economic conditions.

Other assignments of error were rejected and the judgement affirmed in part and reversed in part.

Recent Legislation - Louisiana

(Continued from page 4)

ACT 559 Requires mineral lessee to notify lessor of the expiration of a lease within 90 days of the expiration of production which had maintained the lease and the expiration of all other rights to maintain the lease.

ACT 562 Provides for nonpayment of severence tax for a tertiary recovery project until the project has reached payoff from total production of investment costs, expenses for tertiary project, and interest; defines qualified tertiary recovery project,

ACT 768 Provides new definition of "pool"; provides that the Assistant Secretary of the Office of Conservation of the DNR can order the unit operation of any pools in the same field; defines "royalty owners" and "owner".

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MINERAL LAW UPDATE

This newletter is a quarterly publication on issues concering mineral law, particularly those relating to oil and gas in Mississippi, Alabama and Louisiana Its primary purpose is to help lawyers and landmen stay current on legal developments in their field.

If you would like to receive future issues of Mineral Law Update free of charge, please sent your name and mailing address to: Mineral Law Program, University of Mississippi Law Center, University, MS 38677. We welcome suggestions for topics and contributions of material for publication. The latter should not exceed twelve double-spaced, letter-sized pages. Comments on previously published material will be published as space permits.

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Mississippi Oil and Gas Lawyer's Association

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THE BEGINNING

This newsletter is the first issue of what is hoped will be a useful tool for oil and gas lawyers and petroleum landmen. It is intended to be a means of informing the reader of recent developments in the law, and to examine some issues at length In order to insure the timeliness of topics and the accuracy of material, the editor asked the state associations of these two groups for assistance. Both organizations have generously agreed to help in providing material and expertise to this effort. Indeed, the publication of this newsletter probably could not succeed without their help.

Although this will be a cooperative venture coordinated through the state assiciations, individual contributions are welcome. Articles should not exceed twelve double-spaced, letter-size pages; this equals about three newsletter pages. Shorter articles are also encouraged, as well as case summaries, conference and meeting notices and miscellaneous information relating to the mineral industry.

Although some of the material in this issue seems dated, this should not be a problem in the future. It has taken some time to get this project "off the ground," but it is on track now. The success of this project will depend on you the reader, and we request that we hear from you when you have an opinion - positive or negative. Suggestions for improvement will be gladly received, and comments concerning published material will be passed on whenever possible

In conclusion, we would be remiss in failing to recognize the contribution of the Mississippi Mineral Resources Institute. The MMRI is the primary financial backer of this publication through a grant to the editor. The primary objective of this grant is this publication, and we are thankful that MMRI has recongized the contribution that this newsletter will make to the industry.

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