The Mineral/Royalty Conundrum

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There are numerous form deeds from the 40's, 50's, 60's and beyond, that have plagued landmen and attorneys alike for years, which ambiguously purport to convey either a mineral interest or royalty interest. The fact-specific language used in these deeds, along with mixing and matching attributes of a mineral interest, have caused confusion and misinterpretation of the resulting interest. This article will discuss the attributes of a mineral interest and their application to several of these commonly used deeds.

In Texas, a mineral fee has five basic attributes: (1) the right to execute oil and gas leases; (2) the right to develop; (3) the right to receive royalty; (4) the right to receive bonus payments; and (5) the right to receive delay rentals. Typically, if the grantee is left with one or more of these rights in addition to the right to share in production, the grantee is deemed to have a mineral fee interest. Either a deed contains language indicative of a fractional interest in the mineral fee, striped of certain attributes, or it purports to convey a royalty interest, and contains additional language transferring rights routinely associated with a mineral fee interest. One such scenario purports to convey a royalty, but also grants extensive rights of surface and subsurface use. The below-described examples provide potentially varying results.

Example 1:

Grantor conveys to Grantee "all of my right, title and interest in and to all of the oil royalties, gas royalties, and royalty in casinghead gas, gasoline and royalty in other minerals in and under, and that may be produced and mined from Blackacre, together with the right of ingress and egress at all times for the purpose of mining, drilling and exploring said land for oil, gas and other minerals and removing same therefrom."

In this scenario, the Grantor is attempting to convey all of the royalty rights, as well as the developmental rights. Only a few reported cases involve attempted transfers of strict royalty interests that specifically mention the development right in the deed. Where the description of a reserved or conveyed interest has left the owner with any attributes of the mineral estate other than the right to receive royalty (such as the executive right without the right to receive bonus and delay rentals, as in Diamond Shamrock Corp. v. Cone, 673 S.W.2d 310 (Tex. Civ. App. — Amarillo 1984, writ ref'd n.r.e.)), courts have had little difficulty holding that the interest is a mineral interest, not royalty interest. Even where an interest is referred to as a "royalty interest," it may be construed otherwise if other attributes ascribed to said interest demonstrate such an intention to convey a mineral interest. Courts will look to the language of the deed and all of the provisions as a whole in an attempt to harmonize internally inconsistent expressions and to determine the true intentions of the parties.

In Acklin, et al. v. Fuqua, 193 S.W.2d 297 (Tex. Civ. App. — Amarillo 1946, writ ref'd n.r.e.), the parties filed a trespass to try title suit to determine the type of interest resulting from the following grant:

> one-eighth of all the natural gas, oil, petroleum and substances being all the royalty, in on or under the following described lot..., together with the right to enter thereupon, open mines, drill wells, lay pipe lines and erect all structures necessary or convenient in searching for and removing any natural gas, oil or petroleum.

The court stated that there appears to be an inconsistency between the first part of the clause granting "one-eighth of all the natural gas, oil, petroleum and substances" and the following phrase, "being all the royalty." However, the court held that in determining the intention of the parties from a fair consideration of the whole instrument, it looks to the continued language in the grant, "together with the right to enter thereupon, open mines, drill wells, lay pipe lines...," finding that such language granting the right of production is in harmony with an intention to convey a mineral fee. Id.

In Williams v. J. & C. Royalty Co., 254 S.W.2d 178 (Tex. Civ. App. — Eastland 1953, writ ref'd), a deed reserved "one-half of the royalty retained" in a pre-existing lease but the deed further stated that the Grantor was given access to said lands and development rights. The Grantee argued that this reservation in the deed created a royalty interest which terminated when the existing lease terminated. However, the court disagreed and emphasized that the retention of the development rights by the Grantor evidenced an intent that the interest reserved would survive the termination of the existing lease. The court also indicated that the reserved interest was a mineral interest even though the parties used the term "royalty interest." Id. at 180.

In the case of Prairie Producing Co. v. Schlachter, 786 S.W.2d 409 (Tex. App. — Texarkana 1990, writ ref'd), the original deed purported to transfer "one-half of the oil, gas and other minerals in and under and that may be produced" to the Grantees, with a granting clause specifically conveying the development right. The deed contained a "subject-to" clause because of an existing lease in favor of the Grantee which conveyed one-half of all royalties under the lease except for the right to receive delay rentals and bonus. There was also a "future lease" clause which had a similar disposition of the component parts of the benefits under the lease, i.e. one-half of the royalties, but no bonus or delay rentals. Id. The deed, however, did not mention the executive rights. As successors in interest to the Grantor, the Schlachters sued the lessees of the Grantee, claiming that the deed only transferred a royalty interest.

Disagreeing with the Schlachters, the court found that the deed transferred an interest in the mineral estate because the parties used the traditional words to describe a mineral estate, "in and under and that might be produced," and titled the instrument "Mineral Deed." Applying the "greatest interest" canon, the court agreed that in the absence of language to the contrary, all sticks contained within the bundle of what is considered a mineral interest are conveyed. The Grantors in Schlachter expressly conveyed the development right and the right to receive royalty, and by application of the canon, therefore impliedly transferred the executive right. The reservation of the rights to receive a bonus and delay rentals is not inconsistent with the conveyance of a mineral interest and does not relegate the interest conveyed to a mere royalty interest. Altman v. Blake, 712 S.W.2d 117 (Tex. 1986). The Schlachter court further stated that the rights expressly granted and reserved, i.e. the right of ingress and egress for the purpose of mining and drilling, would, in fact, be inconsistent with the conveyance of a mere royalty interest.

The aforementioned cases seemingly stand for the premise that a strict royalty interest cannot simultaneously own the right to develop, as is the case in Example 1; therefore it is possible that a court of competent jurisdiction would conclude that a mineral interest was conveyed therein, despite the title and use of the phrase "royalty interest." However, it is entirely possible that a different conclusion could be reached for various reasons.

Example 2:

Grantor conveys an undivided one-sixteenth (1/16) interest in and to all of the oil royalty, gas royalty, and royalty in casinghead gas, gasoline and royalty in other minerals in and under, and that may be produced and mined from Whiteacre, together with the right of ingress and egress at all times for the purpose of mining, drilling and exploring said land for oil, gas and other minerals and removing the same therefore. In addition, the deed states that the Grantee does not by these presents acquire any right to participate in the making of future oil and gas mining leases....nor of participating in the bonus or bonuses which Grantor herein shall receive for any future lease, nor of participating in any rental to be paid for the privilege of deferring the commencement of a well under any lease, now or hereafter.

The deed further states that in the event Grantor, or as in the status of the fee owners of the land and minerals, or as the fee owner of any portion of said land, shall operate and develop the minerals therein, Grantee herein shall own and be entitled to receive as a free royalty hereunder, (1) an undivided 1/128 of all the oil produced and saved...to Grantee's credit free of cost..., (2) 1/128 interest of the value or proceeds...of natural gas, and (3) 1/128 of

the net amount of gasoline produced from the wells.

The initial granting language contained in Example 2 is very similar to that in Example 1, but further clarifies the intent of the grant to exclude the Grantee from obtaining any executive rights or the rights to receive bonuses and delay rentals. As discussed above, the court in Schlachter stated that a royalty owner has no right to explore and drill. The court further provided that if a royalty interest had been intended, there would be no need to reserve rentals and bonuses, because a royalty interest does not share in bonuses and rentals unless the conveyance or reservation specifically provides otherwise. Schlittler v. Smith, 128 Tex. 628, 101 S.W.2d 543 (Tex. Comm'n App. 1937, opinion adopted).

To complicate matters, Example 2 contains additional language stating "that in the event Grantor, or as in the status of the fee owners of the land and minerals, or as the fee owner of any portion of said land, shall operate and develop the minerals therein, Grantee herein shall own and be entitled to receive as a free royalty hereunder, (1) an undivided 1/128 of all the oil produced and saved...to Grantee's credit free of cost..., (2) 1/128 interest of the value or proceeds...of natural gas, and (3) 1/128 of the net amount of gasoline produced from the wells" (emphasis added). In the interest of trying to harmonize the varying provisions contained in the deed, this language should be taken into account as to the ultimate intentions of the parties.

However, the court in Alford v. Krum has stated that if other paragraphs in a deed could be construed to be in conflict with the granting clause, it would not be permissible to give them controlling effect and thus overturn the clear and explicit intention of the parties as expressed by the controlling language, the granting clause. 671 S.W.2d 870 (Tex. 1984). The question in this instance is whether the granting clause is clearly attempting to convey a mineral fee as opposed to a royalty.

In Watkins v. Slaughter, 144 Tex. 179, 189 S.W.2d 699 (1955), the deed that was subject to the litigation therein granted a 15/16 mineral interest and reserved a one-sixteenth (1/16) interest, using a traditional mineral estate description. The deed also conveyed the executive right, along with the right to receive bonus and delay rentals to the Grantee, similar to the intended reservation by the Grantor in Example 2. Under these circumstances, the court in Watkins held that only a royalty interest was reserved. Because the Grantor was denied the authority to lease, along with the right to bonuses and delay rentals, and especially because the deed "announced unequivocally" that the Grantor would "receive the royalty retained herein only from actual production," it was obvious that the parties considered the reserved interest to be a royalty. Id at 700. The deed in Watkins however, did not mention the right of development.

As one can see, there are varying results in cases attempting to decipher the mineral-royalty distinction depending on what mineral estate attributes are conveyed or reserved. Courts will look first to the manner in which the parties expressly divided the elements to determine if the interest is a royalty interest or a mineral interest. Courts will also examine traditionally used clauses that signify one estate versus the other estate. Merely because an estate is stripped of the executive power, and the rights to receive bonus or delay rentals, the mineral-royalty issue will not automatically be resolved in favor of the royalty interest. In the interest of caution, a prudent operator should examine the entire deed and all provisions therein to determine the resulting interest, and if there is any room for doubt, a Stipulation of Interest Agreement, with present granting language, should be procured from the current heirs or assigns of the parties to the deed in question that contains a clear reflection of their ownership interests.

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