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THE ARKANSAS LAW OF OIL AND GAS*

*Susan Webber Wright***

Following is Chapter III of a multichapter short treatise on the Arkansas law of oil and gas. Other Chapters appear in Volumes 9 and 10 of the *UALR Law Journal*.*** This treatise is not intended as an in-depth analysis, but rather as a description of the current state law which, the author hopes, will be helpful to those not regularly engaged in the oil and gas law practice.

CHAPTER III

CONVEYANCES OF OIL AND GAS INTERESTS BY DEED

This chapter concerns transfers of oil and gas interests by deed. First, interpretation problems are addressed, including the *Strohacker* Doctrine by which Arkansas courts determine what is meant by a grant or reservation of "minerals." Next is a discussion of decisions on the *Duhig* Rule in Arkansas. Following are discussions of several construction problems, including whether a deed conveys a mineral or a royalty interest, and the intended duration of a royalty interest conveyed. Finally, this chapter focuses on issues arising from a form of royalty deed commonly found in Arkansas.

As noted in Chapter I, the owner of a severed mineral interest has an implied right of reasonable use of the surface for the purpose of developing the minerals. This right is apparently the same as the right of a mineral lessee to reasonable use of the surface.¹ The nature and extent of this right, as well as liability for unreasonable surface use, is treated in Chapter IV on leases.

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*** Chapters I and II concern the Nature of Oil and Gas Interests and Multiple Ownership of Oil and Gas Interests. Wright, *The Arkansas Law of Oil and Gas*, 9 UALR L.J. 223 (1986-87).

1. Cases on reasonable use of the surface make no distinction between the right of a mineral owner and the right of a mineral lessee. Some cases involve litigation between the mineral owner and his lessee. See, e.g., *Martin v. Dale*, 180 Ark. 321, 21 S.W.2d 428 (1929).

*The Definition of "Minerals" — the "Strohacker" Doctrine*²

The Arkansas courts, both state and federal, have on numerous occasions addressed the meaning of the term "minerals" in a grant or reservation. The rule followed is generally known as the *Strohacker* Doctrine, named for the case of *Missouri Pacific Railroad Co. v. Strohacker*,³ in which the Arkansas Supreme Court affirmed a chancery court decision that reservations of "coal and mineral deposits" in 1892 and 1893 deeds did not reserve the oil and gas. The court cited the "contemporaneous construction" rule enunciated by the United States Supreme Court in *Boyd v. United States*,⁴ and held that the intention of the grantor should be ascertained by reference to "substances commonly recognized as minerals"⁵ at the time of the conveyance.

Application of the *Strohacker* Doctrine is a tedious and litigious process, for it treats the meaning of "minerals" as a question of fact to be determined on a case-by-case basis.⁶ It is a title examiner's nightmare.⁷ Although the doctrine requires the finder of fact to give effect to the intent of the parties to the conveyance, the issue is not the parties' subjective intent. In 1958 in *Stegall v. Bugh*⁸ the Arkansas Supreme Court specifically rejected the contention that the subjective intent of the grantor should be given effect:

We think that the meaning which this court has heretofore and should hereafter give to the word "mineral," in connection with its use in situations similar to those of this case, is governed not by what the

2. Gerald L. DeLung wrote an excellent analysis of the development of the doctrine. DeLung, *The Strohacker Doctrine—An Arkansas Rule of Property*, 9 ARK. LAW. 85 (July 1975), reprinted in *Proc., 14th Ann. Ark. Oil & Gas Inst.* (1975). This section borrows heavily from the material in that article.

3. 202 Ark. 645, 152 S.W.2d 557 (1941).

4. 116 U.S. 616 (1886).

5. *Strohacker*, 202 Ark. at 656, 152 S.W.2d at 563.

6. In *Brizzolara v. Powell*, 214 Ark. 870, 218 S.W.2d 728 (1949), the Arkansas Supreme Court reversed and remanded a lower court decision that a reservation of minerals did not include oil and gas. The court pointed out that the question is one of fact.

7. Gerald DeLung has good suggestions concerning steps an attorney seeking a valid oil and gas lease should take in consideration of the *Strohacker* Doctrine. He suggests leasing from all persons claiming oil and gas under "problem tracts" and, if a claimant refuses to lease, using the receivership procedures available under Arkansas statutes. See ARK. STAT. ANN. §§ 52-201 to -213.2 (1971) (for lands owned in cotenancy) and §§ 53-401 to -409 (1971 & Supp. 1985) (for leasing of lands prior to partition). If it is necessary to make a reasoned guess concerning oil and gas ownership, he suggests gathering as much information as is available concerning oil and gas development in that county and surrounding counties so that one can determine the time when the meaning of "minerals" would include oil and gas. See DeLung, *supra* note 2.

8. 228 Ark. 632, 310 S.W.2d 251 (1958).

grantor meant or might have meant, but by the general legal or commercial usage of the word at the time and place of its usage.⁹

In 1966 the Arkansas Supreme Court again explained the doctrine in the case of *Ahne v. Reinhart & Donovan Co.*:¹⁰ "Furthermore, the intent of the parties will be determined so as to be consistent with and limited to those minerals commonly known and recognized by legal or commercial usage in the area where the instrument was executed."¹¹

As a result of *Strohacker*, the Arkansas decisions have held that the word "minerals" includes gas in a 1905 conveyance in Logan County¹² and in a 1934 conveyance in Pope County,¹³ but excludes oil in 1892 and 1894 deeds in Miller County¹⁴ and in a 1900 deed in Union County.¹⁵ Application of the doctrine is not limited to oil and gas. For example, cases have held that bauxite was not included in a mineral reservation in Saline County in 1892,¹⁶ that pulaskite (a form of granite) was not included in a 1953 mineral reservation in Pulaski County,¹⁷ but that novaculite was included in a 1940 reservation in Garland County.¹⁸

Aside from the difficulty of ascertaining what substances were generally considered "minerals" at the time and place of a conveyance, *Strohacker* might invite a court to consider evidence of other deeds in determining the intent of the parties, as a federal district court did in 1965 in *Middleton v. Western Coal and Mining Co.*¹⁹ In *Middleton*, which was affirmed by the Eighth Circuit Court of Appeals,²⁰ the district court (Judge Miller) found that a 1904 deed in Sebastian County to "the coal, fireclay and other minerals" did not include oil and gas, although the court specifically recognized that "the business commu-

9. *Id.* at 634, 310 S.W.2d at 253. A later federal court decision recognized that subjective intent is not the appropriate test for determining the meaning of "minerals." *Thomas v. Markham & Brown, Inc.*, 353 F. Supp. 498 (E.D. Ark. 1973).

10. 240 Ark. 691, 401 S.W.2d 565 (1966).

11. *Id.* at 696, 401 S.W.2d at 569.

12. *Id.* at 691, 401 S.W.2d at 565. The exact words of the grant were "all of the coal, oil and mineral." *Id.* at 691, 401 S.W.2d at 566.

13. *Singleton v. Missouri Pac. R.R.*, 205 F. Supp. 113 (E.D. Ark. 1962).

14. *Missouri Pac. R.R. v. Furqueron*, 210 Ark. 460, 196 S.W.2d 588 (1946). This case is almost indistinguishable from *Strohacker* on the facts. The railroad urged the court to overrule the *Strohacker* Doctrine.

15. *Stegall v. Bugh*, 228 Ark. 632, 310 S.W.2d 251 (1958).

16. *Carson v. Missouri Pac. R.R.*, 212 Ark. 963, 209 S.W.2d 97 (1948).

17. *Thomas v. Markham & Brown, Inc.*, 353 F. Supp. 498 (E.D. Ark. 1973).

18. *Dierks Lumber & Coal Co. v. Meyer*, 85 F. Supp. 157 (W.D. Ark. 1949).

19. 241 F. Supp. 407 (W.D. Ark. 1965).

20. *Western Coal & Mining Co. v. Middleton*, 362 F.2d 48 (8th Cir. 1966).

nity recognized oil and gas as a valuable mineral.”²¹ The court looked to contemporaneous transfers of oil and gas in Sebastian County and pointed out that in these deeds the parties had specifically referred to “oil and gas.” Thus, the court concluded that the parties to the deed did not intend to include oil and gas in a deed to “coal, fireclay and other minerals.”²² This decision and the Eighth Circuit’s affirmance have been criticized as erroneous and inconsistent with the *Strohacker* Doctrine.²³

It is correct to refer to the *Strohacker* Doctrine as a rule of law.²⁴ The Arkansas Supreme Court has refused to take other approaches in determining the meaning of the word “minerals.” A simple approach, advocated by the late Justice McFaddin, would be to include oil as a mineral in any deed after the year 1900.²⁵ Another method is *ejusdem generis*, which would include as a mineral any substance of the same genus or class as those minerals specifically mentioned.²⁶

The Texas Supreme Court applied yet another method in determining the meaning of “minerals” in *Acker v. Guinn*.²⁷ However, the *Acker* approach has little application to oil and gas because it concerns those minerals that must be mined in such a way as to destroy the surface. This approach considers whether the parties intended for the mineral owner to destroy the surface in developing the minerals. If nothing in the deed suggests an intent to grant this right, the court will not construe the deed as conveying the mineral. The *Acker* decision cited the Arkansas decision in *Carson v. Missouri Pacific Railroad Co.*,²⁸ which determined under the *Strohacker* Doctrine that bauxite was not a “mineral” in Saline County in 1892. The court in *Carson* also noted that the mining of bauxite generally destroys the surface, and concluded that the parties to the conveyance probably did not in-

21. *Middleton*, 241 F. Supp. 407 (W.D. Ark. 1965).

22. *Id.* at 423.

23. See DeLung, *supra* note 2, at 89.

24. *Id.*

25. *Stegall v. Bugh*, 228 Ark. 632, 636, 310 S.W.2d 251, 254 (1958) (McFaddin, J., dissenting).

26. This approach is discussed in Note, *Real Property—Scope of the Term “Minerals” in a Mineral Deed*, 4 ARK. L. REV. 249 (1950).

27. 464 S.W.2d 348 (Tex. 1971). In *Moser v. United States Steel Corp.*, 676 S.W.2d 99 (Tex. 1984), the Texas Supreme Court adopted a new approach, to be applied prospectively only, in determining the meaning of “minerals.” The court held that “other minerals” includes “all substances within the ordinary and natural meaning of that word, whether their presence or value is known at the time of severance.” *Id.* at 102. If the mineral in question was not specifically conveyed and if its mining results in surface destruction, the owner of the mineral estate must pay compensation to the owner of the surface for surface destruction. *Id.* at 103.

28. 212 Ark. 963, 209 S.W.2d 97 (1948).

tend for the surface to be destroyed by mining.²⁹ In a 1980 decision, *Southern Title Insurance Co. v. Oller*,³⁰ the Arkansas Supreme Court mentioned that limestone mining generally destroys the surface of the land, and held that the limestone was not generally known or regarded as a mineral in 1909, when chalk deposits were reserved, or in 1975, when a title insurance policy excluding "mineral interest leased or reserved" was issued.

The "Duhig" Rule

a. Background

The *Duhig* Rule received its name from the Texas decision in *Duhig v. Peavy-Moore Lumber Co.*,³¹ in which the grantor conveyed a tract of land by warranty deed, reserving a one-half mineral interest. The deed thus purported to convey the surface and a one-half mineral interest to the grantee. However, at the time of the conveyance the grantor only owned a one-half mineral interest, because a third party held an outstanding one-half mineral interest which the deed did not mention. Both the grantor and the grantee admitted that the third party had a one-half interest in the minerals, but each claimed ownership of the other one-half. The court held for the grantee.

The result in *Duhig* can be reached in more than one way, and the court itself was divided concerning the proper reasoning. Commissioner Smedley, the author of the opinion, took the position that the reservation of one-half of the minerals in the grantor should be interpreted as referring to the interest that was held by the third party. Thus, the deed granted and warranted to the grantee what the grantor had to convey: the surface and one-half of the minerals. Commissioner Smedley pointed out that the language of the deed did not clearly indicate that the grantor intended to reserve a one-half interest in addition to the one-half that the third party already held.³² This reasoning has been called the "one-step" approach to the *Duhig* Rule.³³

Commissioner Smedley wrote that the majority of the *Duhig* court reached the same result by "application of a well settled principle of estoppel."³⁴ According to this reasoning, the warranty in the deed ex-

29. *Id.* at 967, 209 S.W.2d at 99.

30. 268 Ark. 300, 595 S.W.2d 681 (1980).

31. 135 Tex. 503, 144 S.W.2d 878 (1940).

32. *Id.* at 506-07, 144 S.W.2d at 879-80.

33. See I H. WILLIAMS AND C. MEYERS, OIL AND GAS LAW § 311 at 580.29 (1985).

34. 135 Tex. at 507, 144 S.W.2d at 880.

tended to the surface and to one-half of the minerals, while the deed actually granted only the surface to the grantee, as the grantor reserved one-half of the minerals and the other one-half was owned by a third party. Using the analogy of the doctrine of after-acquired title, the grantor was estopped to deny that he conveyed what he warranted. This reasoning has been criticized as a "two-step theory of deed application" unique to the *Duhig* Rule and otherwise unknown in rules governing construction of deeds.³⁵

Some jurisdictions have adopted Commissioner Smedley's approach, while others appear to follow the approach of the majority of the *Duhig* court by relying on estoppel and the breach of warranty.³⁶

b. Cases rejecting *Duhig*

Although most jurisdictions deciding the issue have adopted the *Duhig* Rule there have been some strong dissents³⁷ and a few cases have rejected the rule altogether.³⁸ From a possibly over simplified analysis of the cases, three principal reasons for rejection of the *Duhig* Rule become evident: 1) the grantee knew that the grantor owned less than the entire interest; 2) a quitclaim deed was the instrument of conveyance; and 3) the *Duhig* rule converts a breach of warranty into a grant.

1. Knowledge of the grantee

Some courts have rejected the *Duhig* Rule if the grantee knew at the time of the conveyance that the grantor owned less than all of the

35. Ellis, *Rethinking the "Duhig" Doctrine*, 28 ROCKY MTN. MIN. L. INST. 947, 951 (1983).

36. See 1 H. WILLIAMS & C. MEYERS, *supra* note 33, § 311, at 580.29 n.4 for cases relying on the "one-step" reasoning, which include *Garraway v. Bryant*, 224 Miss. 459, 80 So. 2d 59 (1955); and *Murphy v. Athans*, 265 P.2d 461 (Okla. 1953). See 1 H. WILLIAMS & C. MEYERS, *supra* note 33, at 580.31 n.6 for decisions that appear to follow the "two-step" reasoning, including *Lucas v. Thompson*, 240 Miss. 767, 128 So. 2d 874 (1961); *McClung v. Lawrence*, 430 S.W.2d 179 (Tex. 1968); and *Body v. McDonald*, 79 Wyo. 371, 334 P.2d 513 (1959). See 1 H. WILLIAMS & C. MEYERS, *supra* note 33, at 580.29 n.3 for cases that contain both approaches, including *Brown v. Kirk*, 127 Colo. 453, 257 P.2d 1045 (1953); *Birmingham v. McCoy*, 358 P.2d 824 (Okla. 1960); and *Coyne v. Butler*, 396 S.W.2d 474 (Tex. Civ. App. 1965).

37. *E.g.*, *Salmen Brick & Lumber Co. v. Williams*, 210 Miss. 560, 573-77, 50 So. 2d 130, 135-37 (1951) (Alexander, J., dissenting).

38. *E.g.*, *Gilbertson v. Charlson*, 301 N.W.2d 144 (N.D. 1981); *Hartman v. Potter*, 596 P.2d 653 (Utah 1979). Both cases rejected *Duhig* because of the subjective knowledge of the grantee that the grantor, at the time of the conveyance, owned less than all of the minerals. Later, in *Sibert v. Kubas*, 357 N.W.2d 495, 498 (N.D. 1984), the North Dakota Supreme Court indicated that the question of the grantee's subjective knowledge in *Gilbertson* was only dictum.

minerals. In *Hartman v. Potter*,³⁹ for example, the Utah Supreme Court did not apply *Duhig* because at the time of the conveyance the grantee knew that the grantor had only a one-half interest in the minerals.⁴⁰ Similarly, the North Dakota Supreme Court refused to apply *Duhig* in *Gilbertson v. Charlson*⁴¹ because the grantee, who was a cotenant in the property with the grantors, knew the extent of the grantors' interests. However, in 1984 in *Sibert v. Kubas*⁴² the North Dakota Supreme Court distinguished *Gilbertson* and held that the actual or constructive knowledge of the grantee does not preclude application of *Duhig*.⁴³

The *Duhig* decision did not discuss whether the grantee had knowledge that the grantor owned only an undivided mineral interest. Such knowledge is not relevant in a suit for breach of warranty⁴⁴ and was considered immaterial in a decision which followed the *Duhig* Rule, *Body v. McDonald*,⁴⁵ decided by the Supreme Court in Wyoming in 1959. As pointed out in *Body*, the grantees in such situations probably have knowledge of the extent of their grantors' interests through title examinations.⁴⁶ Even if the grantee does not have actual knowledge, in most cases he would have constructive knowledge because the outstanding interest would be in his chain of title.⁴⁷

Probably the best approach in determining whether the grantee's knowledge is a factor is to ascertain whether the goal is to obtain an objective or a subjective construction of the deed. In a suit between the immediate parties to the conveyance or their lessees, it might be appropriate to treat the question as one of subjective construction, determined by the actual intent of the parties as in a suit for reformation. But if the suit is not between the immediate parties or their lessees, rules of objective construction should prevail in order to protect the expectations of bona fide purchasers and to ensure marketability of titles.

39. 596 P.2d 653 (Utah 1979).

40. Ellis, *supra* note 35, at 961, called this a case of "subjective construction" that neither affirms nor rejects *Duhig* because the latter is a rule of objective construction.

41. 301 N.W.2d 144 (N.D. 1981).

42. 357 N.W.2d 495 (N.D. 1984).

43. *Id.* at 498. The Court distinguished *Gilbertson* on grounds that the grantee owned, prior to the conveyance, an undivided interest in the property. *Id.* at 497.

44. *E.g.*, Thackston v. Farm Bureau Lumber Corp., 212 Ark. 47, 204 S.W.2d 897 (1947).

45. 79 Wyo. 371, 334 P.2d 513 (1959).

46. *Id.* at 383, 334 P.2d at 517. This author is uncertain that parties generally have such actual notice. See I H. WILLIAMS & C. MEYERS, *supra* note 33, § 311, at 580.41-42.

47. See I H. WILLIAMS & C. MEYERS, *supra* note 33, § 311, at 580.36-37 on the effect of actual or constructive notice upon the *Duhig* problem.

In an article cited extensively by the Arkansas Supreme Court in a case applying the *Duhig* Rule, Professor Ellis pointed out that the finder of fact should never attempt to combine the subjective and objective construction.⁴⁸ If the goal is to apply a subjective construction, then the court should look to the grantee's knowledge as well as to other outside circumstances, and should not even consider the *Duhig* Rule.⁴⁹ But if the goal is to apply an objective rule of construction, *Duhig* is the proper approach because it offers a predictable result that protects bona fide purchasers and ensures marketable mineral titles. Thus, in cases requiring rules of objective construction because the litigants are not the immediate parties to the deed, the court in applying *Duhig* should not consider whether the grantee had actual knowledge that the grantor owned less than all of the minerals.⁵⁰

2. Quitclaim deeds

The second reason for rejection of the *Duhig* Rule is that it should not apply to quitclaim deeds, as the doctrine of estoppel by deed applies only to estop a grantor of a warranty deed.⁵¹ This is true if the "two-step" approach is followed, for that theory relies upon estoppel as a result of the covenant of warranty. However, there is no reason to reject *Duhig* under the "one-step" approach when there is a quitclaim deed, as this approach does not rely upon estoppel but merely upon a rule of construction of the deed: the reservation refers to the fractional interest outstanding in a third party. Of course, when the fractional interest owned by the third party is, for example, one-half and the reservation is one-fourth, this approach cannot logically apply because the fraction reserved and the fraction in the third party are different, and the reservation cannot be said to refer to the interest in the third party. Therefore, the *Duhig* Rule might apply to a quitclaim deed under the "one-step" approach if the reservation is construed as referring to the interest owned by the third party. However, as noted below, the Arkansas Supreme Court has rejected this argument.⁵²

48. Ellis, *supra* note 35, at 956.

49. *Id.* See also 1 H. WILLIAMS & C. MEYERS, *supra* note 33, § 311, at 580.41.

50. In support of this position, see 1 H. WILLIAMS & C. MEYERS, *supra* note 33, § 311.

51. See 1 H. WILLIAMS & C. MEYERS, *supra* note 33, § 311.1, at 583-84 (citing, *inter alia*, Hill v. Gilliam, 284 Ark. 383, 682 S.W.2d 737 (1985) (*Duhig* not applicable to a quitclaim)). This is true if a covenant is necessary for estoppel, but learned opinion is divided on this. Williams and Meyers prefer estoppel of the grantor if the grantee has paid valuable consideration, without regard to the existence of a covenant of warranty.

52. Hill v. Gilliam, 284 Ark. 383, 682 S.W.2d 737 (1985).

3. Grant Created from Warranty

A third reason for rejection of the *Duhig* Rule is that application of the Rule creates a grant out of a covenant of warranty. If the grantor owns only a one-half interest because there is a one-half interest outstanding in a third party, and if the grantor purports to convey one-half and reserve one-half in the same deed, it follows that he has breached his warranty if the reservation is given effect. Some opponents of the *Duhig* Rule contend that the reservation should be given effect and the grantee be allowed to pursue his cause of action for breach of warranty. The dissent in *Salmen Brick & Lumber Co. v. Williams*⁵³ took this position and was cited by the dissent in the 1985 decision of the Arkansas Supreme Court in *Peterson v. Simpson*,⁵⁴ which is discussed at length below.

Arkansas Cases on the "Duhig" Rule

Two recent Arkansas cases concern the *Duhig* Rule. The first, *Hill v. Gilliam*,⁵⁵ was decided in 1985 and held that the Rule does not apply to a quitclaim deed. The second, *Peterson v. Simpson*,⁵⁶ was also decided in 1985 and applied the Rule to a warranty deed in a situation in which the parties were not the parties to the deed in question.

In *Hill*, Phillips owned the surface and one-half of the minerals in a tract; Long owned the other one-half mineral interest. Phillips conveyed to Grimes a one-fourth nonparticipating mineral interest in 1937. Later in the same year Phillips conveyed to Gilliam an undivided one-half interest in the property. The parties agreed that at this point Gilliam owned an undivided one-half interest in the surface and an undivided one-half interest in the minerals (subject to the one-fourth nonparticipating mineral interest held by Grimes). In 1947 Gilliam and his wife executed a quitclaim deed back to Phillips, reserving an undivided one-half interest in the minerals. The heirs of Phillips brought suit against the heirs of Gilliam to quiet title, alleging that the reservation in the quitclaim deed was ineffective because of the *Duhig* Rule.

The Arkansas Supreme Court affirmed the chancellor on grounds that the *Duhig* Rule does not apply to quitclaim deeds.⁵⁷ Justice New-

53. 210 Miss. 560, 573-77, 50 So. 2d 130, 135-37 (1951).

54. 286 Ark. 177, 183, 690 S.W.2d 720, 724 (1985).

55. 284 Ark. 383, 682 S.W.2d 787 (1985).

56. 286 Ark. 177, 690 S.W.2d 720 (1985). These cases are the topic of Note, 8 UALR L.J. 267 (1985-86).

57. 284 Ark. at 387, 682 S.W.2d at 739. The court cited *Rosenbaum v. McCaskey*, 386 So. 2d 387 (Miss. 1980) as authority for the proposition that the *Duhig* Rule does not apply to quit-

bern, writing for the court, rejected the Phillips heirs' argument that *Duhig* can apply to a quitclaim deed under the "one-step" approach, noting that three decisions from other jurisdictions adopting the "one-step" reasoning had each involved a warranty deed in which the reservation was construed as an exception to the warranty to insulate the grantor from a suit for breach of warranty.⁵⁸

The opinion in *Hill* seems to give effect to the subjective intent of the parties, as Justice Newbern wrote that "[w]e look to the deed and the context in which it was made to ascertain the intent of the parties."⁵⁹ Justice Newbern pointed out that because Phillips, who had previously owned the surface and one-half of the minerals to the tract, knew of the extent of Gilliam's interest, it was unlikely that the reservation by Gilliam was intended to give Phillips notice of the outstanding one-half interest in Long. Therefore, the court reasoned that Gilliam must have intended, by the reservation, to keep a one-half interest in himself.⁶⁰

The result in *Hill* is probably sound, but the court could have reached the same result by reasoning that *Duhig* is a rule of objective construction, which is not to be applied to any deed—warranty or quitclaim—where the issue is one of the parties' subjective intent. The parties in this case were heirs of the original parties to the deed, not bona fide purchasers protected by the recording system. Therefore, the court could have rejected *Duhig's* application without resorting to a rejection of it to all quitclaim deeds.⁶¹

In *Peterson v. Simpson*⁶² Bullock conveyed a tract to Baird, reserving one-half of the minerals. The parties agreed that Bullock was the owner of one-half of the minerals. In 1941 Baird conveyed his interest to Payne, and in 1947 Payne conveyed his interest to Pope. In 1948 Pope, the owner of the surface and one-half of the minerals, conveyed by warranty deed to Andrews, with the following reservation: "Reserving however, from this conveyance, for the grantors herein, their heirs and assigns forever, ONE-HALF (½) of all oil, gas, coal

claim deeds.

58. 284 Ark. at 387, 682 S.W.2d at 739. The three decisions are: *Brown v. Kirk*, 127 Colo. 453, 257 P.2d 1045 (1953); *Garraway v. Bryant*, 224 Miss. 459, 80 So. 2d 59 (1955); and *Murphy v. Athans*, 265 P.2d 461 (Okla. 1953).

59. 284 Ark. at 387, 682 S.W.2d at 739.

60. *Id.* at 388, 682 S.W.2d at 739.

61. The appellants (the heirs of Phillips) were apparently correct that the "one-step" approach to *Duhig* could apply to quitclaim as well as to warranty deeds. See *supra* text accompanying note 51.

62. 286 Ark. 177, 690 S.W.2d 720 (1985).

and other minerals, in and to and that might be produced from the said real estate.”⁶³ The Simpsons obtained their interest through a series of conveyances beginning with Andrews. The Petersons were the successors in interest to Pope. Each claimed to own one-half of the minerals.

Justice Dudley wrote for the majority and held for the Simpsons on grounds that the *Duhig* Rule should apply as an objective rule of construction. Citing the article by Professor Ellis,⁶⁴ Justice Dudley reasoned that the issue was not one of the subjective intent of the grantor and grantee, who were not the parties to the suit. Instead, the suit was between the successors in interest to the original parties, and the overriding consideration should be protection of bona fide purchasers and marketability of land titles:

Subsequent purchasers, or grantees, must be able to rely upon this interpretation or else, under these types of circumstances, every title would require a lawsuit in order to be alienable. Rejection of the *Duhig* Rule would mean sacrificing the degree of certainty and guidance that it can provide concerning marketability of mineral interests, and replacing it with an outbreak of lawsuits. This we are not willing to do.⁶⁵

The majority opinion pointed out that it is not necessary to adopt the “two-step” reasoning of the *Duhig* case in order to reach the same result.⁶⁶ Justice Dudley quoted the Ellis article⁶⁷ to the effect that the *Duhig* Rule is composed of two sub-rules:

1. A warranty deed which does not limit the interest in the minerals granted purports to grant 100% of the minerals. (The “100% rule.”)
2. If the grantor of a warranty deed does not own enough interest to fill both the grant and the reservation, the grant must be filled first. (The “allocation of shortage rule.”)⁶⁸

The majority opinion in *Peterson* indicated that in a suit for reformation between the original parties, a court may consider subjective intent.⁶⁹ Such consideration would properly include actual knowledge of the grantee concerning the extent of the grantor’s interest.

Thus, the Arkansas Supreme Court has not adopted either the “one-step” or the “two-step” approach to the *Duhig* Rule. Literal ap-

63. *Id.* at 180, 690 S.W.2d at 723.

64. Ellis, *supra* note 35.

65. 286 Ark. at 181, 690 S.W.2d at 723.

66. *Id.* at 179, 690 S.W.2d at 722.

67. Ellis, *supra* note 35, at 947.

68. 286 Ark. at 179, 690 S.W.2d at 722.

69. *Id.* at 181, 690 S.W.2d at 723.

plication of the latter approach, which is based upon an analogy to the doctrine of after-acquired title, would require a court to consider the actual knowledge of the grantee to be immaterial, even in a suit between the immediate parties to the conveyance. The Supreme Court of Wyoming has so held.⁷⁰ Instead, a majority of the Arkansas Supreme Court seems to have adopted *Duhig* as an objective rule of construction to be applied when the suit is not between the immediate parties to the deed.

Justice Newbern, who wrote the opinion of the court in *Hill v. Gilliam*,⁷¹ wrote the dissent in *Peterson*.⁷² The dissenting opinion found no ambiguity in the grantor's intent to reserve for himself a one-half interest in the minerals, for the reservation was "for the grantors herein, their heirs and assigns forever."⁷³ Thus, a minority of the Arkansas Supreme Court would look to the actual intent of the immediate parties to the grant, which the majority refuses to do unless those parties are also the parties to the suit.

The dissent also noted that successors in interest to the original grantee had constructive notice of any outstanding mineral interest if the deed creating that interest was recorded. If the deed was not recorded, the subsequent grantees would be bona fide purchasers, but the dissent argued that the "*Duhig* rule has nothing to do with either situation."⁷⁴ Hence, the dissent claimed that the *Duhig* Rule does nothing to protect the recording system. Again, this shows a fundamental disagreement with the majority, which viewed the *Duhig* Rule as eliminating the need for future litigation on deed construction by adoption of an objective rule. The majority was not concerned that the grantee might have constructive notice and therefore might not be a bona fide purchaser.

Finally, the dissent quoted from the dissent in a Mississippi Supreme Court case, *Salmen Brick & Lumber Co. v. Williams*,⁷⁵ to the effect that a warranty should not constitute a conveyance.⁷⁶ This argument seems persuasive, but actually the *Duhig* situation *does* involve a conveyance of minerals as well as a warranty.⁷⁷ The issue is whether

70. *Body v. McDonald*, 79 Wyo. 371, 334 P.2d 513 (1959).

71. 284 Ark. 383, 682 S.W.2d 737 (1985).

72. 286 Ark. 177, 182, 690 S.W.2d 720, 724 (1985) (Newbern, J., dissenting. Chief Justice Holt and Justice Hickman concurred in the dissent).

73. *Id.* at 183, 690 S.W.2d at 724.

74. *Id.*

75. 210 Miss. 560, 50 So. 2d 130 (1951).

76. 286 Ark. at 183, 690 S.W.2d at 724.

77. Admittedly, the *Duhig* problem arises from the grantor's failure to specify the quantum

the conveyance will be given effect when there is also a reservation and the quantum of minerals is not sufficient to satisfy both the grant and the reservation.

As a result of *Hill v. Gilliam* and *Peterson v. Simpson*, title examiners in Arkansas can assume that the *Duhig* Rule applies to warranty deeds when the immediate parties to the deed are not the current interested parties. When the deed is a quitclaim deed, or when the parties to the deed are the interested parties, the rule does not apply. *Duhig*, although difficult to understand and justify, is probably a sound, predictable approach to a recurring problem in mineral titles.

Mineral or Royalty

Numerous cases from oil producing jurisdictions discuss the issue of whether a deed conveys (or reserves) a mineral or a royalty interest.⁷⁸ As pointed out by Williams and Meyers in their treatise, the consequences of an interest being mineral or royalty include the following:

1) *The quantum of production to which the owner is entitled.*⁷⁹ For example, the owner of a one-eighth mineral interest is entitled to one sixty-fourth of the production if the lease reserves a one-eighth royalty. On the other hand, the owner of a one-eighth royalty is entitled to one-eighth of the production.

2) *Participation in bonus and delay rentals.*⁸⁰ The owner of the minerals is entitled to participate in bonus, which is the consideration paid for the execution of the lease, and in delay rental payments, which keep the lease in force during the primary term in absence of drilling operations or production. The owner of a royalty interest is generally not entitled to either of these payments.

3) *Power to execute leases.*⁸¹ The owner of minerals enjoys the power of executing minerals leases, while the owner of a royalty interest has no such power but has the right to receive part of the production.

of minerals conveyed, which is presumed to be all the minerals other than the quantum reserved in the instrument itself.

78. E.g., *Little v. Mountain View Dairies*, 35 Cal. 2d 232, 217 P.2d 416 (1950); *Rogers v. Morgan*, 250 Miss. 9, 164 So. 2d 480 (1964); *Atlantic Ref. Co. v. Beach*, 78 N.M. 634, 436 P.2d 107 (1968); *Barker v. Levy*, 507 S.W.2d 613 (Tex. Civ. App. 1974). For a thorough discussion of the problem, see HEMINGWAY, *THE LAW OF OIL AND GAS* § 2.7 (2d ed. 1983), most of which is excerpted from Hemingway, *The Mineral-Royalty Distinction in Oklahoma*, 52 O.B.J. 2791 (Nov. 28, 1981).

79. 1 H. WILLIAMS & C. MEYERS, *supra* note 33, § 303.1.

80. *Id.* at § 303.2.

81. *Id.* at § 303.3.

4) *Power to explore and develop.*⁸² The owner of minerals has this power, while the owner of a royalty interest does not.

5) *Partition.*⁸³ The owner of a mineral interest may partition in some jurisdictions, including Arkansas.⁸⁴ However, a royalty interest is not partitionable.⁸⁵

On occasion the Arkansas Supreme Court has been faced with the mineral/royalty distinction.⁸⁶ For example, in *Keaton v. Murphy*⁸⁷ the court held that a conveyance of "an undivided one-half interest of the one-eighth royalty held by the Murphy Land Company in and to all the oil and gas in, under and upon the [described] lands" conveyed one-half of the royalty payable under the lease in effect at the time of the deed.⁸⁸ The appellee contended that the deed conveyed an interest in the minerals in place. The deed expressly stated that the grantees were entitled to one-half of the royalty under an existing lease, and the grantees to the deed testified that the intent was to convey a royalty interest.⁸⁹

The 1950 decision in *Longino v. Machen*⁹⁰ held that the grantee received royalty in an existing lease, not an interest in the minerals in place, in a deed entitled "Sale of Royalty In Oil and Gas Lease." The deed referred to "royalty" in the habendum clause and in the acknowledgement. The ambiguous portion of the deed was the granting clause, which referred to "a one-fourth undivided interest in all right, title and interest retained by us, or in any manner whatsoever owned by us, in a certain oil, gas and mineral lease" ⁹¹ The successors in interest to the grantees contended that this clause conveyed to them a one-fourth interest in the grantor's reversionary interest in the minerals in place. The court acknowledged the ambiguity, but pointed out that royalty alone was created by the lease, and that had the parties wished to convey an interest to the minerals in place, the grantor could have executed an ordinary mineral deed.⁹² This decision and the *Keaton* decision support construction of an ambiguous deed as conveying a royalty

82. *Id.* at § 303.4.

83. *Id.* at § 303.5.

84. *See* Chapter II, 9 UALR L.J. at 244-45.

85. *E.g.*, *Hudgins v. Lincoln Nat'l Life Ins. Co.*, 144 F. Supp. 192 (E.D. Tex. 1956).

86. In addition to the cases discussed herein, *see* *Arkansas Valley Royalty Co. v. Arkansas-Oklahoma Gas Co.*, 222 Ark. 213, 258 S.W.2d 51 (1953).

87. 198 Ark. 799, 131 S.W.2d 625 (1939).

88. *Id.* at 800 n.1, 131 S.W.2d at 626 n.1.

89. *Id.* at 801, 131 S.W.2d at 629.

90. 217 Ark. 641, 232 S.W.2d 826 (1950).

91. *Id.* at 642, 232 S.W.2d at 826.

92. *Id.* at 644, 232 S.W.2d at 827.

interest if the property was subject to a lease at the time of the deed.

In *Wynn v. Sklar & Phillips Oil Co.*⁹³ the deed in question was entitled "Royalty Deed" and conveyed the following interest in the granting clause:

a one eight [sic] (being all the Royalty retained by us) undivided interest of, in and to all the oil, gas and minerals on, in and under the . . . lands . . . granting to the said J. M. Talley, his heirs and assigns, the right of ingress to and upon said lands for the purposes of securing, storing and removing oil and gas, and the right of occupancy of said lands for and only for the purposes of storing, securing and removing oil and gas.⁹⁴

The lower court found that this clause conveyed a one-eighth interest in the minerals in place, but the appellant contended that it conveyed the right to receive one-eighth of the minerals produced, or a royalty interest only. The ambiguity stemmed from inclusion of the words in parentheses. The Arkansas Supreme Court affirmed the lower court on grounds that the words "in and under" generally refer to minerals in place, that a preference should be given a specific provision over a general one in an ambiguous instrument, and that the subsequent conduct of the grantor indicated that he believed that he had conveyed a one-eighth interest in the minerals, not a royalty interest. The court pointed out that although the grantor had executed a lease to the property about two years prior to this conveyance, there was no evidence in the record that the lease was still in effect,⁹⁵ and that it was unlikely that the parties intended to convey only a royalty interest in an unproductive lease.⁹⁶ The opinion correctly noted that in some circumstances the parties to a conveyance have considered a royalty interest to be the equivalent of a one-eighth mineral interest.⁹⁷

Duration of Royalty and the Rule Against Perpetuities

At times the question arises whether a royalty is perpetual or whether it terminates with the lease in existence at the time of the conveyance of the royalty. The holding in *Keaton v. Murphy*,⁹⁸ dis-

93. 254 Ark. 332, 493 S.W.2d 439 (1973).

94. *Id.* at 335, 493 S.W.2d at 441.

95. *Id.* at 342 n.3, 493 S.W.2d at 445 n.3. The court noted authority from Oklahoma to the effect that the issue of the meaning of the word "royalty" may depend upon the existence of a lease at the time of the conveyance. *Elliott v. Berry*, 206 Okla. 594, 245 P.2d 726 (1952).

96. 254 Ark. at 342, 493 S.W.2d at 445.

97. *Id.* at 348, 493 S.W.2d at 449.

98. 198 Ark. 799, 131 S.W.2d at 625 (1939).

cussed above, was cited as controlling in *McWilliams v. Standard Oil Co.*⁹⁹ *McWilliams* leased to Newblock, then conveyed by warranty deed to Jameson, and included the following reservation: "It is expressly agreed and stipulated that a one-half undivided interest in and to the royalty retained by grantor in oil and gas lease heretofore executed covering aforesaid land, is hereby reserved by grantor herein."¹⁰⁰ After the Newblock lease had terminated, the widow and heirs of Jameson executed a lease that was assigned to the defendant, Standard Oil Company. The court held that the royalty retained by *McWilliams* expired with the Newblock lease.

In *Hanson v. Ware*¹⁰¹ the Arkansas Supreme Court found that a perpetual royalty, as opposed to a royalty that terminates with a particular lease, was conveyed in a grant of a one-sixteenth interest in "all the oil and gas produced and saved" by the current lessee or by "any one lese [sic] who may operate for oil and gas from any of the premises aforesaid" which included both leased and unleased tracts.¹⁰²

An additional, and probably more significant holding in *Hanson* was that a perpetual royalty does not violate the Rule Against Perpetuities, as it represents a present interest in real property.¹⁰³ Rejecting contrary decisions from Kansas and California,¹⁰⁴ Justice George Rose Smith, who wrote the opinion of the court, pointed out that interests subject to the Rule Against Perpetuities involve an uncertainty whether the owner of a contingent interest or some third person will acquire absolute ownership. Such is not the case of the owner of a perpetual royalty, who owns the interest absolutely because there is no third party who might acquire ownership. The uncertainty of the perpetual royalty owner is "the possibility that there may in fact be no oil and gas within the land."¹⁰⁵ This holding is correct and well-reasoned, because a royalty interest in Arkansas is recognized as an interest in real property, although minerals are personal property once they are severed from the surface.¹⁰⁶

99. 205 Ark. 625, 628-31, 170 S.W.2d 367, 368-69 (1943).

100. *Id.* at 630, 170 S.W.2d at 369.

101. 224 Ark. 430, 274 S.W.2d 359 (1955).

102. *Id.* at 432-33, 274 S.W.2d at 360-61.

103. *Id.* at 436, 274 S.W.2d at 362.

104. *Id.* at 434-35, 274 S.W.2d at 361-62.

105. *Id.* at 436, 274 S.W.2d at 362.

106. See Chapter I, 9 UALR L.J. at 226.

Other Construction Problems in Arkansas Royalty Deeds

In the 1978 case of *Barret v. Kuhn*,¹⁰⁷ the grantees in certain royalty deeds claimed a right to share not only in the standard one-eighth royalty reserved in leases executed by the owner of the executive right, but also in overriding royalty payments reserved in the leases. Each grantee received an interest through a conveyance entitled "Royalty Deed," and the word "non-participating" was beneath the title.¹⁰⁸ The granting clause gave the grantee, subject to conditions and reservations in the instrument, "an undivided one sixty-fourth (1/64) interest in and to all of the oil, gas and other minerals, in, under and upon the following described lands" ¹⁰⁹ The deed also provided (in what the court called the royalty clause) that the grantors, who reserved the executive right, would not execute a lease for a royalty less than one-eighth.¹¹⁰ The deed further provided that the grantee would receive "one-eighth of all oil and/or gas run to the credit of the royalty interest reserved under and by virtue of any oil and gas mining lease" ¹¹¹ Following the royalty clause was a production clause that provided that "in any event the grantee herein, its successors or assigns, shall be deemed the owner of and shall be entitled to receive one sixty-fourth of all oil and gas produced and saved from said land or any part thereof."¹¹²

The owners of the executive right executed leases to the property reserving the standard one-eighth royalty and an overriding royalty of an additional one-sixteenth in some leases and an additional one-eighth in others. The grantees under the royalty deed claimed that the royalty clause entitled them to one-eighth of all royalty, including overriding royalty. The owners of the executive interests, who were the grantors or their successors in interest, claimed that the grantees were entitled only to one-eighth of the standard one-eighth royalty. The court held that the grantees were limited to one-eighth of one-eighth, as the granting clause in the deed granted to them a one sixty-fourth interest in the minerals, and if they were to receive one-eighth of the overriding royalty as well as one-eighth of the standard one-eighth royalty, they

107. 264 Ark. 347, 572 S.W.2d 135 (1978).

108. A non-participating royalty does not share in delay rental or bonus payments and does not share in the leasing or development rights. See H. WILLIAMS & C. MEYERS, OIL AND GAS TERMS 555 (6th ed. 1984).

109. 264 Ark. at 351, 572 S.W.2d at 137.

110. *Id.*

111. *Id.*

112. *Id.*

would be receiving more than a one sixty-fourth interest.¹¹³ Furthermore, the court pointed out that the one sixty-fourth interest was specified in the production clause.¹¹⁴

The parties to the deed in *Barret* probably intended for the grantee to take a one-eighth interest in the minerals and thereby be entitled to a one sixty-fourth royalty from a standard lease reserving a one-eighth royalty. Had the granting clause conveyed a one-eighth interest in the minerals, the court might have found that the grantee was entitled to share in the overriding royalty. In a similar case, *Griffith v. Taylor*,¹¹⁵ the Texas Supreme Court permitted the grantee to participate in "bonus" royalty reserved by the owner of the executive interest. However, the *Griffith* decision is distinguishable because the granting clause of the deed gave the grantee one-half of the minerals, so that the grantee's participation in the royalty and the overriding royalty did not result in his receiving a fractional royalty greater than the mineral interest conveyed in the granting clause.

In 1983 the Arkansas Supreme Court decided another case involving a deed very similar to the one in *Barret v. Kuhn*. In *Dow Chemical Co. v. Warmack*¹¹⁶ an instrument entitled "Royalty Deed" conveyed an undivided fractional interest "in and to all of the oil, gas and other minerals" in the tract.¹¹⁷ After the property description, a typewritten sentence was inserted as follows: "It is the intention of grantor herein to convey, and grantor herein does hereby convey to grantee ten (10) royalty acres, non-participating."¹¹⁸ The printed portion of the deed reserved in the grantor the right to lease oil and gas and the right to receive delay rental and bonus payments from oil and gas leases. The grantee subsequently tendered a lease of his undivided interest in the salt water, or brine. The lessee refused the lease on the grounds that the grantee had only a non-participating royalty, without the leasing right. The court upheld the lower court's holding that the grantee had the power to lease the brine, as the deed granted an undivided interest in the *minerals* to the grantee, reserving the executive right to oil and gas only. The court held that the typewritten sentence had reference to a non-participating royalty in the oil and gas only.¹¹⁹ Therefore, the grantee was a mineral cotenant to minerals other than oil and gas.

113. *Id.* at 352, 572 S.W.2d at 137-38.

114. *Id.* at 352, 572 S.W.2d at 138.

115. 156 Tex. 1, 291 S.W.2d 673 (1956), *discussed in* Note 35 TEX. L. REV. 459 (1957).

116. 281 Ark. 77, 661 S.W.2d 376 (1983).

117. *Id.* at 78, 661 S.W.2d at 376.

118. *Id.* at 78, 661 S.W.2d at 376-77.

119. *Id.* at 80, 661 S.W.2d at 377-78.

The Arkansas Supreme Court indicated that the form of deed interpreted in *Barret v. Kuhn* and *Dow Chemical Co. v. Warmack* has been used for about fifty years in Arkansas.¹²⁰ Oliver Clegg, a noted oil and gas practitioner, has pointed out several other questions presented by this deed form which remain unanswered.¹²¹ Such questions include whether the grantor has the power to pool the nonexecutive interest of the grantee and whether the grantee would be entitled to participate in extra bonus or an oil payment reserved by the owner of the executive interest. These issues relate directly to the duty, if any, owed by the executive to the nonexecutive interest owners.

120. *Id.* at 78, 661 S.W.2d at 376. This deed form was the subject of a law review article that pointed out errors commonly made by Arkansas lawyers using the form. Langford, *Arkansas Form of Royalty Deed for Oil and Gas Conveyances*, 3 ARK. L. REV. 190 (1949).

121. Clegg, *The Arkansas Royalty Deed: Answers and Questions*, 21st Annual Arkansas Natural Resources Law Institute (1982).

