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ARTICLES

OWNERSHIP AND LEASING OF MINERALS UNDER HIGHWAYS AND RIGHT-OF-WAYS

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I. INTRODUCTION

The recent increase in urban drilling has raised several issues for oil and gas operators, one of which is the ownership of minerals under roads, easements, and other strips of land. Although the task of determining such ownership is far from new to operators, the increase in urban drilling and the drilling of horizontal, rather than vertical, wells has certainly made it more onerous. No matter how difficult it is to determine the mineral ownership, it must be completed if an operator is planning to drill under or within 330 feet of the tract. Attorneys and operators need to remember the strips of land are separate tracts of land and must be identified as such when applying for well permits. If an operator drills under a road that is not leased, then a trespass has been committed. At that point, the permit obtained by the operator may be invalid and the Railroad Commission could possibly shut-in the well.

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Regardless of whether the strip is a road, highway, railroad, or utility easement, ownership of the minerals can be determined through a two-step process: (1) identify how the strip was created and the resulting estate, and (2) determine the effect of subsequent conveyances of the strip and property adjacent thereto. Although this process can be used on all strips of land, regardless of their nature, this paper focuses mainly on roads for the sake of simplicity.

II. Determining How the Road Strip was Created

The first step in determining the ownership of minerals under a road is to identify how the road was created and the resulting estate. There are various ways to create roads; however, this paper briefly discusses only the most common methods.

A. *Express Easements*

A large majority of roads in Texas, especially in urban areas, are created by express easements. An express easement is defined in writing and must comply with the Statute of Frauds.[1] An express easement may be created in a deed, will, or other written instrument. When created in a deed, the express reservation may arise by either a grant or a reservation. The following is common language used to convey an easement: "grant, bargain, sell and convey unto grantor the free and uninterrupted use, liberty, and privilege of the passage in, along, upon and across the following lands."

Although no specific words are required to create an easement, careful attention should be paid to the language employed for two reasons. First, the writing defines the scope of the easement. The easement holder is not permitted to use the land for any purpose not specified in the instrument.[2] Second, the grantor may unintentionally convey fee title to the land, instead of an easement.[3] A common example is the "right of way deed." Oftentimes drafters presume that their intention to convey an easement is made clear by titling their document "right of way deed." However, the title of a document has no bearing on its effect. Where the granting clause in a deed conveys the land, and not just a right-of-way over the land, the grantee obtains fee title to the land, even if subsequent language in the deed refers to the interest as a right-of-way.[4] Another common way that grantors unintentionally convey fee title, rather than an easement, is by granting the land and then stating the purpose for which the land is to be

1. Cummins v. Travis County Water Control & Improvement Dist. No. 17, 175 S.W.3d 34, 51 (Tex. App.—Austin 2005, pet. denied).

2. Marcus Cable Assocs., L.P. v. Krohn, 90 S.W.3d 697, 701 (Tex. 2002).

3. *See* Tex. Elec. Ry. v. Neale, 151 Tex. 526, 529, 252 S.W.2d 451, 453 (1952).

4. *Id.*

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used.[5] While a granting clause that conveys "a right of way over land for street purposes" conveys only an easement, a deed that conveys the land itself and then restricts the use "for highway purposes" does not limit the grant to an easement.[6]

Upon careful review of the instrument granting the interest, if it is determined that an easement was conveyed or reserved, then the holder retains only the right to use the surface for the specified purpose and ownership of the land, including the minerals underneath, remain with the fee owner.

B. *Implied Easements*

Even when an easement has not been expressly conveyed or reserved, one may be imposed by operation of law. Three common easements imposed by law are: (1) easement by implication, (2) easement by necessity, and (3) prescriptive easement.

An easement by implication exists where (1) there is common ownership of the dominant and servient estates prior to severance of title; (2) apparent use of the easement exists at the time of severance; (3) there is continuous use of the easement; and (4) the easement is reasonably necessary for the use and enjoyment of the dominant estate.[7]

An easement by necessity is similar to an easement by implication; however, the standard of necessity is higher and no pre-existing use is required. A person seeking to establish an easement by necessity "must prove that he has no other legal access to his property."[8] Strict necessity does not exist if the owner has any legal means of reaching his land, regardless of how expensive or inconvenient it may be.[9] Once the necessity ends, the easement terminates.[10]

A prescriptive easement is similar to obtaining title to land by adverse possession. "To obtain a prescriptive easement one must use someone else's land in a manner that is open, notorious, continuous, exclusive, and adverse for the requisite period of time."[11] Texas has three, five, ten, and twenty-five year statutory limitation periods.[12]

Regardless of how the easement is obtained, the owner of the implied easement only has the right of use; ownership of the land, including the minerals, is retained by the owner of the servient estate.

5. *See* Stanbery v. Wallace, 45 S.W.2d 198, 199 (Tex. Comm'n App. 1932, judgm't adopted).

6. *Id.*

7. Vinson v. Brown, 80 S.W.3d 221, 228–29 (Tex. App.—Austin 2002, no pet.) (citing Bickler v. Bickler, 403 S.W.2d 354, 357 (Tex. 1966)).

8. Crone v. Brumley, 219 S.W.3d 65, 68 (Tex. App.—San Antonio 2006, pet. denied).

9. Duff v. Matthews, 158 Tex. 333, 336, 311 S.W.2d 637, 640 (1958).

10. *Brumley*, 219 S.W.3d at 68.

11. Brooks v. Jones, 578 S.W.2d 669, 673 (Tex. 1979).

12. TEX. CIV. PRAC. & REM. CODE ANN. §§ 16.024–.027 (Vernon 2002).

C. *Dedication*

Most roads located in subdivisions are created by a dedication. "'Dedication' is the act of appropriating private land to the public for any general or public use. Once dedicated, the owner of the land reserves no rights that are incompatible with the full enjoyment of the public."[13] There are two types of dedication: statutory and common law.[14] Statutory dedication of a street is controlled by statute and operates by way of a grant.[15]

Just like an easement, a common law dedication can be express or implied.[16] The elements for an implied dedication of an easement are: "(1) the acts of the landowner induced the belief that the landowner intended to dedicate the road to public use;" (2) the landowner owned the land in fee simple and therefore was competent to dedicate the land; "(3) the public relied on these acts and will be served by the dedication; and (4) there was an offer and acceptance of the dedication."[17] The existence of an implied dedication is a question of fact.[18] Continued public use for a long period alone is not enough to establish an implied dedication, but can be helpful in establishing the requisite intent.[19]

An express dedication is made by a deed, plat, or other written document, and the extent of the estate conveyed therein is determined by the grantor's intent, as evidenced by the four corners of the instrument.[20] The following is an example of a dedication: "X does hereby set apart and dedicate to the use and benefit of the public forever the plazas, parks, streets and alleys as shown in said plat."

A dedicator, much like the grantor of an easement, should be careful in drafting a dedication. A fee simple estate or a lesser estate, such as an easement, can be conveyed by the instrument; therefore, it is important to clearly establish the grantor's intent to convey only an easement for public use.[21] The Houston Court of Appeals held that a dedication deed stating that the grantor hereby dedicates unto the City of Bryan the following land conveyed fee simple title, rather than an easement.[22] The court held that the term "dedication" only indicates *why* the property was conveyed; it does not define the interest

13. Scott v. Cannon, 959 S.W.2d 712, 718 (Tex. App.—Austin 1998, pet. denied).
14. Jezek v. City of Midland, 605 S.W.2d 544, 548 (Tex. 1980).
15. City of Uvalde v. Stovall, 279 S.W. 889, 890 (Tex. Civ. App.—San Antonio 1925, writ ref'd).
16. *See Cannon*, 959 S.W.2d at 718.
17. Lindner v. Hill, 691 S.W.2d 590, 592 (Tex. 1985).
18. *Id.* at 591–92.
19. *Id.* at 592.
20. Camilla Twin Harbor Volunteer Fire Dep't, Inc. v. Plemmons, 998 S.W.2d 413, 415 (Tex. App.—Beaumont 1999, pet. denied).
21. Russell v. City of Bryan, 919 S.W.2d 698, 702 (Tex. App.—Houston [14th Dist.] 1996, writ denied).
22. *Id.* at 703.

conveyed.[23] Therefore, the use of the term "dedication" alone fails to establish an intent to grant only an easement.[24] When attempting to determine ownership of minerals under a subdivision subject to a dedication, a title examiner must obtain a copy of the plat and read all of the language on the plat to determine whether or not fee title or just an easement was created by the dedication.

D. *Condemnation*

Condemnation, or the power of eminent domain, is the act of the sovereign taking private property for public purposes.[25] The power to condemn can only be conferred by statute and the purpose for the condemnation must be one that is authorized by law.[26] Condemnation passes the right to use the land only for the purposes specified, and the fee owner retains the right to use the land in any manner not inconsistent with the purposes for which it was condemned.[27] "Except where otherwise expressly provided by law, the interest acquired by a condemnor . . . does not include the fee simple title to real property, either public or private."[28] Therefore, a condemnor may acquire fee title to the land only when allowed by statute. When determining the estate obtained by the condemnor under eminent domain, it is important to review both the condemnation order and the statute under which the condemnor is claiming authority. If the condemnor acquired only an easement over the land, the landowner retained fee title, which includes ownership of the minerals.

III. GRANTOR OWNING TITLE TO MINERALS UNDER A ROAD

A. *The General Rule*

Tracing title to ownership of minerals under a public road gets more complicated where the state, county, or city obtains only an easement to create the road, and the grantor retains title to the underlying fee, including the minerals, subject to the easement. In order to trace title to the minerals under a road, it is necessary to examine not only all express conveyances of the road, but also conveyances of tracts adjacent to the road. Subsequent conveyances of the tracts adjacent to the road may carry with it title to all or a part of the grantor's title to the strip. The general rule (the "General Rule") regarding the convey-

23. *Id.* at 702.

24. *Id.* at 702–03.

25. Valero Eastex Pipeline Co. v. Jarvis, 926 S.W.2d 789, 792 (Tex. App.—Tyler 1996, writ denied).

26. Coastal States Gas Producing Co. v. Pate, 158 Tex. 171, 175, 309 S.W.2d 828, 831 (1958).

27. Aycock v. Houston Lighting & Power Co., 175 S.W.2d 710, 714 (Tex. Civ. App.—Galveston 1943, writ ref'd w.o.m.) (citing Muhle v. New York, T. & M. Ry. Co., 25 S.W. 607 (Tex. 1894)).

28. TEX. PROP. CODE ANN. § 21.045 (Vernon 2000).

ance of such minerals was established back in 1862. In *Mitchell v. Bass*, the Texas Supreme Court stated that:

> The established doctrine of the common law is, that a conveyance of land bounded on a public highway carries with it the fee to the center of the road . . . . Such is the legal construction of the grant unless the inference that it was so intended is rebutted by the express terms of the grant. The owners of the land on each side go to the center of the road, and they have the exclusive right to the soil, subject to the right of passage in the public.[29]

B. *Rationale for the General Rule*

In 1927, the Texas Supreme Court adopted six reasons in support of the General Rule: (1) the absence of any purpose for the grantor to reserve a strip of land along the boundary of the land conveyed; (2) the immediate interest and value to the grantee in the land along the boundary; (3) public convenience and the prevention of boundary disputes; (4) the embarrassment to alienation and the improvement of property if a different rule was followed; (5) the concern of the state as to who should pay for improvements to the strip; and (6) this has always been the practice of people.[30]

C. *Justifications for the General Rule*

In addition to the policy rationales stated above, many courts refer to two doctrines as justification for the General Rule: (1) the Appurtenance Doctrine and (2) the Strip and Gore Doctrine.

1. Appurtenance Doctrine

Some courts refer to the Appurtenance Doctrine when dealing with conveyances of tracts of land adjacent to a strip.[31] That is appropriate when the strip is a true appurtenance. "An appurtenance 'means and includes all rights and interests in other property necessary for the full enjoyment of the property conveyed and which were used as necessary incidents thereto.'"[32] Most grantors intend to convey all appurtenances with the land described as evidence by the fact that most deeds convey the land "together with rights and appurtenances thereto." The Appurtenance Doctrine provides sound support when referring to an adjoining street that provides access to the land or a utility easement that furnishes service to the property; however, it does not justify the General Rule as it pertains to a road that is not necessary to

29. Mitchell v. Bass, 26 Tex. 372, 380 (1862).

30. Texas Bitulithic Co. v. Warwick, 293 S.W. 160, 162 (Tex. Comm'n App. 1927, judgm't adopted).

31. Angelo v. Biscamp, 441 S.W.2d 524, 526 (Tex. 1969) (explaining why the strip failed to pass as an appurtenance).

32. Pine v. Gibraltar Sav. Ass'n, 519 S.W.2d 238, 241 (Tex. Civ. App.—Houston [1st Dist.] 1974, writ ref'd n.r.e.).

access the land (*i.e.* a highway that does not have an outlet directly to the land).

2. Strip and Gore Doctrine

The Strip and Gore Doctrine appears to better support the General Rule because its application is not limited to appurtenances or strips of land that benefit the adjacent land. The Strip and Gore Doctrine presumes that the grantor had no intention of reserving fee ownership in a small parcel of land not described in the conveyance if the parcel "(1) is small in comparison to the land conveyed; (2) is adjacent to or surrounded by the land conveyed; (3) belonged to the grantor at the time of the conveyance; and (4) was of no benefit or importance to the grantor."[33] Leaving title to the small tract in the grantor is against public policy because the land is not beneficial or important to the grantor.[34]

D. *Application of the General Rule*

A classic example of the General Rule is where a landowner grants an easement for a road across his land and then separately sells off each tract adjacent to the road using the edge of the road as each tract's boundary line. If read literally, the deed conveys only the grantor's interest in the tract of land up to the edge of the road, leaving ownership of the road with the grantor. However, the General Rule operates against the literal reading of the deed and gives each tract owner title to that part of the road adjacent to their tract, up to the center of the road.

In *Cox v. Campbell*, Campbell owned 186 acres that had a 200 foot railroad right-of-way running across it.[35] Campbell conveyed 108 acres north of the railroad to Castleberry.[36] The southern boundary line of the 108 acres was described as the northern boundary line of the railroad right of way.[37] Later, Campbell conveyed 68 acres south of the railroad to Turner using the railroad as the northern boundary of the tract.[38] Campbell's heirs claimed title to the right of way dividing Castleberry's tract and Turner's tract.[39] The Texas Supreme Court held that the deeds from Campbell conveyed to the center of the railroad right-of-way despite the metes and bounds descriptions provided in the deeds.[40]

33. Bay Area Council Boy Scouts of Am. v. Myers, No. 03-04-00653-CV, 2009 WL 790197, at *4 (Tex. App.—Austin Mar. 27, 2009, no pet. h.).
34. Alkas v. United Sav. Ass'n of Tex., 672 S.W.2d 852, 857 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.).
35. Cox v. Campbell, 135 Tex. 428, 430, 143 S.W.2d 361, 361 (Tex. 1940).
36. *Id.*
37. *Id.*
38. *Id.* at 361–62.
39. *Id.* at 366.
40. *Id.*

A more confusing application of the General Rule exists where a landowner owns a tract of land with a road cutting across it and sells the land lying on the south side of the road, but retains ownership of the land on the north side of the road. Based on the policy concerns discussed above, it appears as though the General Rule would not apply and the grantor would maintain title to the entire road because a strip of land with separate ownership was not created. However, the General Rule still applies and the grantee obtains title to the south half of the road. In *Boothe v. McLean*, the court stated that "our Supreme Court has held that the [General Rule] does apply, despite the fact that the grantor who owned on both sides of a right of way conveyed the land on one side and retained that on the other, unless the right of way was expressly reserved in the deed."[41]

Where multiple easements exist side by side, the General Rule treats all of the easements as one large easement and splits the ownership between the adjacent landowners.[42] In *Haines v. McLean*, William J. McLean owned approximately 259 acres, subject to a county road and two railroad rights-of-way, all of which were adjacent to each other.[43] William J. McLean subsequently conveyed the land to A. F. Grabow.[44] In 1929, Grabow conveyed the land east of the easements to Yoder.[45] The west boundary of the land was described as the east boundary of the adjacent easement (the county road).[46] Grabow's interest in the remainder of the land passed to his daughter, Lydia Grabow Haines.[47] Lydia and her husband conveyed a strip adjacent to and west of the county road and railroad rights-of-ways to Scurry County to create a highway.[48] The issue before the court was the ownership of the minerals under the county road and railroad rights-of-ways, which amounted to approximately 260 feet.[49] The Court declined to treat each easement separately and instead combined all three together, with each adjacent landowner obtaining title to the center of the three easements.[50] In making its decision, the Court stated that there was no reason to treat the three separate easements any different than a single 260-foot strip.[51]

41. Boothe v. McLean, 267 S.W.2d 158, 169 (Tex. Civ. App.—Eastland 1954) *rev'd on other grounds sub nom.* Haines v. McLean, 276 S.W.2d 777 (Tex. 1955).
42. *See Haines*, 276 S.W.2d at 781.
43. *Id.* at 778.
44. *Id.* at 779.
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.* at 778.
50. *Id.* at 783.
51. *Id.*

E. *Avoiding Application of the General Rule*

The only way to avoid application of the General Rule is to expressly reserve the road acreage.[52] In order to exclude the road acreage from the conveyance, the grantor "must make his purpose to exclude clear by express declaration, or equivalent of express declaration, in the instrument."[53] Case law proves that excluding the road acreage in a conveyance is not an easy task. The following are examples of failed attempts to reserve abutting road acreage:

- *Defining the tract by the exterior boundary of the road*: The presumption of an intent to convey title to [the] center of the highway . . . is not overcome by the fact that . . . the deed[ ] described the abutting lands by metes and bounds as extending only to the exterior boundary of the [road].[54]
- *Metes and bounds description extends only to the exterior boundary of the road*: The presumption of an intent to convey title to the center of a street or highway is not overcome by the fact [that] the land is described by metes and bounds, and that the distances stated in the description of the deed do not extend to the center of the street.[55]
- *Excepting the easement from the land conveyed*: An instrument of conveyance which conveys land definitely described in such instrument, and then excepts from such conveyance a road, railroad right of way, canal right of way, etc., as such, occupying a mere easement on, over, or across the land conveyed, conveys the fee to the entire tract, and the exception only operates to render the conveyance or grant subject to the easement.[56]
- *Excepting the easement acreage from the land conveyed*: A deed with field note descriptions that describes the land as "containing 162.00 acres of land save and except therefrom 5.6 acres taken up by the rights of way . . . making 156.4 acres herein and hereby conveyed" was not sufficient to exclude the 5.6 right-of-way acreage from the conveyance.[57]

F. *Exceptions to the General Rule*

While the General Rule is well-settled and has been applied consistently for over 100 years, it is not absolute. There are a few exceptions to the General Rule that allow the grantor to retain ownership of the road without expressly reserving it from the conveyance.

Another exception exists where a road lies entirely on the margin of the landowner's tract and then the owner subsequently conveys the

52. Mitchell v. Bass, 26 Tex. 372, 380 (1862).
53. Texas Bitulithic Co. v. Warwick, 293 S.W. 160, 163 (Tex. Comm'n App. 1927, judgm't adopted).
54. State v. Williams, 161 Tex. 1, 3, 335 S.W.2d 834, 836 (Tex. 1960).
55. *Warwick*, 293 S.W. at 162.
56. Lewis v. E. Tex. Fin. Co., 136 Tex. 149, 154, 146 S.W.2d 977, 980 (1941).
57. Shell Petroleum Corp. v. Ward, 100 F.2d 778, 779–80 (5th Cir. 1939).

tract to another person. In this situation, the grantee obtains title to the entire road, and not just to the center of the road, even if the description of the tract does not include the road acreage.[58] This exception was announced in *Cantley v. Gulf Production Company*.[59] In *Cantley*, the district court partitioned a 668-acre tract of land in 1910.[60] The partition included field notes for each tract and a map showing the location of each tract, all of which was recorded.[61] In both the notes and map, a 30-foot strip was set aside for the creation of a road, which was located between Lots 2 and 5.[62] Neither the description of Lot 2 nor Lot 5 included the 30-foot strip.[63] Douglass purchased Lot 5 and later obtained title to the strip by adverse possession.[64] In 1929, Douglass sold Lot 5 using the same description that appeared in the deed when he obtained title, which did not include the 30-foot strip.[65] The Court held that Douglass did not retain title to the 30-foot strip when he failed to include it in the description of Lot 5.[66] The Court also held that because the strip was located entirely on the land owned by Douglass full title to the strip passed to the purchasers in 1929.[67] Contrary to the General Rule, ownership of the strip was not split between the owners of Lots 2 and 5.

When the road is large in relation to the tract conveyed and potentially more valuable than the adjoining land, the grantee does not obtain title to the road.[68] In *Haby v. Howard*, Haby owned a large tract of land under and surrounding a lake.[69] He sold the land abutting the lake, but retained the land lying under the lake.[70] Owners of a portion of the land abutting the lake later claimed title to a 50-foot wide strip located between the lake and their land.[71] The trial court granted summary judgment in favor of the abutting landowners and held that the strip passed to them under the General Rule.[72] Haby's successors appealed based on the size and value of the strip.[73] The court noted that the strip and the adjoining land were approximately the same

58. Cantley v. Gulf Prod. Co., 135 Tex. 339, 345–46, 143 S.W.2d 912, 915–16 (1940).
59. *Id.*
60. *Id.* at 913.
61. *Id.*
62. *Id.*
63. *Id.* at 913–15.
64. *Id.* at 914.
65. *Id.*
66. *Id.* at 916.
67. *Id.*
68. Angelo v. Biscamp, 441 S.W.2d 524, 527 (Tex. 1969).
69. Haby v. Howard, 757 S.W.2d 34, 36 (Tex. App.—San Antonio 1988, writ denied).
70. *Id.*
71. *Id.* at 37.
72. *Id.* at 35–36.
73. *Id.* at 36, 40.

size, being 1.25 acres.[74] The court also held that there was conflicting evidence of fact regarding the value of the strip of the land.[75] Accordingly, the court held that the strip did not pass as a matter of law under the General Rule and suggested that if a factfinder found that the strip was valuable, Haby and his successors would have retained ownership of it.[76] It is important to remember that for purposes of determining whether the strip is valuable to the grantor, the value is determined on the date that the grantor conveys the tract adjacent to the strip—not the date that the dispute arises.[77] This is important because the minerals under a road may have been worthless in the early 1900s, but with the development of horizontal drilling and the discovery of the Barnett Shale, the value has increased significantly.

Also, the General Rule does not apply to private roads.[78] In *Camilla Twin Harbor Volunteer Fire Department v. Plemmons*, the Beaumont Court of Appeals expressly declined to apply the General Rule to a private road.[79] However, it is important to remember that a private road could become a public road by implied dedication, in which case the General Rule would apply.

G. *Effect of the General Rule on Oil and Gas Leases*

The question of whether title to roads passes to a lessee under an oil and gas lease is usually not an issue because most oil and gas leases contain a Mother Hubbard clause. A typical Mother Hubbard clause states that the lease covers adjacent or contiguous tracts owned or claimed by the lessor. The purpose is to make inadvertent omissions of small strips, such as easements, tracts adversely possessed, and land omitted due to survey errors and improper descriptions, subject to the lease.[80] However, even without a Mother Hubbard clause, the lessee would retain ownership to the road under the General Rule because an oil and gas lease is a conveyance of a fee simple determinable with a possibility of reverter.[81]

74. *Id.* at 40.

75. *Id.*

76. *Id.*

77. Glover v. Union Pac. R.R., 187 S.W.3d 201, 212–13 (Tex. App.—Texarkana 2006, pet. denied).

78. Camilla Twin Harbor Volunteer Fire Dep't., Inc. v. Plemmons, 998 S.W.2d 413, 417 (Tex. App.—Beaumont 1999, pet. denied).

79. *Id.*

80. Sun Oil Co. v. Bennett, 125 Tex. 540, 549, 84 S.W.2d 447, 452 (Tex. Comm'n App. 1935).

81. Concord Oil Co. v. Pennzoil Exploration & Prod. Co., 966 S.W.2d 451, 460 (Tex. 1998).

IV. Obtaining Leases on Tracts Owned by the State or a Political Subdivision

A. *Fee Ownership by the State or a County*

In situations where the land upon which the road lies is state-owned or where the landowner conveys land for purposes of creating the road to the State of Texas in fee, whether intentionally or inadvertently, the minerals under the road are owned by the state. Also, the state owns land that is conveyed to a county; the county merely holds title in trust for the state.[82] In *Robbins v. Limestone County*, the Supreme Court held:

> While the title, under the authority of law, was taken in the name of the county and under statutory authority, and the county was authorized and charged with the construction and maintenance of the public roads within its boundaries, yet it was for the state and for the benefit of the state and the people thereof.[83]

Nothing can divest the state of ownership of the minerals under the roads; therefore, operators seeking to drill under highways and roads owned by the state or a county must obtain a lease from the state.

In any of these situations, it is important to obtain a lease from the state (usually from the General Land Office) covering the road.

B. *Fee Ownership by a Municipality*

Although a county cannot own land used for road purposes, a city can hold title to roads located within its limits.[84] However, leasing the minerals under city-owned roads has proven to be burdensome. Up until recently, the Texas Local Government Code did not authorize a city to lease oil, gas, or minerals under a street, alley, or public square in the municipality.[85] After the 2009 Texas Legislature, the applicable statute was amended and now states that "a municipality may lease under this section a street, alley, or public square in the municipality if the lease prohibits the lessee from using the surface of the land."[86] This amendment seems to solve the problem because in *West v. City of Waco*, the Court stated

> The highways of the state, including the streets of cities, belong to the state, and the state has full control and authority over them. They "are the property of and for the use of the state, which, through its Legislature, has absolute control over same, which con-

82. Baker v. Dunning, 77 Tex. 28, 30–31, 13 S.W. 617, 618 (1890).

83. Robbins v. Limestone County, 114 Tex. 345, 354–55, 268 S.W. 915, 918 (1925).

84. Meyer v. Galveston, H. & S.A. Ry. Co., 50 S.W.2d 268, 273 (Tex. Comm'n App. 1932, holding approved).

85. Act of May 21, 1987, 70th Leg., R.S., ch. 149, 1987 Tex. Gen. Laws 1028 (amended 2009) (current version at Tex. Loc. Gov't Code Ann. § 253.005 (Vernon Supp. 2009)).

86. § 253.005(b).

> trol it may or may not, from time to time, delegate to the local authorities."[87]

The amended Texas Government Code section 253.005(b) seems to be a proper delegation to the city to lease the minerals under municipal streets, alleys, and public squares.

V. CONCLUSION

Due to the recent increase in horizontal drilling, lessees are more concerned with obtaining leases covering minerals located under roads and other rights-of-ways. Determining the ownership of these tracts can be frustrating, especially in well-developed urban areas. Although this paper does not discuss all possible issues that may arise when determining the ownership of roads, it seeks to serve as a stepping stone to assist lessees in obtaining leases from the correct parties.

For further discussion on the ownership of minerals under roads and other rights-of-ways, please see John L. Beckham, *Ownership and Leasing of Oil and Gas Under Roads, Highways, Riverbeds and Streams*, presented at The University of Texas School of Law 18th Annual Oil, Gas & Mineral Law Institute, March 27, 1992; Ernest V. Bruchez, *Ingress and Egress for Mineral Operations on Landlocked Tracts*, presented at The University of Texas School of Law 35th Ernest E. Smith Oil, Gas & Mineral Law Institute, March 27, 2009; and Clifton A. Squibb, *The Strip-and-Gore Doctrine: A Trap for the Unwary*, Oil, Gas and Energy Resources Law Section Report, State Bar of Texas, Volume 33, Number 3, March 2009.

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87. West v. City of Waco, 294 S.W. 832, 833–34 (Tex. 1927) (quoting Travis County v. Trogden, 31 S.W. 358, 360 (Tex. 1895)).