



Fill in the Blanks

Avoiding the pitfalls of using general forms.

BY RICK STRANGE

FORMS ARE A WONDERFUL TOOL FOR ANY ATTORNEY. Forms save time, help lessen the chances of forgetting to include an important provision, and provide an attorney with a degree of comfort because of familiarity. Unfortunately, a form can also get an attorney into trouble if too much reliance is placed upon it, or if the attorney attempts to force the terms of the transaction to fit the form versus modifying the form to reflect the transaction.

The most frequent problem an oil and gas attorney is likely to encounter when a general form was previously used is mineral reservations. The Texas Real Estate Commission has a number of excellent forms on its website.¹ This article will focus on the Farm and Ranch Contract form because it is often used when a tract of land is sold.

The current version of this form is described and discussed below. A prior version was widely used and is fre-

quently encountered today. That form, TREC NO. 25-0, was more difficult for general practitioners unfamiliar with oil and gas conveyances to use than the current version. Article 2 of this form is used to describe the property. Article 2.A(i) contains a blank to describe any mineral interests presently outstanding in third parties. Article 2.A(ii) is for mineral reservations. It provides: "To be additionally retained by Seller." The form has a blank immediately below this for drafters to use to describe any mineral reservation.

An example of the problems that can occur if this form is not completed properly is *Bright v. Johnson*.² In this case, the parties had agreed that the seller was retaining all the minerals. If the drafter had simply written "all" or "all of seller's mineral interests" in Article 2.A(ii), there would have been no issue. Instead, the drafter inserted "All of Record" into the contract. The title company pre-



pared a deed that did not reserve any minerals. When seller discovered that no minerals were retained, this suit was filed. Seller argued that the contract reserved the minerals and that the deed should be corrected. Buyer argued that the contract only reserved two prior conveyances or reservations of mineral interest that appeared of record in the chain of title. The Eastland Court agreed with seller and found that it had reserved the minerals and that the deed should be modified. Even though seller ultimately prevailed, significant time and money was spent litigating an issue that could have been easily prevented.

of whatever the seller owns.⁸ If the seller purports to reserve a fraction of the mineral estate, generally that reservation will operate on the mineral estate as a whole. But in this instance, practitioners need to be careful that there is no conflict between the contract's warranty provision and the reservation.⁹

Fortunately for general practitioners, the Farm and Ranch Contract on the TREC's website now, TREC NO. 25-9, is much easier to use. That form describes the property being sold in Article 2. Article 2.F allows the drafter to describe any reservation but it provides that any min-

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Several rules should be considered if a practitioner wishes to draft a mineral reservation. The general rule is that a conveyance of land without reservations includes all of the minerals and mineral rights.³ Similarly, when a mineral estate is conveyed, all interests are transferred unless they are specifically reserved to the grantor.⁴ This is important because some reservations will refer to something such as the seller's "royalty interest." In that instance, all that is retained is the seller's right to receive royalty payments. The seller would not retain the right to develop the property, right to lease the property, the right to receive delay rentals, or the right to receive bonus payments.⁵ Consequently, if the seller wishes to retain all of the mineral estate, the reservation should not refer to royalty but, instead, all of the seller's interest in the oil, gas, and mineral estate.

Another potential problem is fractions. Many years ago, a one-eighth royalty was standard and, apparently, some assumed would always be standard. Some drafters wishing to retain a one-half interest for the seller would refer to one-half of the usual one-eighth royalty for any oil, gas, or other minerals produced from the land.⁶ A question arises when a lease with a higher royalty is entered into. Is the seller entitled to a one-sixteenth royalty or one-half of the higher royalty? The general rule is that the seller's royalty "floats." In this instance, if the landowner enters into a lease with a higher royalty, the seller would be entitled to one-half of the higher royalty.⁷

When the seller wishes to retain a percentage of the mineral estate, the drafter should clearly state not only what is being reserved, but also how much is being reserved. For example, a reservation of one-half of the seller's interest in the mineral estate will reserve one-half

eral reservation will be described on an attached addendum. That addendum, TREC NO. 44-1, is an excellent resource. It defines the mineral estate broadly and allows the seller to either reserve "all of the Mineral Estate owned by Seller" or to reserve a portion of the mineral estate. To avoid confusion when a portion of the mineral estate has been previously reserved, the form provides that the percentage being reserved is only the percentage of the seller's interest. Consequently, if one-third of the mineral estate is held by a third party and the seller's intent is to keep one-half of the two-thirds they own, the drafter would put 50 percent in the blank. **TBJ**

NOTES

1. Those can be found at trec.state.tx.us/formslawscontracts/forms/forms-contracts.asp.
2. 302 S.W.3d 483 (Tex. App.—Eastland 2009, no pet.).
3. See *Sundance Minerals v. Moore*, 354 S.W.3d 507 (Tex. App.—Fort Worth 2011, pet. denied).
4. *In re Estate of Slaughter*, 305 S.W.3d 804, 808 (Tex. App.—Texarkana 2010, no pet.).
5. See *French v. Chevron U.S.A.*, 896 S.W.2d 795, 797 (Tex. 1995) (describing the five separate and distinct interests comprising the mineral estate).
6. See, e.g., *Sundance*, 354 S.W.3d at 510.
7. See *id.* at 512.
8. See *Stewman Ranch, Inc. v. Double M. Ranch, Ltd.*, 192 S.W.3d 808, 8-9, 813 (Tex. App.—Eastland 2006, pet. denied).
9. This is referred to as a *Duhig* problem. See *Duhig v. Peavy-Moore Lumber Co. Inc.*, 135 Tex. 503, 144 S.W.2d 878 (1940).



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