OWNERSHIP OF MINERAL RIGHTS WITHIN TEXAS RIGHT-OF-WAYS

stacey d lyle
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Stacey D. Lyle, PhD, RPLS
Texas A&M University Corpus Christi
6300 Ocean Drive
Corpus Christi, TX 78412
1-361-825-3712
Stacey.lyle@tamucc.edu

ABSTRACT
Hard shale oil and gas exploration has increased in Texas most recently. These pools of oil and gas in hard shale must be extracted using a hydrologic fracturing technique. Some of these pools are under the State of Texas Highway Right-of-Ways. Ownership of mineral rights is typically determined by the surface owners, but mineral rights can be severed from the surface owner. Exploration companies are required to pay out revenues to the owners of the minerals, so they research the chain of title of properties to determine who the mineral rights owners are. This paper will discuss the concepts of hard shale oil and gas exploration in Texas, mineral rights ownership, highway right-of-way mineral rights ownership, current and past process of land acquisition and the rights in the minerals, and the method of acquisition of minerals from Texas Highway Right-of-Ways. A conclusion will be drawn that discusses how land surveyors determine land ownership for mineral rights in hard shale exploration.

KEYWORDS
Mineral Rights, Hydraulic Fracturing Barnett Shale, Highway Right-of-Way, Texas Department of Transportation

1. TEXAS OIL AND GAS PRODUCTION
The price of oil and gas in 2009 saw a record revenue price. Oil and gas exploration companies rushed to cash in on the revenues obtained during this period. Searching for oil and gas is a science, but also has some risk involved. Occasionally, explored deposits are void or low producing. Three dimensional (3D) ground images are used by geologists, geophysicists, and geoscientist to determine if deposits or pools of oil and gas might exist. The Texas Board of Professional Geoscientist’s (TBPG) protects the public health, safety, welfare and the state's natural resources by ensuring that only qualified persons carry out the public practice of geoscience on public lands.

A person exploring on public land must be licensed by TBPG. The evaluation of the 3D data to determine if an oil and gas deposit might exist is done by a professional (or by those schooled in the art and science of exploration.) When the exploration drills the site and finds a void or low producing, the exploration company must absorb the loss.

Hard shale deposits are likely to “play out” oil and gas productions because the detection of these deposits are more accurate; however, obtaining the deposit is more costly and difficult. Utilizing hydrological fracturing has made obtaining the deposit profitable, but profit margin is not as high as other traditional exploration methods in none hard shale are due to the methodology. Hard shale deposits are known as a tight gas deposit or reservoir. Texas has several shale deposits. The Barnett Shale is located in the Fort Worth, Texas Area as shown in Figure 1.0. The Haynesville Shale is a deposit or reservoir that is located in East Texas and Northern Louisiana also shown in Figure 1.0.

The method of hydraulic fracturing is the process of drilling a borehole to a desired area, either vertically or horizontally. Once the borehole is created the local shale is fractured, and a fluid is pumped into the fractures forcing the gas and oil out to a capturing area.

To explore any area in Texas whether in a shale or not, requires a permit from the Texas Railroad Commission. The Railroad Commission has primary regulatory jurisdiction over oil and natural gas industry, pipeline transporters, natural gas & hazardous liquid pipeline industry, natural gas utilities, the LP-gas industry, and coal and uranium surface mining operations. Applications, which include surveying plats, are required according to the Texas Railroad Commission to explore deposits.

Figure 1.0 Texas Barnett and Haynesville Shale Plays, (Barnett, 2009)
2. Mineral Rights in Texas
Ownership of mineral rights in Texas are a complex issue and well documented in case-by-case situations. Research into the ownership must be done by reviewing the chain of title to determine who has the surface rights and who has the mineral rights.

Texas has a rich history of multiple sovereigns having claims to surface and mineral rights. Under the Spanish and Mexican government ownership of mineral rights were retained by the sovereigns. It was not until Texas was a State and the Constitution of 1866 was ratified that land mineral rights passed from the State to the land owners and was considered to vest to the grantee or patentee. The State would have had to expressly retained mineral rights for the rights to remain with the State after this date when land passed from the State to the private landowner. A statute to this effect then was created in 1895 to better understand ownership of mineral rights from the State to the landowner. Additionally, the Relinquishment Act attempted to address the ownership interest that was maintained by the State. The mineral rights that then passed to the landowner from the State and could then be passed along to sequential land owners in the chain of title. The ability to sever the mineral rights from the surface rights is possible and does exist throughout Texas (Thompson and Thompson, 1982).

When mineral rights are severed, then they are severed for eternity unless re-obtained by the surface owner. Therefore, mineral rights are not automatically extinguished if the owner does not exercise their rights in the minerals, unless the deed to transfer the mineral rights expressly states the same. Mineral rights are transferred like surface rights in a deed and a description of the rights, area, and interest must be defined. Mineral rights can be transferred to assignees in a will as well.

Exploration companies will typically sign a lease which allows the company to explore for minerals on designated areas, both horizontally and vertically. They might sign a lease to explore at $4,000/acre for example and share an amount of the royalties of 1/6 or 1/16 the pay out. If a mineral rights possessor cannot be found, then after 3 years the funds would go to the State of Texas. The surface owner cannot adversely posses the mineral rights ownership. An adverse possesor can take what mineral rights a surface right owner has when an adverse possession is fully adjudicated in favor of the possessor.

The second method of acquirement used for the state highway is by fee simple. Here the State would hold the underlying fee title, and if the mineral rights were attached then the mineral rights would pass at the execution of the deed. The reading of the chain of title and the transferring documents should clear the fee ownership ambiguity. If the mineral rights had previously been severed then the grantor cannot give what the grantor does not own to the State.

Currently the policy of the state is to not take the oil and gas mineral rights when acquiring property according to the TxDOT manual. The state will request the sand/gravel and other mineral rights when available to block others from entering the right-of-way to seek and explore these minerals.

3. Highway Land Acquisition and Mineral Rights
Who owns the mineral rights, under the Highway Right-of-Way, is a question of what was given to the State when the State acquired the surface rights of the property. Land under the right-of-way is basically considered to be obtained by two possible methods. First, it is understood, and the courts have held, that the road dedicated to the public is retained by the granting land owner, unless the providing grant specifically relinquishes ownership. Therefore, the mineral rights might still be with the original grantor and their assignees. Additionally, where the land for the right-of-way was an easement (appurtenant or prescriptive) it might be that its mineral rights are retained by the grantor.

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Table 1.0 TxDOT Manual on Mineral Rights, (TxDOT Manual, 2008)

Chapter 15, Section 2, Minerals

Minerals

As a general policy, all minerals will be acquired with the exception of oil, gas, and sulfur. Surface rights to oil, gas, and sulfur will be acquired if there is a whole taking of the surface rights of the owner of these minerals. However, in cases involving parcels located in a municipality which has an anti-drilling ordinance deemed adequate to safeguard TxDOT's planned highway facility, it will not be necessary to make a title search for separate mineral interests or to acquire the surface rights of the owners of such mineral interests. It is the District's responsibility to advise the ROW Division of its determination that the ordinance involved adequately protects TxDOT for the parcel(s) involved.

If parties other than the surface owner posses a mineral interest, no attempt will be made to acquire the ownership rights of the severed mineral owners unless the entire estate of the mineral owner is being acquired, or if there is active production of minerals on the property to be acquired. This practice is due to:

- the owner of the severed minerals will make no attempt to encroach upon the highway since, as a practical matter, the owner will be able to recover the minerals from operations commenced outside the right of way limits;
- the obstructing highways is a penal offense in this State; and the injunctive relief is available to TxDOT.

Gravel, sand, caliche, and iron ore gravel are considered road construction materials and are not regarded as minerals. When the grantor reserves title to minerals, the reservation does not include these road-building items.

If the grantor desires to retain all minerals and will not sign a deed containing the standard reservation of oil, gas, and sulfur, then, as a concession to avoid condemnation, the special mineral clause shown in Approved Special Clauses for Use in Conveyance Instruments for Use in Conveyance Instruments may be substituted in place of the standard clause. Use of this special
mineral clause is to be limited and not used as a standard item in deeds.

If a property owner will not sign a deed containing the standard mineral reservation, it is permissible for the property owner to retain all minerals as a concession to avoid condemnation. No further concession can be made without prior approval of the ROW Division. Owners who insist on their own phraseology should be reminded that, if the State condemns, only oil, gas and sulfur are reserved from the conveyance. When use of a special mineral clause is necessary, the standard mineral reservation clause is to be stricken from the deed and the following language inserted:

"Grantors reserve all of the oil, gas and sulphur and other minerals in and under said land but waive any and all rights of ingress and egress to the surface thereof for the purpose of exploring, developing, mining or drilling for the same; provided, however, that operations for exploration or recovery of any such minerals shall be permissible so long as all surface operations in connection therewith are located at a point outside the area described property and upon the condition that none of such operations shall be conducted so near the surface of said land as to interfere with the intended use thereof or in any way interfere with, jeopardize, or endanger the facilities of the Texas Department of Transportation or create a hazard to the public users thereof; it being intended, however, that nothing in this reservation shall affect the title and the rights of the State to take and use without additional compensation any water, stone, earth, gravel, caliche, iron ore gravel or any other road building materials upon, in and under said land for the construction and maintenance of the State Highway System of Texas."

Chapter 16, Section 3, Mineral Exceptions

Mineral Exceptions

On whole takings, an exception to mineral interests in a commitment or policy is not acceptable. Commitments and policies on partial takings may include an exception to all oil, gas and sulfur leasehold interests and/or other mineral interests. In the list of exceptions in title commitments and policies, standard practice is to list "oil, gas and sulphur as provided for in the deed to the State of Texas."

4. Texas General Land Office

If the State owns the mineral rights in the Highway Right-of-Way then they are entitled to the lease and royalty revenues. This is managed and distributed by the Texas General Land Office. Statutes, rules, and procedures are put in place for the exploration and acquirement of the minerals.

Table 2.0 Texas General Land Office Policy of Highway Right-of-Way Tract Leases (GLO, 2010)

<table>
<thead>
<tr>
<th>I. Highway Right-of-Way Tracts Subject to Lease:</th>
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<tr>
<td>a) A highway right-of-way tract may be leased if the state owns the minerals located under the tract and if the right-of-way is not within 2500 feet of a well which was capable of producing in paying quantities on January 1, 1985. If the right-of-way is being leased for the purposes of drilling a horizontal well, the 2500 foot limitation may be deleted.</td>
</tr>
<tr>
<td>b) At its discretion, the School Land Board may establish the size and boundaries of each right-of-way tract to be leased or to be exempted from leasing. However, each right-of-way tract shall extend across the entire width of each right-of-way, subject to the provisions relating to Preferentially Leasing to Adjacent Mineral Owners (see Section IV).</td>
</tr>
<tr>
<td>c) The School Land Board may refuse to lease a particular right-of-way tract, either on its own motion or upon the request of the State Department of Highways and Public Transportation.</td>
</tr>
<tr>
<td>d) A right-of-way on Relinquishment Act land will not be leased in accordance with these procedures. Such a right-of-way will be leased by sealed bid in the same manner as the leasing of state-owned public school land.</td>
</tr>
<tr>
<td>e) Unless the right-of-way is leased for the specific purpose of drilling a horizontal well, a lease issued on the right-of-way tract is void if it is determined that a well capable of producing oil and/or gas in paying quantities was located within 2500 feet of the right-of-way on January 1, 1985.</td>
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Leasing Process:

a) Anyone may apply to lease acreage in a right-of-way tract by submitting the following materials to the Commissioner of the General Land Office at the address shown above.

(1) Written application which includes a map showing the boundaries and dimensions of the right-of-way tract which the applicant proposes to lease.

(2) Names and addresses of any adjacent mineral owners listed in the county records. See Section III for the definition of adjacent mineral owners as used in these procedures.

(3) Affidavit stating that there was no well capable of producing in paying quantities within 2500 feet of the right-of-way tract boundaries as of January 1, 1985, or that the right-of-way is being leased for the specific purpose of drilling a horizontal well.

(4) A $100.00 processing fee payable to the Commissioner of the General Land Office.

b) A person who holds a lease or leases on lands which are adjacent to a right—of-way and who applies to lease an adjoining right-of-way must additionally submit the following materials.

(1) Written waiver of the statutory notice to which the applicant is entitled.

(2) A certified copy or a reproduction of a certified copy of his or her recorded lease or leases on the land adjacent to the right-of-way tract.

(3) Notarized affidavit of the consideration paid for the lease or leases on the adjacent land.

(4) A map or plat which clearly indicates the mineral ownership (or if the tract is leased, the lease ownership) of all tracts adjacent to the right-of-way.

III. Notifying Adjacent Mineral Owners:

a) If land adjoining a right-of-way tract is unleashed, then an
IV. Adjacent Mineral Owners Right to Preferentially Lease:

b) Each adjoining mineral owner must receive notice of the proposed leasing of the right-of-way tract;

c) however, an adjacent mineral owner may waive this notice by mailing a written waiver to the Commissioner of the General Land Office.

IV. Adjacent Mineral Owners Right to Preferentially Lease:

a) An adjacent mineral owner is entitled to preferentially lease the right-of-way adjoining their mineral interest.

b) If the adjacent mineral owners on opposite sides of a right-of-way tract differ, then each adjacent mineral owner is entitled to preferentially lease one-half of the right-of-way.

c) If there is only one mineral owner on both sides of a right-of-way, he or she may exercise a preference to lease the entire right-of-way tract.

d) If the adjacent mineral owners on opposite sides of a right-of-way tract differ and if only one-half of the tract was preferentially leased, then the unleased one-half can be preferentially leased by the mineral owner who has already preferentially leased the other half.

e) When the mineral ownership of unleased lands adjoining a right-of-way tract is divided among several adjacent mineral owners, each adjacent mineral owner shall have a preferential right to lease a proportional interest in one-half of the right-of-way. Each adjacent mineral owner may lease an interest in the right-of-way tract in proportion to his or her interest in the adjoining acreage. However, if any adjacent mineral owners do not want to lease an interest in the right-of-way, the School Land Board shall equitably apportion the interests in the right-of-way tract among those adjacent mineral owners who wish to lease an interest.

f) The terms of a preferential lease depend on whether lands adjacent to the right-of-way are leased. If the adjacent land is unleased then the School Land Board shall set the terms of the lease. If the adjacent land is leased, then the right-of-way shall be leased upon the same terms as the most favorable lease held on acreage adjoining the right-of-way tract.

g) Any mineral owner may waive his or her preferential right to lease the adjacent right-of-way tract by providing the General Land Office with a written waiver executed and acknowledged by the mineral owner or his duly authorized agent. The filing of such written waiver with the General Land Office shall result in the forfeiture of the preferential right to lease the land.

V. Leasing Directly to Applicant or by Sealed Bid:

a) If an adjacent mineral owner’s preferential right to lease is forfeited either due to the owner failing to exercise his or her preferential right to lease by failing to tender the appropriate bonus and statutory sales fee within 120 days of receipt of notice of the proposed leasing of the right-of-

way, or by waiver as provided above, then the School Land Board may lease the right-of-way tract directly to an applicant or by sealed bid at any time within 18 months after the preferential right to lease expires or is forfeited.

VI. Issuing the Leases:

a) A lease will only be issued after the School Land Board approves the lease and is in receipt of the applicable bonus payment and the statutory sales fee equal to 1½ percent of the bonus payment.

b) Each lease issued on a right-of-way tract shall grant the lessee the authority to pool the tract.

c) Additionally, each lease issued on a right-of-way tract shall provide for the payment of compensatory royalty.

Table 3.0 Texas Property Code on Lease of Highway Lands

<table>
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<tr>
<th>Section</th>
<th>Description</th>
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<tr>
<td>32.201</td>
<td>Preferential Right to Lease Certain Land by Adjoining Mineral Owner</td>
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</table>

(a) In this section, “mineral owner” means any person who owns the right to explore for, develop, and produce oil and gas from a tract of land adjoining lands owned by the state that were or may be acquired to construct or maintain a highway, road, street, alley, or other right-of-way.

(b) Oil and gas under lands owned by the state that were or may be acquired to construct or maintain a highway, road, street, alley, or other right-of-way may be offered for lease under this chapter only after the oil and gas are first offered for lease to the mineral owner of the land adjoining the length of the land to be leased. The Board shall set the terms and conditions of the lease as follows:

1. In instances where the adjoining land is covered by an existing oil and gas lease currently in effect, the royalty, bonus, and rental shall be identical to those amounts contained in the lease covering the adjoining land or, in the event there is more than one lease covering adjoining land, shall be no less favorable to the state than the most favorable of such leases.

2. In instances where the adjoining land is not covered by an existing oil and gas lease currently in effect, the royalty, bonus, and rental shall be as provided in Sections 32.1072 and 32.1073 of this code.

(c) The preferential right of the mineral owner created by Subsection (b) of this section is subject to the following limitations:

1. The lease of the oil and gas extends only to the center of the width of the particular highway, road, street, alley, or other right-of-way adjacent to the property in which the lessee is the mineral owner; and

2. The preferential right to lease must be exercised by the mineral owner within 120 days of actual notice of the intention to lease as provided by Subsection (d) of this section.

(d) Actual notice, describing the land as required by Section 32.204 of this code, has occurred upon mailing of the notice of the intention to lease by registered mail to the last known address of the affected mineral owner.
or owners, if more than one, as determined from records of the county clerk for the county in which the land to be leased is located. If the identity or address of a mineral owner is not known, and cannot be located after a diligent search of the records of the county clerk and tax assessor-collector for the county in which the land is located, the actual notice required by Subsection (c) of this section shall be provided by publication. The notice shall be published in the manner provided in the Texas Rules of Civil Procedure for citation by publication in actions against unknown owners or claimants of interest in the land. Actual notice has occurred on completion of all procedures required by the Rules of Civil Procedure. (e) To exercise the preferential right under this section, the mineral owner must tender to the commissioner the bonus set by the board, together with the appropriate statutory sales fee. The tender to the commissioner must be made on or before the end of the 120-day period provided by Subsection (c)(2) of this section. (f) At any time during the 120-day period a mineral owner may waive his preferential right to lease by providing the General Land Office with a written waiver. Failure by the mineral owner to exercise his preferential right to lease the land within the 120-day period provided by Subsection (c)(2) of this section, or the filing of a written waiver, results in forfeiture of the preferential right to lease the land. (g) If a mineral owner's preferential right is forfeited under this section, the land may be offered for lease by the board directly to an applicant or by sealed bid as provided by this chapter. The board shall not offer nor accept a price or terms which are less than that offered to the adjoining mineral owner under this section. If not leased at a public offering within 18 months from the date the lease was offered to the adjoining mineral owner, it shall be reoffered to the mineral owner prior to public offering in accordance with the provisions of this section. (h) An adjoining mineral owner shall have the right to seek a judicial determination of the state's title to minerals beneath the adjoining highway right-of-way, and legislative consent to sue the state is hereby granted. Within 60 days of a final nonappealable judgment finding the state did not have title, or only had partial title, the state shall refund all or the proportionate part of any bonus, rental, royalty, and other consideration to the lessee. The state's lessee shall pay to the lawful mineral owner the value of any oil and gas produced from or allocated to the minerals upon which the state's title failed. 

5. CONCLUSIONS

Once land and mineral ownership is determined in title, then the property must be surveyed to match the deed description to the possession facts. To determine the extent of the mineral ownership is done by the surface area and typically in acres. The surface area in the deed and on the ground is determined to assist the exploration companies in determining the percentage of ownership of the ‘pool’.

Where a deed conflicts on the ground the exploration company will only pay on what the owner has title. Excess and deficiency must be resolved in title by fact and by law. This is typically resolved by the exploration companies in conjunction with the landowner. For example figure 2.0 shows a survey plat that was made for the Texas Railroad Commission. It appears that Highway 377 was within the permit. Where the State is the mineral owner the exploration company must obtain a lease from the State.

When it comes to whether or not a professional surveyor is needed to survey oil and gas leases, is based on the client often requesting that the plat is generated and stamped by a licensed surveyor. This is done to assure the quality of the data/research and offer some form of liability protection for the surveying services. The Texas Board of Professional Land Surveying has stated that if you place your ‘seal’ on a report for the Texas Railroad Commission then it should be to the minimal standards and follow the Act and Rules of the Texas Board of Professional Land Surveying.

![Figure 2.0 Survey Plat Submitted to Texas Railroad Commission in Hood County Texas, (TRRC, 2010)](image)
Railroad Commission is answered in Texas Attorney General opinion in a letter to the Texas Board of Professional Land Surveyors:

"...You ask whether the Texas Board of Professional Land Surveying (the “Board,”) may require that all proposed well locations submitted to the Texas Railroad Commission be surveyed by a registered professional land surveyor. Rules promulgated by the Railroad Commission (The “Commission”) require information about well locations to accompany applications for certain oil and gas well permits, but they do not require that the locations be surveyed by a registered professional land surveyor.

The Commission has reasonable discretion to determine what information must accompany permit applications filed under Commission rule. If measurements determined by a less precise method than professional surveying yield enough information for the Commission to implement its rules on oil well permits and oil well spacing, such well locations need not be surveyed...

The Commission, however, does not require that a registered surveyor prepare the plats submitted to it. It submitted its reasons for this in connection with Attorney General Opinion JM-418, stating that the position of a new well can be determined by measurement from an existing marker and this location may be recorded on a map based on a prior survey.” (Cornyn, 2002).

Therefore, it is inferred that a Registered Professional Land Surveyor is not required to prepare a plat for the Texas Railroad Commission. This could mean that the determination of what is owned in fact and law, might not be adequately determined in when dealing with oil and gas leases.

The Texas Railroad Commission considers geographic information systems (GIS) as a tool manage and maintain the oil and gas permits and exploration in Texas. Figure 3.0 shows were a GIS is used to show the lease boundaries and well locations. In the future, GIS datasets will likely supplant surveying products, such as plats, in resolving mineral right ownership.

6. Acknowledgments

Texas Department of Transportation, Conrad Blucher Institute for Surveying Science

7. References


Figure 3.0 Lease and Survey/Abstract locations in reference to oil and gas wells new Highway 377 in Hood County, Texas (TRRC GIS, 2010).