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RELINQUISHMENT OF STATE OWNED MINERALS— THE AGENCY RELATIONSHIP BETWEEN THE "OWNER OF THE SOIL" AND THE STATE

Many laws have been enacted respecting public lands and the minerals therein To one who will study the intricacies of our school land laws, and the purposes for which they were enacted, it is quite obvious that they were not always clear in their meaning [O]ur school land laws have been to a large extent patchwork, each law being cumulative of the other, and no new law repealing a prior law, unless clearly repugnant to the prior law.¹⁸

Title to the minerals beneath public lands granted to private individuals by the state has long been a source of confusion in Texas. Texas has developed a system whereby the grantees of public lands acquire either absolute title to the minerals beneath their land or no title whatsoever, but are nevertheless constituted the agent of the state for the purpose of leasing such minerals. The confusion results from a historic vacillation between the Spanish system of reserving all mines and minerals to the sovereign, and the Anglo-American system of granting all minerals to the landowner.¹⁹

The "agency" concept ultimately adopted in Texas with respect to certain minerals to which the state has retained title represents a hybrid of the Spanish and Anglo-American systems. Although the surface owner of such land has no title to the underlying minerals, the agency authority conferred on him creates an anomalous situation in which he exercises many of the rights, and enjoys most of the benefits of a fee simple owner. The agency system is aimed toward maximum development of the state's mineral resources while simultaneously promoting cooperation between the surface owner and the state's mineral lessee who must, of necessity, interfere with the landowner's surface rights in the mining process.²⁰

In 1783 Charles III of Spain promulgated the Spanish Mining Ordinance reserving all minerals, known and unknown, on all lands, private

18. *Magnolia Petroleum Co. v. Walker*, 125 Tex. 430, 436, 83 S.W.2d 929, 932, *cert. denied*, 296 U.S. 623 (1935).

19. Although the Anglo-American system generally grants all minerals to the surface owner, there exists an exception whereby all royal mines (gold and silver) were reserved to the sovereign. *Cox v. Robison*, 105 Tex. 426, 431, 150 S.W. 1149, 1151 (1912); *Cowan v. Hardeman*, 26 Tex. 217, 223 (1862).

20. TEX. REV. CIV. STAT. ANN. art. 5367, comment (1962); *Norman v. Giles*, 148 Tex. 21, 26, 219 S.W.2d 678, 681 (1949).

or public, to the crown.²¹ The ordinance was applicable to Mexico and, therefore, to Texas.²² When Texas obtained its independence from Mexico in 1836, it impliedly retained the Mexican law reserving the minerals to the sovereign,²³ and in the following year this reservation was expressed in legislation.²⁴ The policy of separating the patent of the surface from that of the underlying minerals was reaffirmed by specific exception to the adoption of the common law in 1840.²⁵

No serious policy change with respect to the reservation of minerals to the state occurred until Texas enacted the Constitution of 1866.²⁶ An ordinance originally intended only as a release of the minerals of a particular salt lake to the surface owners was incorporated as a general provision of the constitution releasing all mines and minerals to all grantees of state land.²⁷ In 1912 the supreme court decided that the peculiar circumstances surrounding the enactment of the provision manifested an intention on the part of the legislature to limit the scope of its operation.²⁸ Accordingly, this first general release, abrogating the Mexican system of mineral reservation, was held to have retrospective application only.²⁹ Nearly identical provisions were included in the constitutions of 1869³⁰ and 1876.³¹ Furthermore, general releases of minerals to the surface owners appeared as statutes in 1879³² and 1895.³³ Worded as present releases, each of these statutes and constitutional sections, like the provision in the Constitution of 1866, has been construed as a retrospective rather than a prospective release of minerals to the surface owners.³⁴

21. TEX. CONST. art. XIV, § 7, comment (1876).

22. *Id.*

23. *Id.*

24. Tex. Laws 1837, An Act for the Relief of James Erwin and Others § 4, at 1291, 1 H. GAMMEL, LAWS OF TEXAS 1289 (1898); see *Cox v. Robison*, 105 Tex. 426, 435, 150 S.W. 1149, 1151 (1912); *State v. Parker*, 61 Tex. 265 (1884); *Cowan v. Hardeman*, 26 Tex. 217 (1862).

25. Tex. Laws 1840, An Act to Adopt the Common Law of England § 2, at 178, 2 H. GAMMEL, LAWS OF TEXAS 177 (1898).

26. TEX. CONST. art. VII, § 39 (1866) states "[t]hat the state of Texas hereby releases to the owner of the soil all mines and mineral substances" See *State v. Parker*, 61 Tex. 265, 268 (1884).

27. TEX. CONST. art. XIV, § 7, comment (1876); *Cox v. Robison*, 105 Tex. 426, 433-34, 150 S.W. 1149, 1152-53 (1912).

28. *Cox v. Robison*, 105 Tex. 426, 434, 150 S.W. 1149, 1153 (1912).

29. *Id.* at 434-35, 150 S.W. at 1153.

30. TEX. CONST. art. X, § 9 (1869).

31. TEX. CONST. art. XIV, § 7 (1876).

32. Tex. Laws 1879, ch. 1, at 545, — H. GAMMEL, LAWS OF TEXAS — (1898).

33. Tex. Laws 1895, ch. 1, at 801, — H. GAMMEL, LAWS OF TEXAS — (1898).

34. *Cox v. Robison*, 105 Tex. 426, 437, 150 S.W. 1149, 1156 (1912); Walker, *The Texas Relinquishment Act*, SW. LEGAL FOUNDATION, FIRST INSTITUTE ON OIL & GAS LAW 245, 246 (1949).

The effective date of the last general mineral release—September 1, 1895³⁵—is highly significant since that statute has also been construed to have retrospective application only.³⁶

[This date] is generally accepted by lawyers as a deadline in title research with regard to mineral ownership. If the title in question had its origin out of the sovereign prior to that date it is generally considered that the State of Texas has no interest in any of the minerals in the land . . .³⁷

THE RELINQUISHMENT ACT OF 1919

The Relinquishment Act of 1919³⁸ was enacted to afford the surface owner adequate protection from a lessee of the mineral estate.³⁹ Under the former Permit and Lease Act of 1913,⁴⁰ as amended in 1917,⁴¹ purchasers of public school lands acquired no interest in the underlying minerals.⁴² All minerals were reserved to the state and were subject to oil and gas lease by anyone upon application to the state.⁴³ The sole remuneration provided for the surface owner was a 10 cents per acre annual fee, payable by the lessee as compensation for damages to the surface which occurred during drilling operations.⁴⁴ Surface owners considered this to be inadequate compensation for the loss of a portion of their property rights.⁴⁵ In order to prevent violence between surface owners and lessees, the Relinquishment Act of 1919 was enacted.⁴⁶

35. Tex. Laws 1895, ch. 1, at 801, — H. GAMMEL, LAWS OF TEXAS — (1898); Walker, *The Texas Relinquishment Act*, SW. LEGAL FOUNDATION, FIRST INSTITUTE ON OIL & GAS LAW 245, 246 (1949).

36. *Cox v. Robison*, 105 Tex. 426, 439, 150 S.W. 1149, 1156 (1912); Walker, *The Texas Relinquishment Act*, SW. LEGAL FOUNDATION, FIRST INSTITUTE ON OIL & GAS LAW 245, 246 (1949).

37. Walker, *The Texas Relinquishment Act*, SW. LEGAL FOUNDATION, FIRST INSTITUTE ON OIL & GAS LAW 245, 246 (1949).

38. TEX. REV. CIV. STAT. ANN. arts. 5367-5382 (1962).

39. *Greene v. Robison*, 117 Tex. 516, 531-32, 8 S.W.2d 655, 659-60 (1928); Walker, *The Texas Relinquishment Act*, SW. LEGAL FOUNDATION, FIRST INSTITUTE ON OIL & GAS LAW 245, 255-56 (1949).

40. Tex. Laws 1913, ch. 173, at 409.

41. Tex. Laws 1917, ch. 83, at 158.

42. *Empire Gas & Fuel Co. v. State*, 121 Tex. 138, 152-53, 47 S.W.2d 265, 270 (1932).

43. *Id.* at 152-53, 47 S.W.2d at 270.

44. Tex. Laws 1913, ch. 173, at 409; Tex. Laws 1917, ch. 83, at 158; Walker, *The Texas Relinquishment Act*, SW. LEGAL FOUNDATION, FIRST INSTITUTE ON OIL & GAS LAW 245, 255-56 (1949).

45. Walker, *The Texas Relinquishment Act*, SW. LEGAL FOUNDATION, FIRST INSTITUTE ON OIL & GAS LAW 245, 256 (1949). See also *Norman v. Giles*, 148 Tex. 21, 26, 219 S.W.2d 678, 681 (1949); *Greene v. Robison*, 117 Tex. 516, 531, 8 S.W.2d 655, 659-60 (1928).

46. Walker, *The Texas Relinquishment Act*, SW. LEGAL FOUNDATION, FIRST INSTI-

As stated in the original enactment of the Relinquishment Act, its purpose was "[t]o promote the active co-operation of the owner of the soil and to facilitate the development of . . . [the State's] oil and gas resources"⁴⁷ Implementation of this directive was primarily relegated to a statute which now appears as article 5367:

The State hereby constitutes the owner of the soil its agent . . . and in consideration therefor, relinquishes and vests in the owner of the soil an undivided fifteen-sixteenths of all oil and gas which has been undeveloped and the value of the same that may be upon and within the surveyed and unsurveyed public free school land and asylum lands . . . sold with a mineral classification or mineral reservation The remaining undivided portion of said oil and gas and its value is hereby reserved for the use of and benefit of the public school fund and the several asylum funds.⁴⁸

Article 5367 represents the first example of the special "agency" concept which Texas has adopted for the development of minerals reserved to the state. The surface owner of land subject to the Relinquishment Act stands in the unique position of acting as the state's representative for the leasing of state owned minerals, and at the same time exercises valuable proprietary interests in the minerals. Indeed, for the first 9 years after its promulgation the Relinquishment Act was construed as vesting fee simple title to fifteen-sixteenths of the oil and gas in the surface owner.⁴⁹ The state was thought to have reserved a "non-participating royalty" of one-sixteenth,⁵⁰ with all bonuses, rentals, and royalties being retained by the surface owner.⁵¹

Article 5367 was first construed as placing the surface owner in the role of the state's agent in the seminal case of *Greene v. Robison*,⁵² where the constitutionality of the Relinquishment Act was challenged. The Texas Supreme Court was compelled to hold that no title or inter-

TUTE ON OIL & GAS LAW 245, 256 (1949). See also *Norman v. Giles*, 148 Tex. 21, 26, 219 S.W.2d 678, 681 (1949); *Greene v. Robison*, 117 Tex. 516, 531, 8 S.W.2d 655, 659-60 (1928).

47. TEX. REV. CIV. STAT. ANN. art. 5367, comment (1962); see *Greene v. Robison*, 117 Tex. 516, 527, 8 S.W.2d 655, 658 (1928).

48. TEX. REV. CIV. STAT. ANN. art. 5367 (1962).

49. *Texas Co. v. State*, 154 Tex. 494, 501, 281 S.W.2d 83, 87 (1955); Walker, *The Texas Relinquishment Act*, SW. LEGAL FOUNDATION, FIRST INSTITUTE ON OIL & GAS LAW 245, 259 (1949).

50. See *Norman v. Giles*, 148 Tex. 21, 26, 219 S.W.2d 678, 681 (1949). The terms "relinquishes" and "vests" as used in article 5367 suggested a true conveyance of the mineral estate. *Id.* at 26, 219 S.W.2d at 681.

51. Walker, *The Texas Relinquishment Act*, SW. LEGAL FOUNDATION, FIRST INSTITUTE ON OIL & GAS LAW 245, 259 (1949).

52. 117 Tex. 516, 8 S.W.2d 655 (1928).

est in the oil and gas on lands subject to the Relinquishment Act passed to the surface owner.⁵³ Furthermore, it was held that the one-sixteenth interest reserved to the state should be considered a royalty,⁵⁴ and “[i]f a bonus is paid, if a larger royalty or other amounts are contracted for, the state and the owner of the soil receive equally in like amounts.”⁵⁵ To have held otherwise would have rendered the Relinquishment Act unconstitutional “as making a gift, as constituting an unauthorized diversion of a part of the school fund, and as delegating to an agent duties imposed by the Constitution upon the Legislature.”⁵⁶ By construing the Act to mean that whatever payments the surface owner might receive were merely compensation for damages to the surface estate and for acting in the capacity of the state’s agent, the court interpreted the Act to allow it to be held constitutional.⁵⁷

Unlike the earlier general mineral releases to the owners of the soil, the present Relinquishment Act applies only to public free school and asylum lands which have been sold with a mineral classification or mineral reservation.⁵⁸ A second distinction is that the Relinquishment Act applies only to oil and gas,⁵⁹ whereas the general release acts applied to all minerals. These distinctions are in addition to the fact that the Relinquishment Act vests no title in the surface owner, but merely constitutes him the agent of the state for the purpose of leasing the oil and gas beneath his property.⁶⁰ Nor was there found in the general release acts the Relinquishment Act requirement that the landowner share equally with the state in all bonuses, rentals, and royalties beyond the minimum amounts required to be paid to the state.⁶¹ The final dis-

53. *Id.* at 527, 8 S.W.2d at 658.

54. *Id.* at 527, 8 S.W.2d at 658.

55. *Greene v. Robison*, 117 Tex. 516, 530, 8 S.W.2d 655, 660 (1928). *See also* *Empire Gas & Fuel Co. v. State*, 121 Tex. 138, 156, 158, 47 S.W.2d 265, 271-72 (1932).

56. *Greene v. Robison*, 117 Tex. 516, 527, 8 S.W.2d 655, 657 (1928).

57. *See* *Greene v. Robison*, 117 Tex. 516, 527, 8 S.W.2d 655, 658 (1928).

58. TEX. REV. CIV. STAT. ANN. art. 5367 (1962). The Texas public domain was classified in 1883 into “free school lands, asylum lands, and university lands; each class being dedicated to a special purpose; all other lands being designated public lands.” *Schendell v. Rogan*, 94 Tex. 585, 591, 63 S.W. 1001, 1002 (1901). *See also* TEX. CONST. art. VII, § 2; *Empire Gas & Fuel Co. v. State*, 121 Tex. 138, 148-50, 47 S.W.2d 265, 268 (1932).

59. TEX. REV. CIV. STAT. ANN. art. 5367 (1962); Walker, *The Texas Relinquishment Act*, SW. LEGAL FOUNDATION, FIRST INSTITUTE ON OIL & GAS LAW 245, 247 (1949).

60. TEX. REV. CIV. STAT. ANN. art. 5367 (1962) Walker, *The Texas Relinquishment Act*, SW. LEGAL FOUNDATION, FIRST INSTITUTION ON OIL & GAS LAW 245, 247 (1949).

61. *Greene v. Robison*, 117 Tex. 516, 533, 8 S.W.2d 655, 660 (1928). *See also*

inction between the Relinquishment Act and the general release acts is that the former is to be construed as operating both prospectively and retrospectively, while the latter operated retrospectively only.⁶²

Although the Relinquishment Act applies both retrospectively and prospectively, its operation is limited prospectively to the date of the Sales Act of 1931,⁶³ which superseded the Relinquishment Act. The Relinquishment Act, therefore, applies to any surveyed or unsurveyed free school or asylum land sold with a mineral classification during the 36-year period between September 1, 1895, and August 21, 1931.⁶⁴ If the land was not sold with a mineral reservation or classification, the surface owner acquired full title to all of the underlying minerals.⁶⁵ Forfeiture of Relinquishment Act land and a subsequent resale by the state after August 21, 1931 has been held not to deprive the state of ownership of the minerals in such lands.⁶⁶ Because the land remains subject to the Relinquishment Act, the provisions of the Act may be applicable to certain sales made after the limiting date.⁶⁷

"THE OWNER OF THE SOIL"

The Relinquishment Act provides that "the owner of the soil" is constituted the agent of the state for the purpose of leasing the oil and gas on certain lands.⁶⁸ The interest in the land necessary to confer this status, however, has been left to judicial construction. It is now settled that

the right to act as agent provided for in the act was peculiar to the owner of the soil at the time of a lease or sale, and . . . a prior

Walker, *The Texas Relinquishment Act*, SW. LEGAL FOUNDATION, FIRST INSTITUTE ON OIL & GAS LAW 245, 247 (1949).

62. *Buvs v. Robison*, 117 Tex. 541, 544, 8 S.W.2d 664, 665 (1928) Walker, *The Texas Relinquishment Act*, SW. LEGAL FOUNDATION, FIRST INSTITUTE ON OIL & GAS LAW 245, 246, 248 (1949).

63. TEX. REV. CIV. STAT. ANN. art. 5421c (1962).

64. Walker, *The Texas Relinquishment Act*, SW. LEGAL FOUNDATION, FIRST INSTITUTE ON OIL & GAS LAW 245, 249-50 (1949).

65. *Id.* at 250.

66. *Magnolia Petroleum Co. v. Walker*, 125 Tex. 430, 437, 83 S.W.2d 929, 932, *cert. denied*, 296 U.S. 623 (1935); Walker, *The Texas Relinquishment Act*, SW. LEGAL FOUNDATION, FIRST INSTITUTE ON OIL & GAS LAW 245, 251 (1949). *See also* TEX. REV. CIV. STAT. ANN. art. 5421c-1 (Supp. 1974) which provides for the grantee of state land to acquire title to any subsequently discovered excess in acreage. If the original patent of the land was subject to the Relinquishment Act, then the excess should also be subject thereto.

67. *See* *Magnolia Petroleum Co. v. Walker*, 125 Tex. 430, 437, 83 S.W.2d 929, 932, *cert. denied*, 296 U.S. 623 (1935).

68. TEX. REV. CIV. STAT. ANN. art. 5367 (1962). *See also* *Greene v. Robison*, 117 Tex. 516, 8 S.W.2d 655 (1928).

owner of the land would have no rights in the matter after title to the surface had passed out of his hands.⁶⁹

No problem is presented when the title involved is in fee simple; where less than fee simple is involved, however, questions have arisen as to the authority of the possessor of the surface estate to act as the agent of the state.

The Texas Supreme Court has held that a purchaser under contract who has not paid the full purchase price for the Relinquishment Act land is the "owner of the soil" with authority to execute oil and gas leases for the state.⁷⁰ Similarly, the owner of an undivided interest in the surface estate has been held to be authorized to act in this agency capacity for the other interest owners in the same tract of land.⁷¹ The owners of such undivided interests share in the royalties and rentals to be paid the owner of the soil in the proportion that their percentage of ownership bears to the whole and undivided surface estate.⁷² It is not necessary for the owner of such an undivided interest to secure the joinder of the other interest owners in order to execute a valid oil and gas lease on Relinquishment Act lands.⁷³

It is not fully settled whether a life tenant or a possessor of the soil under a long term lease should be entitled to "owner of the soil" status. In *Holt v. Giles*,⁷⁴ the Texas Supreme Court refused to grant the agency power to the owner of a 99-year lease on land for grazing and farming purposes who was in effect a tenant occupying the land.⁷⁵ The holder of an undivided interest in the reversion was held to be the only one with the authority to execute the Relinquishment Act lease.⁷⁶ A vigorous dissent pointed out that the holder of the lease could be substantially damaged by the development and exploration of oil and gas on his surface estate, but would be precluded from receiving any relief under the majority's construction of the Relinquishment Act.⁷⁷ The purpose of the Relinquishment Act—to provide compensation for the

69. *McDonald v. Dees*, 15 S.W.2d 1075, 1077 (Tex. Civ. App.—El Paso 1929, no writ). See also *Greene v. Robison*, 117 Tex. 516, 8 S.W.2d 655 (1928).

70. *Sheldon v. Robison*, 117 Tex. 537, 539, 8 S.W.2d 662, 663 (1928).

71. *Holt v. Giles*, 150 Tex. 351, 357-58, 240 S.W.2d 991, 994 (1951).

72. *Id.* at 357-58, 240 S.W.2d at 994.

73. *Glass v. Skelly Oil Co.*, 469 S.W.2d 237, 240 (Tex. Civ. App.—El Paso 1971, writ ref'd n.r.e.).

74. 150 Tex. 351, 240 S.W.2d 991 (1951).

75. *Id.* at 357, 240 S.W.2d at 994.

76. *Id.* at 357, 240 S.W.2d at 994; Note, 30 TEXAS L. REV. 637, 638 (1952).

77. *Holt v. Giles*, 150 Tex. 351, 362, 240 S.W.2d 991, 996-97 (1951).

loss of the use of the surface estate⁷⁸—would, therefore, be thwarted. The fee simple owner would be entitled to the compensation for damages to the soil even though he had no right of possession for many years.⁷⁹

A case subsequently decided by the El Paso Court of Civil Appeals has held that a life tenant is authorized to execute oil and gas leases as the agent of the state.⁸⁰ Because the ultimate remaindermen would be unascertainable until the death of all of the life tenants, it was held that the objectives of the Relinquishment Act would best be served by allowing for the life tenant to act as the representative of the state.⁸¹

Because the 99-year lease of the surface estate and the life tenancy are roughly equivalent in that they both entail long term possession of the surface estate, a distinction between the two interests and between the two cases would be unwarranted. The cases, therefore, cannot be reconciled. Undoubtedly the reasoning of the later civil appeals case is in closer conformity with the objectives and purposes of the Relinquishment Act than is the earlier supreme court case involving the 99-year lease. It is the long-term possessor of the surface, regardless of title ownership, who will be damaged by the exploration and development of the state's oil and gas, and it is he who should receive compensation.

Where marital property rights were involved in the ownership of the surface estate, *Humble Oil & Refining Co. v. Lloyd*⁸² held that the power to alienate the surface estate was a prerequisite to having the agency authority as the "owner of the soil."⁸³ In this case the intestate spouse's community one-half interest in the surface estate descended to her children, but the surviving husband was held to have the sole authority to act as the state's agent for the minerals as long as there were community property debts.⁸⁴ "Because of the existence of these

78. *Greene v. Robison*, 117 Tex. 516, 531, 8 S.W.2d 655, 659-60 (1928); Walker, *The Texas Relinquishment Act*, SW. LEGAL FOUNDATION, FIRST INSTITUTE ON OIL & GAS LAW 245, 255-56 (1949).

79. See *Holt v. Giles*, 150 Tex. 351, 362, 240 S.W.2d 991, 996-97 (1951).

80. *Glass v. Skelly Oil Co.*, 469 S.W.2d 237, 240 (Tex. Civ. App.—El Paso 1971, writ ref'd n.r.e.); see McCoy, *Oil and Gas*, 26 Sw. L.J. 59, 66 (1972).

81. *Glass v. Skelly Oil Co.*, 469 S.W.2d 237, 240 (Tex. Civ. App.—El Paso 1971, writ ref'd n.r.e.); see McCoy, *Oil and Gas*, 26 Sw. L.J. 59, 66 (1972).

82. 108 S.W.2d 213 (Tex. Civ. App.—Beaumont 1937, writ ref'd).

83. *Humble Oil & Ref. Co. v. Lloyd*, 108 S.W.2d 213, 217-19 (Tex. Civ. App.—Beaumont 1937, writ ref'd). See also Walker, *The Texas Relinquishment Act*, SW. LEGAL FOUNDATION, FIRST INSTITUTE ON OIL & GAS LAW 245, 280 (1949); 16 TEXAS L. REV. 418, 419 (1938).

84. *Humble Oil & Ref. Co. v. Lloyd*, 108 S.W.2d 213, 218 (Tex. Civ. App.—Beaumont 1937, writ ref'd).

debts the children, who had inherited their mother's one-half interest in the land, had no control or management of the community estate."⁸⁵ Without the power to alienate the property, the children were not entitled to the status of "owner of the soil."⁸⁶

THE EXTENT OF THE AGENT'S AUTHORITY

The Relinquishment Act does not grant the owner of the soil any interest or title in the oil and gas under mineral reserved school land, but merely makes him the agent of the state for the purpose of leasing such land for oil and gas.⁸⁷

It is clearly implied in the decisions . . . construing the Relinquishment Act . . . that the leasing power . . . of the surface owner is limited to the execution of an oil and gas lease for bonus, rental and royalty considerations not less than the statutory minimum and consistent with prevailing values.⁸⁸

Where the surface owner attempts to convey *all* of the minerals, therefore, such conveyance affects only the minerals other than oil and gas.⁸⁹ The state is not required to accede to the unauthorized acts of its agents, but may repudiate them and ask that they be set aside,⁹⁰ When the agent has exceeded his authority by attempting to convey the oil and gas belonging to the state, the opposite party is not entitled to have the contract enforced even to the extent of the agent's authority.⁹¹

Should there exist a mineral lease executed by a prior owner, the surface owner's agency rights begin upon termination of the previous lease.⁹² Furthermore, where there exists a valid Relinquishment Act lease on the land, the surface owner has no interest in the lease which will entitle him to bring an action to cancel it.⁹³

Where the surface owner undertakes to lease the reserved minerals,

85. Walker, *The Texas Relinquishment Act*, SW. LEGAL FOUNDATION, FIRST INSTITUTE ON OIL & GAS LAW 245, 279 (1949).

86. *Humble Oil & Ref. Co. v. Lloyd*, 108 S.W.2d 213, 217-19 (Tex. Civ. App.—Beaumont 1937, writ ref'd).

87. *Greene v. Robison*, 117 Tex. 516, 527, 8 S.W.2d 655, 658 (1928).

88. *State v. Standard*, 414 S.W.2d 148, 153 (Tex. 1967).

89. *Greene v. Robison*, 117 Tex. 516, 527, 8 S.W.2d 655, 658 (1928).

90. *State v. Magnolia Petroleum Co.*, 173 S.W.2d 186, 190 (Tex. Civ. App.—San Antonio 1943, writ ref'd w.o.m.).

91. *Id.* at 190.

92. TEX. REV. CIV. STAT. ANN. art. 5373 (1962); *Lemar v. Garner*, 121 Tex. 502, 513, 50 S.W.2d 769, 773 (1932).

93. *Colquitt v. Gulf Prod. Co.*, 52 S.W.2d 235, 238 (Tex. Comm'n App. 1932, jdgmt adopted).

it will be presumed that he acted as the agent of the state and in compliance with the terms of the Act.⁹⁴ It is the duty of the surface owner to secure the highest rental possible, and he may not lease the oil and gas for less than 10 cents per acre per annum.⁹⁵ The surface owner and the lessee are limited by statute to the basis of compensation to be paid the surface owner,⁹⁶ and the parties may not contract to alter this or to fix another basis of compensation.⁹⁷

The surface owner's authority to assign his interest in the lease of the lease income has been specifically recognized.⁹⁸ Prior to the making of the lease, however, the surface owner has no right to assign or convey any interest.⁹⁹ Although article 5349 requires the filing of assignments of oil and gas leases with the General Land Office, the statute has been held not to apply to the lease and transfer of school land.¹⁰⁰ It has been held, therefore, that the Relinquishment Act does not require the filing of assignments relating to its lands in the General Land Office.¹⁰¹ It should also be noted that where a valid oil and gas lease has been entered into under the Relinquishment Act, the assignee may not challenge a lease provision as violative of the Act.¹⁰²

Despite language in the Relinquishment Act which states that the state's agent is authorized to "sell or lease" the oil and gas,¹⁰³ much of the litigation concerning the Act has dealt with whether a surface owner has any power at all to convey title to the oil and gas under his land.¹⁰⁴ Since 1928 it has been established that "[t]here is no vesting of title or interest in the oil and gas in the owner of the soil."¹⁰⁵ If the landowner has no title to the minerals, he may not, of course, lawfully convey them.

94. *Permian Oil Co. v. State*, 161 S.W.2d 568, 570 (Tex. Civ. App.—Austin 1942, no writ).

95. *State v. Magnolia Petroleum Co.*, 173 S.W.2d 186, 189-90 (Tex. Civ. App.—San Antonio 1943, writ ref'd w.o.m.).

96. TEX. REV. CIV. STAT. ANN. arts. 5367, 5379 (1962).

97. *State v. Standard*, 414 S.W.2d 148, 153 (Tex. 1967).

98. See TEX. REV. CIV. STAT. ANN. art. 5368 (1962); *Norman v. Giles*, 148 Tex. 21, 34, 219 S.W.2d 678, 686 (1949); *Lewis v. Oates*, 145 Tex. 77, 93-94, 195 S.W.2d 123, 133 (1946); *Lemar v. Garner*, 121 Tex. 502, 513, 50 S.W.2d 769, 772 (1932).

99. *Lemar v. Garner*, 121 Tex. 502, 513, 50 S.W.2d 769, 773 (1932).

100. *Labbe v. Carr*, 385 S.W.2d 592, 594 (Tex. Civ. App.—Eastland 1964, writ ref'd n.r.e.).

101. *Id.* at 594.

102. *Phillips Petroleum Co. v. Ham*, 228 F.2d 217, 219 (5th Cir. 1955).

103. TEX. REV. CIV. STAT. ANN. art. 5368 (1962).

104. See *Greene v. Robison*, 117 Tex. 516, 531-32, 8 S.W.2d 655, 660 (1928).

105. *Id.* at 527, 8 S.W.2d at 658.

Where the surface owner attempts to convey a fee simple interest in the oil and gas beneath Relinquishment Act land, the supreme court has held that the Act should not be read into the agreement between the parties.¹⁰⁶ Rather than interpreting the attempted conveyance as a Relinquishment Act lease, the entire contract will be considered a nullity—despite any language in the agreement to the effect that the surface owner was acting in the capacity of the state's agent under the auspices of the Relinquishment Act.¹⁰⁷ Whether the instrument is an attempted fee simple conveyance or an agency lease must be determined as of the time the instrument was executed.¹⁰⁸

The strict construction generally accorded the Relinquishment Act was continued in *Ussery v. Hollebeke*¹⁰⁹ which invalidated a provision attempting to reserve to the grantors of the surface estate one-half of the amounts received from the oil and gas and other minerals under the land.¹¹⁰ The court refused to recognize a distinction between an attempted conveyance of the oil and gas to which the state has absolute title, and an attempted reservation.¹¹¹ Similarly, an option to acquire a working interest has been held illegal as consideration for the leasing of oil and gas under Relinquishment Act lands.¹¹²

Finally, where the surface and mineral estates are jointly conveyed, and it is unknown at the time of the conveyance that the land is subject to the Relinquishment Act, there is a failure of consideration for the conveyance to the extent of the consideration given for the oil and gas¹¹³ since the seller had no title in the oil and gas to convey.¹¹⁴ In such a case the purchaser who relied on the seller's representations of sound title to the mineral estate is entitled to a refund of the purchase price in the amount of the consideration given for the oil and gas.¹¹⁵

106. *Texas Co. v. State*, 154 Tex. 494, 501-502, 281 S.W.2d 83, 88 (1955). The supreme court concluded that should the Relinquishment Act be read into the instrument in order to sustain its validity, the integrity of the instrument would be destroyed. *Id.* at 501-502, 281 S.W.2d at 88.

107. *Id.* at 502, 281 S.W.2d at 88.

108. *Id.* at 500, 281 S.W.2d at 87.

109. 391 S.W.2d 497 (Tex. Civ. App.—El Paso 1965, writ ref'd n.r.e.).

110. *Id.* at 500.

111. *Id.* at 499.

112. *State v. Standard*, 414 S.W.2d 148, 153 (Tex. 1967); see Note, 46 TEXAS L. REV. 403, 405 (1968).

113. *Hill v. Ellsworth*, 35 S.W.2d 704, 705-706 (Tex. Comm'n App. 1931, jdgmt adopted).

114. *Greene v. Robison*, 117 Tex. 516, 527, 8 S.W.2d 655, 658 (1928).

115. *Hill v. Ellsworth*, 35 S.W.2d 704, 706-707 (Tex. Comm'n App. 1931, jdgmt adopted).

THE AGENCY STATUS AS A VALUABLE RIGHT

Even though the surface owner has no title in the oil and gas beneath land subject to the Relinquishment Act, he does have a valuable proprietary interest in the royalty due him *after* he has executed an oil and gas lease as the state's agent.¹¹⁶ It is somewhat incongruous that these royalties, whether payable in kind or in money, "should be adjudged to be present interests in land"¹¹⁷ when the surface owner has no fee interest in the oil and gas. Even more extreme is the view that in the absence of a lease, the surface owner's agency power is a valuable right for which he should receive compensation in the event of condemnation of the surface.¹¹⁸ The reasons for this anomalous situation whereby the surface owner has been held to have no title in the minerals beneath land subject to the Relinquishment Act, and at the same time enjoys a valuable proprietary interest in the right to act as the state's agent, are purely historical. It should be remembered that from 1866 until 1919 the policy of the state had been to release all minerals absolutely to the surface owners, and that this policy was continued for the first 9 years of the Relinquishment Act's existence. Further, the construction of the Relinquishment Act "creating" the agency concept was adopted solely for the purpose of rendering the Act constitutional.¹¹⁹

Vestiges of a fee interest in the minerals beneath lands patented under the Relinquishment Act, therefore, continue to be associated with the "owner of the soil" status. Thus, the agency concept permits the surface owner to act and enjoy the minerals beneath these lands in much the same manner as if he had a fee interest in them, although he theoretically has no such interest.

DUTIES AND LIABILITIES OF THE AGENT

Although the agency authority has been held to be a valuable right accruing for the benefit of the surface owner, both the surface owner and the lessee are subject to duties and liabilities pursuant to the Relinquishment Act. In the first place, the surface owner is obligated to obtain the best possible price for the lease beyond the 10 cents per

116. *Greene v. Robison*, 117 Tex. 516, 527, 8 S.W.2d 655, 660 (1928). *See also* *Tennant v. Dunn*, 130 Tex. 285, 291-92, 110 S.W.2d 53, 57 (1937).

117. *Tennant v. Dunn*, 130 Tex. 285, 292, 110 S.W.2d 53, 57 (1937).

118. *State v. Figueroa*, 389 F.2d 251, 252 (5th Cir. 1968). *See also* *Schooler v. State*, 175 S.W.2d 664, 668 (Tex. Civ. App.—El Paso 1943, writ ref'd w.o.m.).

119. *Cf. Greene v. Robison*, 117 Tex. 516, 527, 8 S.W.2d 655, 658 (1928).

acre statutory minimum.¹²⁰ The Commissioner of the General Land Office has the statutory duty to refuse to accept for filing any lease under the Relinquishment Act which does not recite the true consideration paid for the lease.¹²¹ Because the filing of the lease is a prerequisite to its taking effect, the land commissioner is in a position to make certain that at least the market value is paid for the lease.

The second basic obligation of the surface owner, as well as that of the lessee, is the liability to pay the state its one-half of all bonuses and rentals in excess of the statutory minimum.¹²² In the event that the lessee has paid the surface owner the entire amount of the bonuses and rentals under a mistake of fact that the surface owner is entitled to them, the lessee is entitled to indemnity against the surface owner should the state sue the lessee for its half.¹²³

The third obligation of the surface owner is statutory.¹²⁴ If there is a producing oil or gas well on non-Relinquishment Act land which is draining the oil and gas beneath Relinquishment Act land, the surface owner of the Relinquishment Act land has a good faith obligation to commence the drilling of an offset well within 100 days of the commencement of production on the non-Relinquishment Act land.¹²⁵

FORFEITURE OF THE AGENCY POWER

It is possible for the surface owner to lose his agency powers, although the situations in which this can occur are very limited and are readily cured.

The only express statutory authority for forfeiture of the leasing authority of the surface owner is that provided by Article 5370, namely, failure to drill an offset well The statute contemplates a continuing and perpetual agency unless forfeited on this statutory ground or perhaps on equitable grounds . . . such as the fraud of the agent, or his failure or inability to act.¹²⁶

Prior to 1949 it had been held that "the statute [article 5370] requires no notice of it to be given to the parties interests, and they are doubt-

120. *State v. Magnolia Petroleum Co.*, 173 S.W.2d 186, 189-90 (Tex. Civ. App.—San Antonio 1943, writ ref'd w.o.m.).

121. TEX. REV. CIV. STAT. ANN. art. 5421c-2 (1962).

122. *Cross v. Shell Oil Co.*, 144 Tex. 78, 82, 188 S.W.2d 375, 377-78, *conformed to* 189 S.W.2d 216 (Tex. Civ. App.—Fort Worth 1945).

123. *Shell Oil Co. v. Lutz*, 155 S.W.2d 392, 393 (Tex. Civ. App.—Fort Worth 1941, writ ref'd w.o.m.).

124. TEX. REV. CIV. STAT. ANN. arts. 5369, 5370 (1962).

125. TEX. REV. CIV. STAT. ANN. art. 5369 (1962).

126. *State v. Standard*, 414 S.W.2d 148, 153 (Tex. 1967).

less charged with notices of their own default"¹²⁷ If the lessee of Relinquishment Act land failed to drill the offset well, then the agent's leasing authority was automatically terminated at the same time as the forfeiture of the lease.¹²⁸

As a result of a 1949 amendment to article 5370, the agent's leasing authority is no longer automatically terminated with the forfeiture of the lessee's interest, and forfeiture is no longer possible without notice to the parties.¹²⁹ Article 5370 now provides that where Relinquishment Act lands are leased, and the land commissioner becomes aware of violations of the statutes requiring the drilling of offset wells,

[he] shall, on the wrapper containing the papers relating to such lease, write and sign officially words declaring such forfeiture, and the lease and all rights thereunder shall thereupon be forfeited together with all payments made thereunder. Notice of such action shall forthwith be mailed to the . . . owners of the surface and the owners of the forfeited lease¹³⁰

Within 30 days of the forfeiture, and on proper showing by the lessee, the lease may be reinstated by the commissioner.¹³¹ Should the commissioner choose not to reinstate the lease, however, he must notify the surface owner that the land is again available for leasing.¹³²

If the surface owner has not satisfied the requirement for drilling an offset well within 100 days of such notification, his rights under the Act also will be terminated.¹³³ In such an event the forfeited agency rights are automatically reinstated upon the termination of any lease executed by virtue of article 5371 which provides the means for leasing the oil and gas after forfeiture.¹³⁴

It is only after a lengthy process in which notice of potential forfeiture is given on two separate occasions, therefore, that the surface owner's agency authority becomes terminable. Even so, the termination is only temporary. The automatic reinstatement of the agency status and the absence of any penalty other than temporary forfeiture for breach of the agency duties further illustrates the similarity between the agency status and fee simple ownership of the minerals.

127. *Normal v. Giles*, 148 Tex. 21, 33, 219 S.W.2d 678, 686 (1949).

128. *Id.* at 33, 219 S.W.2d at 686.

129. TEX. REV. CIV. STAT. ANN. art. 5370 (1962).

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. TEX. REV. CIV. STAT. ANN. art. 5371 (1962); see *Greene v. Robison*, 117 Tex. 516, 533, 8 S.W.2d 655, 660 (1928).

OTHER STATUTES CONSTITUTING THE OWNER OF THE SOIL
THE AGENT OF THE STATE

The agency concept for the leasing of state owned minerals is firmly entrenched in Texas law. Even the statute which superseded the Relinquishment Act, the Sales Act of 1931,¹³⁵ which provides for a "free royalty" to the state of a fractional interest from the minerals produced, has been construed as creating such an agency relationship.¹³⁶ In *Winterman v. McDonald*¹³⁷ the supreme court held that although the Sales Act of 1931 does not specifically provide that the surface owner of lands sold under the act is entitled to the agency status for the purpose of leasing the underlying minerals, public policy impliedly authorizes the surface owner to act in the capacity of the state's agent.¹³⁸

A 1967 statute, article 5421c-10, expressly recognizes the surface owner as the state's agent for the purpose of leasing state owned coal, lignite, sulphur, potash, uranium, thorium, and any other minerals produced in conjunction with them.¹³⁹ Although the statute has not yet been judicially construed, under its terms the lessee pays to the state 60 percent of all bonuses, rentals, and royalties and pays the remaining 40 percent to the surface owner.¹⁴⁰ In the event of production, the state is entitled to one-sixteenth of the revenue from the minerals produced. The provision that all payments made by the lessee to the surface owner shall be in lieu of all other damages is identical in effect to the provision found in the Relinquishment Act.¹⁴¹

CONCLUSION

The agency concept for the development of state owned minerals is anomalous to the remainder of Texas land titles law. Although the surface owner of land beneath which there is state owned minerals has no title to such minerals, he nevertheless receives almost all of the revenue from the sale of such minerals; he has been held to have a valuable interest in the minerals which is compensable upon condemnation of the surface estate; and he enjoys automatic reinstatement of the agency authority and benefits after forfeiture. The only explanation for the development of this concept is that it is historical.

135. TEX. REV. CIV. STAT. ANN. art. 5421c (1962).

136. *Winterman v. McDonald*, 129 Tex. 275, 285, 102 S.W.2d 167, 172-73 (1937).

137. *Id.* at 275, 102 S.W.2d at 167.

138. *Id.* at 285, 102 S.W.2d at 172-73.

139. TEX. REV. CIV. STAT. ANN. art. 5421c-10, § 1 (Supp. 1974).

140. *Id.* § 2.

141. Compare *id.* § 4 with TEX. REV. CIV. STAT. ANN. art. 5379 (1962).

The agency concept came into existence in order to placate surface owners whose property was being damaged by the drilling operations of the state's lessees.¹⁴² It was specifically designed for the production of oil and gas under such circumstances. The legislature should be cautious in enacting similar statutes providing for the same basis of compensation as in the Relinquishment Act of 1919 when other minerals than oil and gas are involved. Mining and development processes in taking coal and lignite are vastly different from those used in the production of oil and gas. If the agency concept is to be retained in such circumstances, investigation should be made into the amount of damages necessary to compensate the surface owner for the development of each type of mineral.

A contingency not yet considered by the legislature is the possibility of one lessee developing the oil and gas pursuant to the Relinquishment Act, and another lessee developing other minerals under article 5421c-10 on the same trace of land at the same time. None of the "agency" statutes provide any means for establishing priority for the use of the surface estate in such a case. The land commissioner's authority to file or refuse to file a mineral lease may be the only method for controlling the number of lessees entitled to enter the surface owner's property at one time.¹⁴³

Even so, the agency concept adopted in Texas provides the most practical method available for administering the development of state owned minerals. Although the surface owner has no title to such minerals, he enjoys most of the benefits of title ownership. The difference between ascribing a value to the agency status and granting title to the minerals is minimal. The effect of ascribing a value to the agency status, however, is to satisfy to a large extent the traditional policy of releasing the minerals to the grantees of public lands. At the same time, the state derives valuable revenue from its share of the proceeds. Finally, by giving the surface owner the authority to act as the state's agent, the leasing process is facilitated. The state is relieved of the substantial burden of executing the leases, and the surface owner has at least a limited choice of whom he would prefer as the lessee.

142. See *Norman v. Giles*, 148 Tex. 21, 26, 219 S.W.2d 678, 681 (1949); *Greene v. Robison*, 117 Tex. 516, 531, 8 S.W.2d 655, 659-60 (1928).

143. See TEX. REV. CIV. STAT. ANN. art. 5421c-2 (1962), art. 5421c-10, § 3 (Supp. 1974).