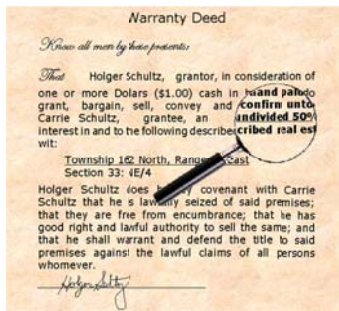


Chapter 5

“Intent” Based on Words

“Words” in a deed can alter the outcome of the interest either being conveyed or reserved. One aspect of contract law is that if the court is attempting to determine the meaning and effect of a conveyance they must restrict themselves to the document itself. The restriction does not allow the court to look at other extrinsic evidence (parol evidence) such as prior agreements, side agreements, or verbal interactions either before or after the creation of the contract. If terms or conditions in the contract appear to be clear and unambiguous, the court must accept the “*plain meaning*” of the terms and will not be influenced by outside evidence. This strict view bases the outcome on the *words* and the *words* alone. This basic rule of



law will only consider parol evidence if the instrument is ambiguous. Over the years, court decisions based on certain words or phrases have become the “law of the land” in the states where the decisions have been made. The general rule in construing a deed is to ascertain the intention of the parties from language used and to give effect to that intend to the fullest extent of the law. *Henningson v Stromberg*, 221 P.2d 438, 442 (MT 1950).

For instance, in most states, if a grantor reserved a subsurface interest *in what was being conveyed*, the grantor’s reserved interest would be proportionately reduced by the interest he conveyed.

On the other hand, if the grantor reserved a subsurface interest *in the lands that were described* in the conveyance, the grantor’s reserved interest would not be proportionately reduced by the interest being conveyed. *Averyt v. Grand, Inc.*, 717 S.W.2d 891 (Tex. 1986).

Often conveying language in deeds will contain the phrase: “*The Land Described.*” This has very specific meaning. On the other hand, conveying language can contain the phrase: “*The Interest Conveyed.*” This has very specific meaning. A deed that contained “*all that real property described*” or “*in and to all the oil, gas, and other minerals in and said land described*”

expresses an intention to grant or reserve out of the entire lands described in the deed.

This can be confusing, especially if the grantor owns less than 100% of the surface or minerals at the time of the conveyance or reservation. One must determine if the grant or reservation is out of what was owned at the time, or out of the entire tract of land. In such cases, the wording in the conveyance or reservation becomes paramount as to what is being conveyed or reserved.

From time to time, words such as, "I convey a 25% interest," can lead to ambiguities. In a case like this, the land professional should ask if the conveyance is conveying a full 25% interest in the entire tract of land or just 25% of the grantor's interest in the tract of land. In most states, courts have determined that when an ambiguity exists the court will try and determine the intent of the parties based on the words in light of the circumstances that existed at the time of the conveyance.

Intent Clauses

Often, language will be added to the granting clause with the intent of clearing up any potential ambiguities or confusion about what is being granted or reserved. This language would be considered the "Intent Clause" of the document. Intent clauses can be found in every state but seem to be more popular in a handful of states.

The following would be an example of intent clause language:

"It is my intent to convey to Ben a full 25% mineral interest in the tract of land."

Scenario 1:

Assume Abe owned an undivided 50% interest in both the surface and minerals in a 160-acre tract of land and conveyed the land to Ben using this language...

WARRANTY DEED

KNOW ALL MEN BY THESE PRESENTS THAT

Abe hereinafter called Grantor, for and in consideration of the sum of Ten and no/100 -----Dollars each in hand paid and other good and valuable consideration, the receipt of which is hereby acknowledged, do hereby grant, bargain, sell, convey, transfer and deliver unto Ben, hereinafter called Grantee,

"I hereby grant to Ben all my right, title, and interest in and to the described lands reserving unto myself an undivided 50% interest in and to all the oil, gas, and other minerals in and under said lands.

It is my intent to reserve a full undivided 50% interest in and to all of the oil, gas, and other minerals in and under said lands."

This intent language clears up any type of ambiguity.

Assume that Abe added this language:

"It is my intent to convey only surface interest to Ben."

The Land Professional can see how this would clear up any ambiguity.

When an ambiguity exists in granting language but the conveyance has intent language added, the courts have often placed greater weight on the intent language because they see it as language added in an attempt to make a clear statement of reservation or conveyance.

A Texas court concluded, "That construction, which is most consistent with the *intention of the grantor*, as gathered from the terms of the conveyance, is accepted as the true one. Technical rules of construction are not favored and must not be applied so as to defeat the intention." *Barkley v. Gibbs*, Tex.Com.App., 242 S.W. 462. (Emphasis ours).

Scenario 2:

Assume Abe's conveyance to Ben covers a 150-acre tract of land. Read as follows and determine how many net mineral acres are being conveyed to Ben:

- 37.5 net mineral acres (150 gross X 40/160)
- 40 net mineral acres

WARRANTY DEED

KNOW ALL MEN BY THESE PRESENTS THAT

Abe hereinafter called Grantor, for and in consideration of the sum of Ten and no/100 -----Dollars each in hand paid and other good and valuable consideration, the receipt of which is hereby acknowledged, do hereby grant, bargain, sell, convey, transfer, and deliver unto Ben, hereinafter called Grantee,

"I hereby grant to Ben 40/160th mineral interest in and to the said lands described.

It is my intent to convey 40 net mineral acres to Ben."

ANSWER: It appears from the granting clause that Abe is conveying 40/160ths X 150 gross acres or 37.5 acres. However, with the intent language, the outcome would be different granting 40 mineral acres to Ben.

The "Land Described"



Abe

1. Abe owned an undivided 50% interest in both the surface and subsurface minerals in a tract of land.



Betty

2. Abe conveyed his interest in the lands to Betty.



Abe

3. Abe included the following reservation:

"Excepting and reserving, subject to previous reservations of record, an undivided 25% interest in and to all of the oil, gas and other minerals in and under said lands."

Has Abe Kept

25% of the entire tract of land

25% of what he owned at the time
or $50\% \times 25\% = 12.5\%$

ANSWER: In this case, there is not intent language added so, according to the words in the conveyance, Abe is keeping an undivided 25% interest in the entire mineral estate, since he is keeping 25% of the minerals that are "in and under said lands."

The "Interest Conveyed"



David

1. David owns the other undivided 50% of the surface and subsurface in the tract of land.



David Grandson's Trust

2. David conveyed his interest in the land to the "David's Grandson's Trust."



David

3. He included the following reservation:

"Excepting and reserving, subject to previous reservations of record, an undivided 25% interest in and to all the oil, gas and other minerals in and under said lands described and conveyed."

Had David Kept

25% of the entire tract of land

25% of the 50% he conveyed or $50\% \times 25\% = 12.5\%$

ANSWER: Again, there is no intent language added. Because the language limited the reservation to the land described and *conveyed*, and since David conveyed only 50% of the land, he can only keep 25% of what he conveyed. He ends up with 12.5% of the mineral estate.

Ambiguous Language

Assume that a mineral deed arrives in your office. In the deed, Barrett MacDonald, grantor, conveys to Kenneth MacDonald a "25% mineral interest" in a 200-acre tract of land. Upon further research, you determine that prior to the deed, Barrett only owns an undivided 80% mineral interest in the 200-acre tract of land under lease with your company.

After an examination of the conveyance, determine what interest should be given to Kenneth and what interest Barrett should keep.

RECEPTION 327557

MINERAL DEED

KNOW ALL MEN BY THESE PRESENTS THAT

BARRETT MACDONALD hereinafter called Grantor, for and in consideration of the sum of One and no/100 -----Dollars each in hand paid and other good and valuable consideration, the receipt of which is hereby acknowledged, do hereby grant, bargain, sell, convey, transfer and deliver unto Kenneth MacDonald 45 N. Main St., Brady, ND 74325, hereinafter called Grantee, a twenty-five (25%) mineral interest:

"PROPER LEGAL DESCRIPTION"

WITNESS our hand this 10th day of May, 2012.

Signed Barrett MacDonald

STATE OF TEXAS }
COUNTY OF BEXAR }

Before me, THE UNDERSIGNED A Notary Public, in and for said County and State, on this day personally appeared Barrett MacDonald known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that they executed the same for the purposes and consideration therein expressed.

Given under my hand and official seal, this 12th day July, 2012 A.D.

Terry Marshall, Notary Public, in and for Bexar County, Texas.

Barrett MacDonald _____

Kenneth MacDonald _____

A. If Barrett is conveying 25% of his undivided 80% mineral interest, the division should be as follows:

Barrett MacDonald 200 X .80 X .75 = 120 net mineral acres

Kenneth MacDonald 200 X .80 X .25 = 40 net mineral acres

B. If Barrett is conveying a full undivided 25% of the minerals out of the 200-acre tract of land, the division should be as follows:

Barrett MacDonald 200 X .75 = 150 net mineral acres

Kenneth MacDonald 200 X .25 = 50 net mineral acres

C. If you determine that the conveying language is too ambiguous to transfer the interest out of Barrett and into Kenneth, what steps would be in order?

ANSWER: This is a case of ambiguous language. Before the land professional would make any changes to the interest, some sort of due diligence should be done. Guessing at what the intent of the parties was would be the wrong course of action. It would appear that a phone call to Barrett would be in order. The land professional really does not care if Barrett's intent was to convey 25% of the whole or 25% of his interest. Prior to making any change in the interest, the land professional should secure a Ratification and Rental Division Order containing both Barrett and Kenneth's notarized signature.

The Words "Out Of" vs. "Of"

It is often difficult to determine the amount of interest being conveyed or reserved when the grantor, who only owns an undivided portion of the minerals, references that undivided interest at the time of the conveyance. Again, the land professional must determine if the percentage being granted comes *out of* the grantor's fractional mineral interest owned at the time, or if the percentage being granted is a percentage *of* the grantor's interest. Understanding the impact of the words "out of" or "of" becomes very important to the land professional.

Scenario 1: Assume Abe owned an undivided 50% mineral interest in a 200-acre tract of land. His brother owned the other 50%. Abe conveys 25% of something to Ben. Read the conveying language in the deed and determine if Abe conveyed

- 50 net mineral acres (200 gross X 25%)
- 25 net mineral acres (100 net acres owned by Abe X 25%)

WARRANTY DEED

KNOW ALL MEN BY THESE PRESENTS THAT

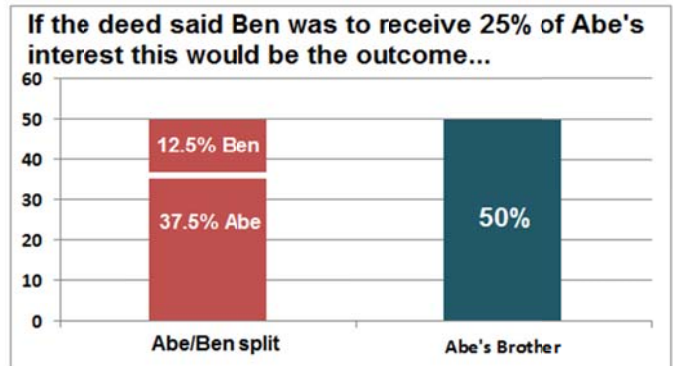
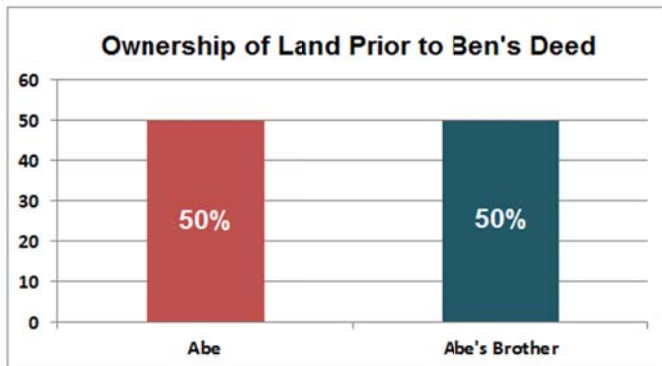
Abe hereinafter called Grantor, for and in consideration of the sum of Ten and no/100 -----Dollars each in hand paid and other good and valuable consideration, the receipt of which is hereby acknowledged, do hereby grant, bargain, sell, convey, transfer, and deliver unto Ben, hereinafter called Grantee,

"an undivided Twenty-Fifty Percent (25%) mineral interest in and to all oil, gas and other minerals *out of* the interest owned by the grantor at the time of this conveyance".

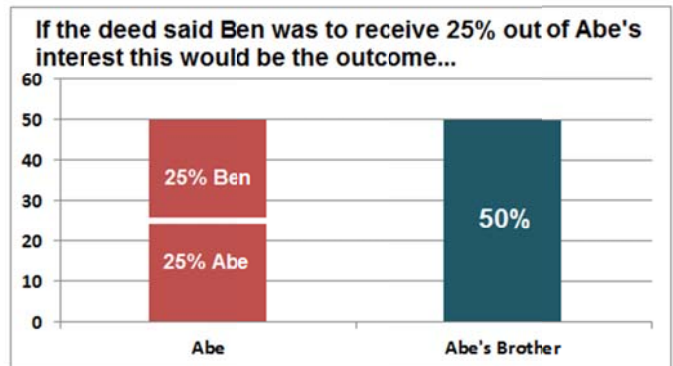
ANSWER: If your answer was that Abe was only conveying 25% of what he owned at the time, or 25 net mineral acres, you would not have interpreted the language the same as some courts. According to *Hemingway Oil and Gas Law and Taxation*, Fourth Edition, p.113-114, the phrase "*out of*" held the key and refers back to only the *source of the interest* from which the 25% *interest is to be taken*. The 25% is to be taken *out of* the grantor's 50% but it does not mean that the grantor is conveying 25% of his 50%. If the deed had simply used the word "of," the result might be different in that the word "of" is the same as "times" in a multiplication formula. The grantor would be conveying 25% of his 50%. In this regard, Williams and Meyers, 1 Oil and Gas Law 654, Sec 319, commenting on case law says, "The position

adopted by the court appears to be a tenable construction of the phrase 'out of.'" When the words "out of" are used, the term refers to the *source of the interest from which the 25% interest is to be taken* and will not operate to reduce the amount of the mineral interest acquired by Ben, the grantee.

"Out of" = subtractions whereas "of" = multiplication. Therefore, in this deed, Abe would have conveyed a full undivided 25% mineral interest that comes "out of" his undivided interest in the 200 gross acre tract of land. He is not conveying 25% of his undivided interest. *Black v. Shell Oil Company*, 397 S.W.2d 877 (Tex. Civ. App. – Texarkana 1965); *Minchen v. Hirsch*, 295 S.W.2d 529 (Tex. Civ. App. 1956).



The term "out of" refers to the source of the interest from which the 25% interest is to be taken from. Abe clearly says that Ben's interest is to come "out of his source" not out of his brother's source of interest.



Scenario 2: Assume the same facts as seen in Scenario 1, except the granting language was changed. Study the language in the following Warranty Deed and determine what interest Abe is conveying.

With this different language, determine if Abe conveyed:

- 50 net mineral acres (200 gross X 25%)
- 25 net mineral acres (100 net acres owned by Abe X 25%)

WARRANTY DEED

KNOW ALL MEN BY THESE PRESENTS THAT

Abe hereinafter called Grantor, for and in consideration of the sum of Ten and no/100 -----Dollars each in hand paid and other good and valuable consideration, the receipt of which is hereby acknowledged, do hereby grant, bargain, sell, convey, transfer, and deliver unto Ben, hereinafter called Grantee,

"I do hereby grant, bargain, sell, convey, transfer and deliver unto Ben an undivided Twenty-Fifty Percent (25%) interest in and to all oil, gas and other minerals. It being the intention of grantor herein to convey 25% of the minerals *out of* the interest owned by him in the above-described tract of land."

ANSWER: Again, courts have ruled that the phrase "out of" refers to the source of the interest from which the 25% interest is to be taken. Therefore, the answer is that Ben receives 50 net mineral acres. Refer to the following chart for added explanation.

Scenario 3: Assume the same facts as seen in Scenario 1 and 2, except the granting language was changed to read...

WARRANTY DEED

KNOW ALL MEN BY THESE PRESENTS THAT

Abe hereinafter called Grantor, for and in consideration of the sum of Ten and no/100 -----Dollars each in hand paid and other good and valuable consideration, the receipt of which is hereby acknowledged, do hereby grant, bargain, sell, convey, transfer, and deliver unto Ben, hereinafter called Grantee,

"I have Granted, Bargained, Sold, and Conveyed, and by these presents do hereby grant, bargain, sell, and convey, unto Ben, an undivided 25% mineral interest *of my* 50% interest in, on, or under the following described lands and premises."

With this different language, determine if Abe conveyed:

- 50 net mineral acres (200 gross X 25%)
- 25 net mineral acres (100 net acres owned by Abe X 25%)

ANSWER: In this case, courts might very well determine that Abe's clear intention is to grant 25% *of* his 50% rather than 25% out of his 50%. Therefore, Ben would receive 25 net mineral acres.

Scenario 4: Assume the same facts as seen in Scenario 1, 2, and 3, except that language was added to set forth the intent of the grantor.

WARRANTY DEED

KNOW ALL MEN BY THESE PRESENTS THAT

Abe hereinafter called Grantor, for and in consideration of the sum of Ten and no/100 -----Dollars each in hand paid and other good and valuable consideration, the receipt of which is hereby acknowledged, do hereby grant, bargain, sell, convey, transfer, and deliver unto Ben, hereinafter called Grantee,

"I have Granted, Bargained, Sold, and Conveyed, and by these presents do hereby grant, bargain, sell, and convey, unto Ben, an undivided 25% mineral interest of my 50% interest in, on, or under the following described lands and premises."

"It is my intention to convey unto Ben, his heirs and assigns, free and clear of all claims, liens, and encumbrances, a 25% mineral interest out of my interest therein."

With this different language, determine if Abe conveyed:

- 50 net mineral acres (200 gross X 25%)
- 25 net mineral acres (100 net acres owned by Abe X 25%)

ANSWER: A court in *Minchen v. Hirsch*, Tex.Civ.App. 295 S.W.2d 529, wr. ref., n. r. e. (1956) dealt with a very similar case. The case revolved around a 1/16th royalty interest being conveyed to a party named Minchen. In the granting clause of the deed, the grantor conveyed a 1/16th royalty interest *of* his existing interest but added intent language whereby he included (in handwriting) the addition of the word "out" prior to the word "of". The finding of the court was as follows:

"We think the clear meaning of this clause is that it was the intention of the grantor to convey to Minchen an undivided one-sixteenth (1/16th) royalty interest in the land. This clause cannot be reconciled with the granting clause. It appears that the ambiguous wording of the habendum clause was noticed by the grantor and that he added the entire paragraph in the deed which stated his intention to be to grant to the grantee a perpetual 1/16th fee mineral royalty out of his interest.

The phrase 'out of' clearly indicates only the source from which the one-sixteenth (1/16th) interest was to be taken. In construing a deed or other instrument of conveyance some meaning should be given to every word in the written instrument, if it can reasonably be done and if it is not inconsistent with the general intent of the whole instrument, so that the deed may operate, as by law, it may, according to the intention of the parties." *Edwards v. Edwards*, Tex.Civ.App., 52 S.W.2d 657. That construction, which is most consistent with the intention of the grantor, as gathered from the terms of the conveyance, is accepted as the true one. Technical rules of construction are not favored and must not be applied so as to defeat the intention. *Barkley v. Gibbs*, Tex.Com.App., 242 S.W. 462. (Emphasis ours).

"We think, also, that the well settled rule of law, that where handwritten and printed or typewritten matters in an instrument are inconsistent, the handwritten part will prevail, is in support of appellant Minchen's contention that the handwritten word 'out' in the clause of intention serves to show the intent of the grantor to convey an undivided one-sixteenth (1/16th) mineral interest. Without the addition of the word 'out' written in by the grantor the statement of intent would have read that he intended to grant a one-sixteenth (1/16th) of his interest. With the addition of that word it clearly stated his intent to be to grant a one-sixteenth (1/16th) out of his interest."

Therefore, it would appear that the answer to scenario 4 is that Abe is granting to Ben 50 net mineral acres (200 gross X 25%).

Subject to Language

"Subject to" refers to a conveyance of property to a grantee when there exists a prior mortgage, deed of trust, mineral reservation, right of way, or easement. When there is an existing mortgage, the conveyance becomes an acquisition *subject to* the liabilities attached to the property. This conveyance may require the consent of the lender.




When there is a prior mineral reservation, the conveyance becomes *subject to* the reservation that is attached to the tract of land.

Assume that Abe, the owner of a tract of land, conveys the land to Ben, but immediately following the granting clause, he adds the following language,

"such conveyance is subject to 100% of all oil, gas, and other minerals in and under said lands previously conveyed to Carl."

Also assume that no such mineral conveyance to Carl has been made.

Because there was no prior mineral conveyance to Carl would the minerals automatically pass to Ben? Would they pass to Carl? Would Abe still be the owner of the minerals? If your company wanted to lease the minerals, which party should you lease from?

<p>1. "Such conveyance is subject to 100% of all oil, gas and other minerals in and under said lands previously conveyed to Carl."</p> <div style="text-align: center;"><p>Surface lands pass to Ben.</p><p>Do mineral lands?</p></div>	
<p>2.</p> <p>No such mineral conveyance to Carl has ever been made.</p> <div style="text-align: center;"><p>Carl</p></div>	<p>3.</p> <p>Your company wishes to lease the minerals. Which party should sign the lease?</p> <p><input type="checkbox"/> Abe</p> <p><input type="checkbox"/> Ben</p> <p><input type="checkbox"/> Carl</p>

ANSWER: Since the *subject to* language contains no words of grant to Carl, he would not be able to claim any ownership in the minerals. Since the *subject to* language would make it appear that Abe's intent was not to grant any of the minerals to Ben, many courts might determine that no minerals would pass to him, thus leaving the minerals in Abe's possession.

Excepting vs. Reserving Language

Very often mineral reservation language will contain both the words "excepting and reserving." At times, the words "save and except" will be found without the word "reserve." At times, only the word "excepting" will be found in a deed. Strictly defined, the words *except* and *reserve* mean two completely different things, even though they are often interchanged.

When the word "except" is used in a conveyance, it operates to exclude something out of the thing which was granted. For instance, assume a grantor conveys Section 12: SW/4NW/4 containing 40 acres "save and except a three-acre cemetery located in the NW/4 of said tract of land more fully described as..." The general rule regarding exception language is that the *excluding words* used must be as *definite* as those which were required to *convey the title*. The following excepting language would not meet this threshold: "I convey Section 12: SW/4NW/4 save and except 3 acres."

When the word "reserve" is used in a conveyance, it operates to *retain ownership* in the item reserved back to the grantor. Excepting language may not be reserving anything back to the grantor. In the previous example the 3-acre cemetery may, if fact, belong to the county or some other entity. The 3-acres would be excluded from the grant and would not pass to the grantee, but that does not necessarily imply that it will be kept by the grantor.

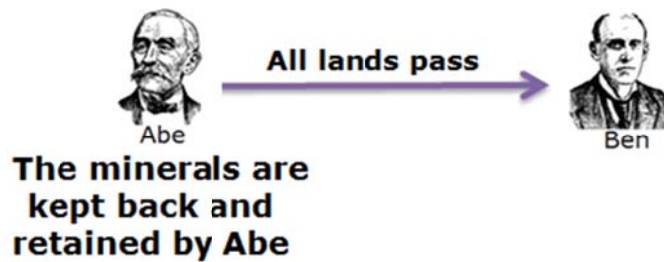
Reservation Language

It is not uncommon in a chain of title to see a surface owner reserving either a portion of, or all of the minerals beneath the tract of land. When this takes place, the land professional must be aware of the construction of the reservation and the language being used.

Assume the following. Abe, the grantor, conveys the land to Ben, but immediately following the granting clause, he adds the following language,

"Grantor hereby reserves unto himself and his heirs 100% of all oil, gas, and other minerals that are in and under said lands described."

“Grantor hereby reserves unto himself and his heirs 100% of all oil, gas and other minerals that are in and under said lands described.”



The word “reserve” means to retain some type of ownership in what is being conveyed, to keep back or withhold something from the grant. Notice that in the illustration, both a “grant” and “reservation” have taken place. In order for the reservation to take place, the grant must first take place. If Abe had not conveyed any surface he could not reserve to himself the minerals. Reservation language must rise to the level of keeping something out of something that is being granted. Abe already owned the minerals. If he simply recorded a “reservation document” that contained no words of grant of any kind, what effect would the document have?

Reservation Language with Prior Restrictive Covenants

General Rule: A statement that does not rise to a reservation cannot retroactively create a reservation when referenced in a later deed.

Assume that Abe, a fee simple absolute owner of 100 acres, filed of record a Dedication and Restriction for the Land in a Texas county courthouse. The following restriction was set forth:




“No oil drilling, oil development operations, oil refining, quarrying, or mining operations of any kind shall be permitted upon or on any lot. All mineral rights shall belong and shall continue to belong to Abe.”

Sometime later, Abe sold the land to Ben. The conveying deed stated:

“This conveyance is made subject to any and all easements, restrictions, and mineral reservations affecting said property that are filed for record...”

The deed did not contain separate mineral reservation language. Later, Abe purported to convey all oil, gas, and minerals rights to Carl via a special mineral deed.

Your company wishes to lease the minerals from the appropriate mineral owner. From whom should you lease? Abe? Ben? or Carl?

<p>1.</p>  <p>Abe</p> <p>Abe filed of record a Dedication and Restriction for the Land in Texas. The following restriction was set forth:</p> <p><i>"No oil drilling, oil development operations, oil refining, quarrying or mining operations of any kind shall be permitted upon or on any lot. All mineral rights shall belong and shall continue to belong to Abe."</i></p>	<p>2.</p>  <p>Ben</p> <p>Sometime later, Abe sold the land to Ben. The conveying warranty deed stated:</p> <p><i>"This conveyance is made subject to any and all easements, restrictions, and mineral reservations affecting said property that are filed for record..."</i></p>
<p>3.</p>  <p>Carl</p> <p>Later, Abe purported to convey all oil, gas and minerals rights to Carl via a special mineral deed.</p>	<p>4.</p> <p>Your company wishes to lease the minerals from the appropriate mineral owner. Whom should you lease?</p> <p><input type="checkbox"/> Abe</p> <p><input type="checkbox"/> Ben</p> <p><input type="checkbox"/> Carl</p>

ANSWER: On May, 17, 2012, a Texas Court ruled over a very similar case. They determined that Ben was the legitimate mineral owner.

The court concluded that Abe's restriction language in the Dedication and Restriction for the Land was attempting to reserve minerals to himself, but since Abe did not convey any surface or minerals in this instrument he could not reserve to himself an interest that he already owned. *A statement that does not rise to a reservation cannot retroactively transmute into a reservation when referenced in a later deed. A reservation must be made at the time of the conveyance and the "subject to" language in Ben's deed was not null, but merely served to protect Abe's warranty. Even though Abe may have intended to reserve the mineral rights in Ben's deed, he did not effectively do so because the restrictions were insufficient to reserve the mineral interests. Farm & Ranch Investores, LTD. V. Titan Operating, LLC., et al.*

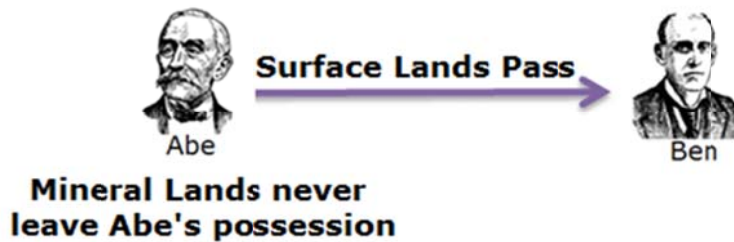
Excepting Language

Very often reservation language added to a conveyance will contain only the word "excepting."

Assume the following: Abe, the grantor, conveys the land to Ben, but immediately following the granting clause, he adds the language below,

"Grantor hereby excepts unto himself and his heirs 100% of all oil, gas, and other minerals that are in and under said lands described."

"Grantor hereby *excepts* unto himself and his heirs 100% of all oil, gas and other minerals that are in and under said lands described."



The term "excepting" refers to Abe's intention of keeping the mineral interest from Ben that he already owns. The surface lands would pass to Ben but the minerals would never leave Abe's possession.

In the state of New York, a reservation stating, "excepting mines and minerals, which are not hereby intended to be conveyed," reserved not only the estate in the mines and minerals, but the court also ruled that the reservation in effect reserved a part of the premises granted. *White v. Miller*, 92 N.E. 1065 (N.Y. 1910).

The Placement of Exception Language in a Warranty Deed

Courts are often called upon to determine the "intent" of a deed. In many cases they will look at the construction of the words and where they are placed within the four corners of the document. For instance, examine the following Warranty Deed that contains both excepting and reserving language. Notice that the words are placed within the granting portion of the document.

WARRANTY DEED

THIS WARRANTY DEED is made the ____ day of _____, 20____, by and between _____, (hereinafter referred to as "Grantor", and _____, (hereinafter referred to as "Grantee":

The Grantor, for and in consideration of the sum of _____ (\$_____) and other valuable consideration, receipt of which is hereby acknowledged, hereby grants, bargains, sells, remises, releases, and conveys to the Grantee, all that certain land situated in _____ County, State of _____, to-wit:

"Legal Description"

EXPRESSLY Excepting and Reserving unto Grantor, and each of them...

TO HAVE AND TO HOLD said described premises unto the Grantee forever. Grantor hereby covenants with said Grantee that the Grantor is lawfully seized of said land, has good right and lawful authority to sell said land, that said land is free from all encumbrances, and hereby fully warrants the title to said land and will defend the same against the lawful claims of all persons whosoever.







} Granting Clause

} Habendum Warranty Clause

Exception Language used in the Habendum Clause in a Warranty Deed

The General Rule: No part of the mineral estate will be reserved by a grantor who uses only *exception language* in a habendum clause of a warranty deed, unless the grantor expressly reserves the minerals to himself. Such exception language will be construed only as excepting from the covenant of warranty.

Scenario 1:

<p>Assume Abe owned, in fee simple, 100% of a 10-acre tract of land. Using a Warranty Deed he conveyed the land to David using the following language:</p>    <p>Abe</p> <p>David</p>	<p>Abe hereby Grants, Bargains, Sells and Conveys unto David, party of the second part, the following described real property and premises,</p> <p>Proper legal description</p> <p>TO HAVE AND TO HOLD said described premises unto the grantee forever. Grantor hereby covenants with said Grantee that the Grantor is lawfully seized of said land, has good right and lawful authority to sell said land, that said land is free from all encumbrances, and hereby fully warrants the title to said land and will defend the same against the lawful claims of all persons whosoever.</p> <p><u>Except an undivided one-half of all the oil, gas and other mineral rights.</u></p>
<p>Three years later, Abe conveyed an undivided 50% of the minerals under the tract of land to Betty.</p>    <p>Abe</p> <p>Betty</p>	<p>David believes that he owns 100% of the mineral rights.</p> <p>Betty believes that she owns 50% of the mineral rights.</p> <p>Who do you think owns the mineral rights?</p> <p><input type="checkbox"/> David</p> <p><input type="checkbox"/> Betty</p>

Examine the construction of the deed on the following page and notice where the excepting language is placed in the conveyance. Because the language is not a part of the granting clause, rather a part of the habendum clause, courts have construed the language as excepting from the covenant of warranty rather than the grant.

WARRANTY DEED

THIS WARRANTY DEED is made the ____ day of _____, 20____, by and between _____, (hereinafter referred to as "Grantor", and _____, (hereinafter referred to as "Grantee":

The Grantor, for and in consideration of the sum of _____ (\$_____) and other valuable consideration, receipt of which is hereby acknowledged, hereby grants, bargains, sells, remises, releases, and conveys to the Grantee, all that certain land situated in _____ County, State of _____, to-wit:

"Legal Description"

TO HAVE AND TO HOLD said described premises unto the Grantee forever. Grantor hereby covenants with said Grantee that the Grantor is lawfully seized of said land, has good right and lawful authority to sell said land, that said land is free from all encumbrances, and hereby fully warrants the title to said land and will defend the same against the lawful claims of all persons whosoever.

"Except an undivided one-half of all the oil, gas and other minerals"




Granting Clause

Habendum
Warranty Clause

ANSWER to Scenario 1: If no language is used in the deed indicating that it was ***the intention of Abe to reserve the minerals to himself***, the exception contained in the habendum clause of the deed should not be construed as a reservation of the mineral rights, but must be construed as excepting them from the covenant of warranty. *Jarrett v. Moore*, 159 Okla. 93, 14 P.2d 390. With this Oklahoma case, since Abe did not expressly reserve the minerals to himself, David would own 100% of the minerals.

Scenario 2:

General Rule: When reservation language appears in the habendum clause of a conveyance and it appears that there is intention on the part of the grantor to reserve minerals, that language will hold precedence over the granting clause in the deed. *Abbott v. Woods*, 295 P.2d 793 (Okla. 1956).

<p>Assume Abe, the owner of a tract of land, by Warranty Deed conveyed the land to David.</p> <p>The habendum clause contained the following:</p> <p><i>"Except 15/16ths of all minerals rights reserved" in said land.</i></p> <div data-bbox="186 730 365 997"><p>Abe</p></div> <div data-bbox="414 850 673 871"></div> <div data-bbox="698 718 925 1008"><p>David</p></div>	<p>Abe believes the mineral rights belong to him.</p> <p>David believes the mineral rights belong to him.</p> <p>Who do you think owns the mineral rights?</p> <p><input type="checkbox"/> Abe</p> <p><input type="checkbox"/> David</p>
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The Grantor, for and in consideration of the sum of _____ (\$_____) and other valuable consideration, receipt of which is hereby acknowledged, hereby grants, bargains, sells, remises, releases, and conveys to the Grantee, all that certain land situated in _____ County, State of _____, to-wit:

"Legal Description"

TO HAVE AND TO HOLD said described premises unto the Grantee forever. Grantor hereby covenants with said Grantee that the Grantor is lawfully seized of said land, has good right and lawful authority to sell said land, that said land is free from all encumbrances, and hereby fully warrants the title to said land and will defend the same against the lawful claims of all persons whosoever.


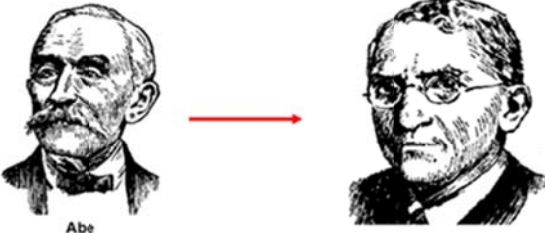
Except 15/16th of all mineral rights reserved in said land

} Granting Clause

} Habendum Warranty Clause

ANSWER to Scenario 2: With the language as cited, an Oklahoma court concluded, "The reservation of mineral rights appearing in the habendum clause of a deed will control over the granting clause where the intention of the grantor to create such reservation is clearly expressed." The court held that there was a clear intention to reserve the 15/16ths mineral interest; that the language "except 15/16ths of all mineral rights reserved," ***expressed a clear intention by the grantor not to include this mineral interest under the general granting clause in the deed.*** In this case, it appears that Abe is the owner of the minerals. *Wescott v. Bozarth*, 202 Okla. 149, 211 P.2d 258. (Emphasis ours)

Scenario 3:

<p>1. Assume that Abe, the fee owner, granted to Betty a 10-year mineral deed.</p>  <p>Abe Betty</p>	<p>3. The warranty language read... "TO HAVE AND TO HOLD said described premises unto the Grantee forever. Grantor hereby covenants with said Grantee that the Grantor is lawfully seized of said land, has good right and lawful authority to sell said land, that said land is free from all encumbrances, and hereby fully warrants the title to said land and will defend the same against the lawful claims of persons whosoever.</p> <p><i>Except all oil and gas rights and mineral rights held by Betty.</i>"</p>
<p>2. Eight years later, by Warranty Deed, Abe conveyed the land to David.</p>  <p>Abe David</p>	<p>4. Abe believes that at the end of the 10-year term, the minerals will revert to him. David believes the minerals will revert to him. Who do you think will own the minerals?</p>

ANSWER: Examine the construction of the deed. Notice where the excepting language is placed in the conveyance. An Oklahoma court ruled that, to create a reservation, it must appear from the instrument that ***the grantor intended to, and by appropriate words, expressed the intent to reserve an interest in himself***, otherwise, the exception must be construed as an exception to the warranty. The court found that no such intention was expressed and found in favor of the defendant, in this case, David. *Jarrett v. Moore*, 159 Okla. 93, 14 P.2d 390 (1932).

Third Party Reservation Language

It should be quite clear that if someone were selling a tract of land and wished to reserve minerals, they could only reserve the minerals that they owned. They could not reserve the minerals under their neighbor's tract of land when they were selling their own tract of land. In other words, you can only *keep* or reserve what you own. You cannot *keep* or reserve out of what someone else owns.

In the same vein, could Abe, who owned a certain tract of land, convey the land to Ben and reserve the minerals to Carl?

Assume the following: Abe conveyed the land to Ben and immediately following the granting language he added, "Grantor hereby *excepts* and *reserves* unto Carl and his heirs 100% of all oil, gas, and other minerals that are in and under said lands described."

It is clear that the intent is to reserve the minerals to Carl; however, the tract of land was Abe's separate property. None of the property belonged to Carl and he would be considered a stranger in title or a third party to the reservation; therefore, in most states, none of the minerals would transfer to Carl. According to *Black's Law Dictionary 1309* (7th ed. 1999), words of "reservation" are not deemed to be words of "grant." Therefore, most states would not consider the third party or a stranger in title interest to be valid.

The question remains, who ultimately owns the minerals? Abe or Ben? Some courts have attempted to address this issue by determining if the language used was "excepting" language or if it was "reserving" language. By using the previous definitions of excepting and reserving, if Abe was "excepting" the minerals, they would never have passed to Ben and would be owned by Abe. On the other hand, if Abe was "reserving" the minerals, but the reservation language failed, the minerals would pass with the surface to Ben. However, it appears that most courts would not attempt to make this distinction and would find in favor of Abe.

1. "Grantor hereby excepts and reserves unto Carl and his heirs 100% of all oil, gas and other minerals that are in and under said lands described."



2. Your company wishes to lease the minerals. Which party should sign the lease?

- Abe
 Ben
 Carl

Arkansas – Courts have concluded “that reservation to a stranger to the instrument is void for all purposes.” *Rye v. Baumann*, 231 Ark. 278, 329 S.W.2d 161, 165 (Ark. 1959). A reservation cannot create a life estate into a stranger in title. *Rye v. Bauman*, 231 Ark. 278, 329 S.W. 2d 161 (1959). If the grantor/owner of a tract of land sold the land, reserving a life estate to himself and his brother, the effect would be a life estate being established in only the grantor’s name.

Montana – Can a mineral reservation “to the grantors” effectively reserve a mineral interest to a non-mineral owning spouse, who merely joins in the execution of a deed for homestead purposes? In Montana the answer is “Yes.” The non-owning spouse does acquire a mineral interest in the land though the reservation.

In *Kelly v Wallace*, 972 P.2d 1117 (MT 1998), the Montana Supreme Court stated “[t]here was no dispute about whether non-parties to a conveyance can benefit from a transfer.” By referring to earlier cases it stated that “where intent can be shown, the court will give effect to the grantor’s intent to benefit a non-party to the transfer.” *Id.* at 1125. Title examiners must review all conveyances of surface interests with mineral reservations and account for the interest potentially reserved by the joining spouse.

New York – “A deed with a reservation or exception by the grantor in favor a third party, a so-called ‘stranger to the deed,’ does not create a valid interest in favor of that third party.” *Estate of Thompson v. Wade*, 509 N.E. 2d 309, 310 (N.Y. 1987)

North Dakota – In North Dakota, the land professional must be aware of the state’s third party reservation rule, often referred to as the Malloy rule. The rule originated when one spouse (who owned all of the surface and mineral interest) conveyed the surface to a subsequent party, reserving a mineral interest. The other spouse joined in to properly convey the homestead rights. The reservation language kept the minerals “unto the grantors.” Malloy answers the question of whether the reservation “unto the grantors” also reserves a mineral interest to the spouse who previously owned nothing.

The fight started with *Stetson v. Nelson*, 118 N.W.2d 685 (ND 1962), in which the Supreme Court held such a reservation to a stranger was ineffective.

This changed in 1983, when the North Dakota Supreme Court held such a conveyance was effective, and that it did reserve a mineral interest in a spouse who previously held nothing. *Malloy v. Boettcher*, 334 N.W.2d 8.

For purposes of running title, the land professional must realize that the Malloy decision was prospective only, and as a consequence many deeds in North Dakota *during this period* were “retroactively” determined to have reserved a mineral interest in a third party. Title examiners must review all conveyances with a reservation and account for the interest potentially reserved by the third party.

Oklahoma – In Oklahoma, “a reservation or exception in favor of a stranger to a conveyance is void or inoperative.” Howard H. Harris, *Reservations in Favor of Strangers to the Title*, 6 Okla.L.Rev. 127 (1953).

Virginia – Courts have concluded that under the common law, in order for a reservation to be good, it “must be made to all, some, or one of the grantors and not to a stranger to the deed.” *Shirley v. Shirley*, 259 Va. 513, 525 S.E.2d 274, 2000 Va. LEXIS 34 (2000).

West Virginia – West Virginia Courts have concluded that a reservation to a third party is void, but that the grantor retains the mineral rights. *Meadows v. Belknap*, 199 W. Va. 243, 250, n. 14, 483 S.E.2d 826, 833, n.14 (1997).

Wyoming – A court determined that a grantor may reserve an interest to a third party as long as conveying or granting language is used. *Simpson v. Kistler Investment Co.*, 90 O&GR 364, 713 P.2d 751 (Wyo. 1986). For example: “excepting and reserving all mineral rights in favor of Jim Johnson 50%, and Jane Johnson 50%, with the express provision that all such mineral rights shall be distributed, vested, and granted in such persons.”

North Dakota - has a third party reservation rule, often referred to as the Malloy rule. In 1983, the Supreme Court ruled that when one spouse, owning both surface and subsurface interest, conveys to a third party and the non-owning spouse signs the conveyance because of homestead rights, such a conveyance is effective to reserve a mineral interest in the non-owning spouse. *Malloy v. Boettcher*, 334 N.W.2d 8.

Montana - A mineral reservation "to the grantors" can, indeed, reserve a mineral interest to a non-mineral owning spouse if the spouse executed the deed for homestead purposes. In *Kelly v Wallace*, 972 P.2d 1117 (MT 1998), the Montana Supreme Court found that when intent can be shown, the court will give effect to a "non-party to the transfer".

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The Duhig Rule

In Texas, the court has fashioned a rule referred to as the *Duhig Rule*. Alabama, Colorado, Louisiana, Oklahoma, Mississippi, North Dakota, New Mexico, Texas, Arkansas, and Wyoming are states that have adopted the Duhig rule. Utah ignores the Duhig rule.

The rule says that if one party conveys to another through a warranty deed, and that party wishes to reserve minerals, then it is necessary that all prior reservations of record be set forth, if the conveying party intends to retain the reserved interest. The court has found that *the granted interest* on the face of the conveying deed *will take priority over any reserved interest to the extent possible*.

The Duhig Rule

The general rule, subject to a determination of the intention of the parties, is that if one party convey to another and wishes to reserve minerals, then it is necessary that the previous reservation(s) be set forth - if the conveying party intends to retain the reserved interest.

The court found that a *granted interest takes priority over a reserved interest to the extent possible*. However, the "Duhig Rule" is not followed if it can be shown that the grantee had actual notice of previously reserved interests.

Duhig v. Peavy-Moore Lumber Co., 144 S.W.2d 878 (Tex. 1940)

Trying to understand the Duhig rule for the first time may be hard to wrap your arms around. Try to see it in light of the following illustration:

Assume I am selling a car on Craig's List. The ad says, "\$3,000 or best offer." You see the ad, call me up, come over to my house to look at the car, and are now negotiating a price for the car.

You make me an offer of \$2,500. I accept your offer but with this one caveat. I tell you that I had just bought two of the tires on the car, they

cost me a lot of money and I want to keep them. You agree and tell me that you will come back later to pick up the car.

When you arrive at my house, you see the car but notice that there are no tires on the car. You say, "What happened to the tires? You told me you were only taking two of them." I respond, "I did only take two of them just like I said, but the other two tires belonged to someone else."

What would you be thinking? How would you feel? Wouldn't it have been appropriate to tell you about the other two tires? Would you feel cheated or taken advantage of? Wouldn't you be thinking that the \$2,500 agreed-upon price was the car less only two tires, not four? Of course you would.

If this same scenario were dealing with surface and mineral lands, in a Duhig state, the law would find in the buyer's favor. In other words, it is incumbent upon the seller to let the buyer know what they are paying for. Turn the car scenario into a purchase of a farm. The cost to the buyer is \$2,500,000. The warranty deed given to the buyer says the seller is reserving an undivided 50% of the minerals. If you were the buyer, you would believe that the purchase price you are paying comes with the surface lands and 50% of the minerals. If the seller is keeping 50% of the minerals, would it not appear that the other 50% are being conveyed? In essence that is the Duhig rule.

Scenario 1 – Assume that Abe is the original owner of a tract of land. He owns 100% of both surface and minerals. In 1973, Abe conveys the land to Betty but he reserves 50% of the minerals at the time of the conveyance.

Twenty years later, Betty, through a warranty deed, sells 100% of the same tract of land to David. In the deed, Betty reserves 50% of the minerals but did not mention the prior reservation in the 1973 conveyance.

Since the prior reservation was not set out, you must ask yourself, "What mineral interest *appears* to be granted to David?" Clearly he is receiving 100% of the surface land. However, if you were David and knew nothing about the previous 50% mineral reservation, from the *face of your deed*, what mineral interest would appear to be *granted*: 50%? 25%? none?

Abe conveys the land to Betty but he reserves 50% of the minerals



Abe



Betty

Who owns what percent of the minerals under this tract of land?

- Abe 50%, Betty 50%, Carl 0%**
- Abe 50%, Betty 25%, Carl 25%**
- Abe 50%, Betty 0%, Carl 50%**

20 years later, Betty, through a WD sells 100% of the same land to David. Betty reserves 50% of the minerals but does not mention Abe's prior reservation.



Betty



David

ANSWER: If David knew nothing about the previous reservation, the conveyance would appear to be granting 100% of the surface rights and 50% of the mineral rights to him. The Duhig rule would protect him, making it incumbent upon Betty to make the previous reservation known. In this case, Betty would receive no mineral interest in the tract of land because *the granted interest* on the face of the conveying deed has taken *priority over the reserved interest to the extent possible*.

Scenario 2





In 1973, Abe sold a 640-acre tract of land to Betty. The deed contained the following provision:

“Reserving an undivided one-half interest in and to all oil, gas, and associated minerals under said lands hereby described.”

Twenty years later, Betty through a warranty deed, sold the 640-acres to David. Betty had forgotten all about the previous reservation and thought that she owned all of the minerals. In the deed, Betty included the following reservation language:

“Reserving an undivided seventy-five (75%) interest in and to all oil, gas, and associated minerals under said lands hereby described.”

Your company wishes to lease all mineral ownership in the 640 acres. Who owns what portion of the minerals? From whom do you lease?

<p>Abe conveys the land to Betty but he reserves 50% of the minerals</p>  <p>Abe</p>  <p>Betty</p>	<p>Your company wishes to lease all mineral ownership in the 640-acres.</p> <p>Who owns what portion of the minerals? From whom do you lease?</p> <p>Abe _____%</p> <p>Betty _____%</p> <p>Carl _____%</p>
<p>20 years later, Betty, through a WD sells 100% of the same land to David. Betty reserves 75% of the minerals but does not mention Abe's prior reservation.</p>  <p>Betty</p>  <p>David</p>	

ANSWER: Since Betty did not make known the previous reservation, it would appear from the face of the deed that David is being granted 25% of the minerals, and the granted interest would take priority over the reserved interest only to the extent possible. In this case, your company would need to lease Abe = 50%, Betty = 25% and David = 25%.

Alabama – In Alabama, the courts have not mentioned the Duhig rule, but their findings appear to align with the Duhig rule. *Morgan v. Roberts*, 434 So.2d 738 (Ala. 1983).

Arkansas – Arkansas has adopted the Duhig rule; however, Duhig cannot be applied to reservations found in quitclaim deeds. *Hill v. Gilliam*, 284 Ark. 383, 682 S.W.2d 737 (1985). The Supreme Court also ruled that Duhig would apply only to warranty deeds, and then only when the parties to the deed are not parties involved in the dispute. *Peterson v. Simpson*, 286 Ark. 117, 690 S.W.2d 720 (Ark. 1985).

Colorado – Although a Colorado Supreme Court expressed some reservations concerning the logic of the Duhig Rule, the court did not reject it. In the Supreme Court Case *O'Brien v. Village Land Co.*, the court's rulings were consistent with Duhig. *O'Brien v. Village Land Co.*, 794 P.2d 246, 249-251 (Colo. 1990). *Dixon v. Abrams*, 145 Colo. 86, 357 P.2d 917.

California – There are no cases in California related to Duhig issues, but it is assumed by many that California courts would most likely reject the Duhig Rule.

Louisiana – Louisiana adopted the rule in the case of *Dillon v Moran* (362 So. 2d 1130, La. App. 2d Circuit, (1978). It was also applied in *Continental Oil Co. v. Tate*, 211 La. 852, 30 So.2d 858 (1945).

Michigan – There are no cases in Michigan related to Duhig issues, but it is assumed that Michigan would follow the majority of Duhig states.

Mississippi – A Mississippi Court distinguished the Duhig rule stating, "A quitclaim deed operates only as a conduit to pass the grantor's interest to the grantee. To determine what interest passes by a quitclaim deed, a grantee, or any interested person, must look to the chain of title prior to the deed to determine what interest the grantor had to convey and subtract therefrom any express reservation in the quitclaim deed. If the grantor had a smaller interest than the deed purports to convey, the grantee may not complain. The grantor by a quitclaim deed makes no representation, covenant, or warranty of title and has no duty or obligation to protect the conveyance against any prior conveyance to others in the chain of title." *Rosenbaum v. McCaskey*, 386 So. 2d 387 (Miss. 1980).

Montana – While the Montana Supreme Court has not specifically adopted the Duhig Rule, but relies upon the doctrine of “estoppel by deed” upon which the Duhig is actually based. *Hart v Anaconda Copper Mining Co.*, 222 P. 419, 421 (MT 1924).

North Dakota – North Dakota has adopted the Duhig rule. *Kadrmias v. Sauvageau*, 188 N.W.2d 753 (N.D.1971); *Sibert v. Kubas*, 357 N.W.2d 495, 497 (N.D.1984). The Duhig rule does not apply when the grantee had actual notice of the outstanding mineral interest, because the grantee owned that interest. *Gilbertson v. Charlson*, 301 N.W.2d 144 (N.D.1981). North Dakota has made it clear that actual knowledge violates the use of the Duhig rule.

The Duhig rule was premised upon a breach of warranty until *Miller v. Kloeckner*, 600 N.W.2d 881 (N.D. 1999) held a general warranty is not necessary. “The key question is, not what the grantor purported to retain for himself, but what he purported to give the grantee. If he undertook to convey half the minerals and had the power to do so, he should be held to his undertaking.” *Id.* at 885, 1 Williams & Meyers, at 580.36.

The rule has also been adopted in the North Dakota Mineral Title, “Where full effect cannot be given both to the interest conveyed in the granting clause of a warranty deed and to the interest reserved therein because of a previous outstanding interest in a third party, priority will be given to the interest conveyed in the granting clause rather than to the interest reserved until full effect is given to the interest conveyed.”

Oklahoma – Oklahoma adopted the rule in *Murphy v. Athans*, 265 P.2d 461, (1954). The rule applies to warranty deed conveyances where the grantor, who owns a fractional interest in the minerals, reserves a portion of the mineral estate without setting forth the previous mineral reservations. *Birmingham v. McCoy*, 358 P.2d 824 (Okla. 1960). *Bryan v. Everett*, 365 P.2d 146 (Okla. 1961).

Texas – *Duhig v. Peavy Moore Lumber Co.*, 135 Tex. 503, 144 S.W.2d 878 (1940).

Utah – In *Hartman v. Potter*, 596 P.2d 653 (Utah 1979) the court rejected the Duhig Rule without referring to the Duhig case.

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

The following states have not yet adopted the Duhig Rule: California, Pennsylvania, West Virginia, New York, Kansas, Georgia, Michigan, Utah, and Montana.