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A TEXAS TIME CAPSULE:
Leasing Issues for Lands Affected by the
Relinquishment Act

Perhaps more than any other time in Texas's history, the traditional antagonism between the respective owners of the surface and severed mineral estate was apparent in the early years of the 20th century in West Texas. During this time, oil exploration in the area was expanding after the Texas Legislature passed new acts permitting exploration on private lands in which the minerals were owned by the state. The exploration activity came into direct conflict with the surface use of the ranchers and farmers, who had purchased the surface for agriculture use. As tensions rose between oil and gas operators, the State, and surface owners, the Legislature reasoned that the surface owners needed both an incentive to cooperate with oil and gas operators and compensation for the damages caused by exploration. The ultimate solution was the passage of the Relinquishment Act of 1919. Nearly a century later, the Act is still a central consideration for companies leasing in West Texas. Due to the unique history surrounding the passage and subsequent interpretation of the Act, this is an area of oil and gas law that is distinctively Texan.

Portions of the State, particularly certain counties like Pecos and Reeves, are checkerboarded with "Mineral Classified" lands that are subject to the Relinquishment Act. While the general application of the Act is simplistic and the necessary state lease is easy to complete and file, there are aspects of this ownership relationship that require the attention of both landmen and title attorneys. These include the surface owners' statutory duties owed to the State of Texas as agents, the rights of the surface owners to benefits under the lease, and the alienability of those rights.

PURPOSE

First, it is vital to understand how the Relinquishment Act is applied in practice. In order to understand how the Act functions, it is helpful to briefly summarize the history surrounding the enactment of the Act and its actual text. Next, this paper will provide a thorough review of the subsequent judicial interpretations of the statute by various Texas courts. Finally, the paper will discuss the ramifications these interpretations have had on the rights of the parties and specific leasing issues that arise on lands subject to the Act.

PART I: UNDERSTANDING THE ACT

A. Historical Context

The Relinquishment Act cannot be fully understood outside of its historical context. Likewise, the subsequent judicial interpretations of the Act were directly influenced by the economics of West Texas at the turn of the 20th Century.

Our requisite starting point is the Texas Constitution of 1876, which set aside half of Texas' unsold public lands for the Permanent School Fund in order to finance free public schools.¹ Notably, the Constitution gave the Legislature the sole ability to sell the lands "under such regulations, at such times, and on such terms as may be prescribed by law; and the Legislature shall not have the power to grant any relief to purchasers thereof."² In essence, the Legislature alone had the burden of managing the sale of state lands for the benefit of public schools. Thus, in the latter part of the 19th century the Legislature passed a series of acts which authorized such sales and granted specific authority to convey state owned lands for the purpose of funding public schools.

First, in 1895, the Texas Legislature passed a series of land acts which established a specific procedure for selling public lands.³ Contemporaneously, the Legislature passed the Mining Act of 1895 which ordered the Commissioner of the General Land Office (hereinafter “GLO”) to map all unsold lands and employ a team of geologists to identify “mineral” lands which would not be available for sale.⁴ As detailed by the Texas Supreme Court in *Schwarz v. State*:

From 1895 to 1907 these mineral classified lands were not open to settlement, merely to prospecting. Vast areas of West Texas were reserved from sale to those who desired to draw their living from the use of surface resources because the land was known or suspected to contain valuable minerals from which the State desired to derive income.⁵

This policy represented a hesitancy to sever the mineral and surface estates, a policy that, in effect, left a large amount of West Texas land unused. To remedy this inefficiency, the Legislature passed the Land Sales Act of 1907, providing that mineral classified lands may be sold, but,

all sales of such land shall be upon the express condition that the minerals shall be and are reserved to the fund to which the land belongs and such reservation shall be stated in all applications to purchase.⁶

Accordingly, the State began selling mineral classified lands with an express reservation of the mineral estate. This resulted in private ownership of the surface and State ownership of the minerals, which minerals were held specifically for the benefit of Texas public schools as detailed in the Texas Constitution of 1876.

After 1907, while the State of Texas had been able to monetize the surface estate’s value, it still lacked a mechanism for exploration, i.e. monetization, of the oil and gas reserves in minerally classified lands. Thus, Texas took additional legislative action with the Permit Lease Act of 1913 that set the stage for the Relinquishment Act six years later. In 1917 the Act of 1913 was redrafted, but the Act remained substantively intact.⁷ Under this Act, a private individual or company who wished to explore state owned minerals for oil and gas could apply for an exploration permit. If that exploration resulted in the discovery of oil or gas, the permittee could request a lease to cover the lands. Hence, the development of state owned minerals had begun.⁸

To recap, as of 1917, Texas had identified significant state-owned mineral resources, reserved the rights to those resources in sales of the various surface tracts, and created a mechanism for encouraging private development of the oil and gas. The expected monetization, however, was not forthcoming. Quite the opposite, in fact; oil and gas exploration under the Permit Lease Acts of 1913 and 1917 lead to real conflict between surface owners and oil and gas developers in West Texas. While the oil and gas developers rushed west to explore these public minerals, the surface owners, who relied on the use of the land for their livelihoods, were not keen to cooperate. In many cases, this included refusing entry to oil companies and, in some cases, threatening violence.⁹

The Relinquishment Act of 1919 (hereinafter Relinquishment Act) was the legislature’s compromise to appease the surface owners while also encouraging the development of the mineral classified lands.¹⁰ The compromise may have been described best in *Oil in Texas: The Gusher Age, 1895-1945*:

[The Relinquishment Act] was the incentive for farmers and ranchers to keep their dogs penned and their shotguns on racks in the parlor when oil company landmen came to call.¹¹

To further emphasize the reconciliatory purpose of the Act, the Court in *Greene v. Robison* (discussed in depth, below) stated:

There was a dual or double ownership of the land, the surface estate and the mineral estate, each antagonistic to and conflicting with the other. There was no provision of law for the protection of the owner of the soil in his peaceable enjoyment and possession of his property. The development of an oil field on it would be disastrous to him and utterly destructive to his property. Therefore the attitude of owners of the school and asylum lands was practically one of armed resistance. The conditions were inimical to any effort at development, and the state was not realizing on its mineral estate in these lands. The purpose of the act was to meet this practical situation."¹²

B. The Text of the Act

For reasons which will be apparent shortly, the text of the Relinquishment Act cannot be relied upon in isolation. It should be a legislative goal to enact statutes that have a clear and unambiguous meaning, so that citizens can rely on the plain language of the text; as we'll see, the actual text of the Relinquishment Act is not a model for statutory drafting.

Nonetheless, the foundation of the Relinquishment Act is still active in its original text and has merely been added to by amendments. There are three provisions of the Statute, in particular, now contained in

the Texas Natural Resources Code, which created the unique rights of the owner of the soil:

52.171: The state hereby constitutes the owner of the soil its agent for the purposes herein named, 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 and portions of such surveys sold with a mineral classification or mineral reservation, subject to the terms of this law. 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.

52.172: The owner of said lands is hereby authorized to sell or lease to any person, firm or corporation the oil and gas that may be thereon or therein upon such terms and conditions as such owner may deem best, subject only to the provisions hereof, and he may have a second lien thereon to secure the payment of any sum due to him. All leases and sales so made shall be assignable. No oil or gas rights shall be sold or leased hereunder for less than ten cents per acre per year plus royalty, and in case of production, the lessee or purchaser shall pay the state the undivided one-sixteenths of the value of the oil and gas reserved herein, and like amounts to the owner of the soil.

52.182: The payment of the ten cents per acre and the obligation to pay the owner of the soil one sixteenth of the production and the payment of same when produced and acceptance of same by owner shall be in lieu of all damages to the soil.

There is a lot to unpack in those three provisions, and, because the effect of the Act has come from judicial interpretation, we will not dwell on the plain meaning of the text. However, before we look at the pivotal interpretation of the Act, it's easy to predict how a layperson or even the Land Commissioner would have interpreted these words. When the statute says the State "relinquishes and vests in the owner of the soil an undivided fifteen-sixteenths of all oil and gas," one would assume that this is indeed a relinquishment and vesting of a 15/16th mineral interest to the surface owner, as previous relinquishment acts had done. In fact, this was the common interpretation and owners of the soil believed they now owned 15/16ths of the minerals.¹³

This apparent relinquishment of the State's mineral interest was not met with unanimous praise. The Act essentially divested the State of significant mineral interests, the proceeds of which were earmarked to fund public schools. The Act was challenged by a series of cases on constitutional grounds, and ultimately the Texas Supreme Court addressed the constitutionality of the Act in 1925.

C. *Greene v. Robison* (1928)

Greene v. Robison was an original proceeding for mandamus directed to the Commissioner of the GLO addressing the constitutionality of the Relinquishment Act. There were six pending cases challenging the constitutionality of the Act,¹⁴ and the

Court sought to interpret the Act and determine its validity in a single opinion.

A principle of statutory interpretation utilized by the Court was:

all reasonable doubts will be resolved in favor of the validity of an act, and that, where an act is susceptible of a valid construction, that construction will be given it.¹⁵

This was the guiding principle, and the shoehorn with which the Court found that the statute was constitutional.

There were four constitutional challenges argued by the litigants:

- 1) The Act constitutes a donation to the owner of the surface of a part of the Permanent Free School Fund;
- 2) The Act attempts to create an irrevocable agency coupled with an interest in the subject-matter;
- 3) The Act provides that a part of the Permanent School Fund may be used to compensate the owner of the soil for services rendered by him, and for damages to his surface rights; and
- 4) The Act creates "an agency with power to fix the conditions, times, and terms of sale of public school and asylum lands," in contravention to Section 4, Article 7 of the Constitution.¹⁶

In summary, it was argued that the Act was unconstitutional because: (1) the Act was essentially a gift of real property to the surface owners i.e. no additional consideration was being paid by the surface owners for the vesting of a real property interest, (2) it constituted an unauthorized diversion of part of the public school fund,

and (3) that it delegated to an agent the duties imposed by the Constitution on the Legislature.¹⁷

In its analysis, the Court first recognized the purpose of the Act:

The intention of the Legislature was to utilize the co-operation and services of the surface owner in the sale of the reserved mineral estate – to use him as an intermediary in the sale.¹⁸

Here the Court reiterates that the Relinquishment Act was intended to be a solution to the lack of cooperation from surface owners that was hindering oil and gas development on these lands.

Court's Conclusion #1: There is no vesting of title or interest in the oil and gas in the owner of the soil. Thus, there is no unconstitutional gift.

The Court's first conclusion is its most important and goes against a plain reading of the statute. This is most evident in the Court's analysis the Act's text in the following statement:

The expressions in article 5367 that the state 'relinquishes and vests' in the surface owner fifteen-sixteenths of the oil and gas, and that the remaining portion is 'reserved' for the benefit of the school and asylum funds, are confusing and uncertain of meaning, and perhaps not of importance.¹⁹

The Court essentially opens its analysis by recognizing that the language of the Act is "confusing and uncertain of meaning" but for some reason comes to the bizarre conclusion that the actual text is "perhaps not of importance." Rather, the Court preferred

to focus on the overall purpose of the act, reading the entire act as one in order to determine what the Legislature *intended*, rather than what they actually said. Accordingly, the Court thought that it was clear that there was no gift or donation to the owner of the soil.

Court's Conclusion #2: The payments made to the owner of the soil are simply payments for damage to the surface. Thus, there is no unconstitutional diversion of lease proceeds.

The counter argument to the first constitutional challenge was that even if the owner of the soil did not receive a donation of the minerals, they received a donation of part of the proceeds of the lease, diverting from their purpose as part of the school fund.²⁰ But the Court danced past this issue by focusing on the issue of surface damages.

The Court reasoned that the payments provided for by the Relinquishment Act were, in fact, payments in lieu of payments for damage to the soil, and the intention of the legislature was that the payments were not part of the consideration for the sale (leasing) of oil and gas.²¹

The true intention of the Act, according to the Court, was to secure the cooperation of the owner of the soil and to do so by compensating the owner of the soil for his loss of use of the surface. In fact, the Court puts great emphasis on the negative impact of a severed mineral estate on the surface, and finds a compensation to be necessary and just:

The state had sold the land, the soil with all that goes with it, to the purchaser thereof, and was under obligation to protect him in the use and enjoyment of what it had sold

him; and this the state had failed to do.²²

Further, the Court states:

The Legislature has brought about this desired result in a lawful manner by requiring the purchaser of the oil and gas to compensate the owner of the soil for the use he makes of the surface, independent of the price he pays for the minerals²³

Recall, however, that it is well settled Texas law that the mineral estate is the dominant estate; every severed estate in Texas has this issue – there is nothing unique about this situation. The Court referenced an “obligation to protect” the surface owner, yet provided no legal requirement. Nonetheless, this was the motivation for giving such a large benefit to the owners of the soil, who received this massive windfall.

Therefore, “the landowner acquires no estate in the oil and gas” and the Legislature was “simply making an equitable provision for protecting its citizens in their property rights it has sold them.”²⁴

Court’s Conclusion #3: Compensation under the lease is to be paid equally to the state and the owner of the soil.

The Court finally addressed the issue of whether the Act contravenes the constitutional requirement that the Legislature, alone, may fix the conditions, times, and terms of sale of public school lands.²⁵ Although there is a minimum price set out in the act, the owner of the soil has the ability to contract for a higher price. This is obviously in the interest of the State, but it means that the owner, as agent for the State, is determining the terms of the sale.

The Court clearly states that the “Constitution has never been construed to require that the Legislature should prescribe in detail and with exactness” the price of the sale.²⁶ The Court states that, along with the minimum price in the statute, obtaining the best price is in compliance with the constitutional provision.

In discussing this issue, the Court – almost in passing – interpreted the Act *to require payment in “like amounts” to the State and the owner of the soil.*²⁷ This is not crystal-clear from the text, but the Court treats it as so. Accordingly, this is the most important takeaway from *Greene* – the 50/50 Rule – because it sets out the unique yet uncomplicated way to apportion bonus, rental, and royalty payments for lands affected by the Act. All payments are to be made 50% to the State of Texas, and 50% to the surface owner.

D. Greene’s Legacy

Greene is highly criticized for its forced interpretation of the statute and the Court’s willingness to contort the statute to make it constitutional. The preferred result of *Greene* would have been for it to be deemed an unconstitutional donation, and then the Legislature would have simply redrafted the Act in a clearer way. However, that did not happen, and, because of this interpretation, the fuzzy language of the Relinquishment Act lives today.

The positive result of *Greene* is that the Court made bold conclusions about the meaning of the text. While this interpretation does create many odd rules, which will be discussed next, it sets out the simple half-and-half payment structure which is easy to remember.

PART II: SPECIFIC LEASING ISSUES

A. Transferability of Lease Benefits

The general rule derived from *Greene* is that the surface owner of Relinquishment Act lands is a leasing agent for the state, entitled to one-half of the benefits of said lease, and those benefits run with the land.

Generally speaking, if surface owner A sells his interest in the land to purchaser B, then B becomes agent of the state and is entitled to the lease benefits. However, due to the uniqueness of the rights resulting from the Act, there are interesting issues as it relates to transferability of this pseudo-property right.

First, because the Court in *Greene* established that the owner of the soil had no right to the oil and gas in place,²⁸ the owner cannot sell the minerals as if he were a true mineral owner.²⁹ Mineral and royalty deeds from the owner of the soil are void,³⁰ as are reservations of mineral or royalty interests.³¹ These are basic rules that make sense with our understanding of the nature of the surface owner's rights. Because a surface owner does not have an interest in the minerals themselves, they cannot convey or reserve said minerals.

1. *Lemar, et al. v. Garner*

An exception to this general rule comes from *Lemar, et al. v. Garner*.³² This case emphasizes the longstanding Texas policy against restraints on alienation.

The primary issue set out in *Lemar* was whether the benefits of a lease on Relinquishment Act lands could be severed from actual ownership of the surface estate.³³ In other words, can a surface owner lessor sell the surface but retain the benefits

under the original lease? Or must the benefits necessarily run with the land?

With *Greene* in mind, it would seem clear that the rights are tied to the land. The Court in *Greene* jumped through hoops to illustrate the importance of characterizing the proceeds of the lease as a compensation for use of the surface estate, employing notions of both policy and fairness to emphasize the importance of the payments to the owner of the soil.

Instead, the Court in *Lemar* characterizes the benefits under the lease as a property right which can be conveyed:

That when a valid and binding lease or conveyance of the minerals is made by the owner of the land, as the agent of the state, then in that event he receives the foregoing amounts as compensation for his services. His share of the rentals, royalties, and bonuses derived from the leases executed by him become property rights during the period of time for which the lease runs.³⁴

The Court reiterates that until a lease is entered, the surface owner has no rights to assign or convey mineral rights in the property. Once a lease is executed, however, he does attain alienable rights to the lease benefits.³⁵ These rights can be conveyed or reserved.

It is important to clarify that these alienable rights to lease benefits are a creature of the existing lease; when the lease terminates, any assigned or reserved right to receive the land owner's share of the lease benefits also terminates, similar to an overriding royalty interest.³⁶

The conclusion of the Court in *Lemar* seemed to have much more to do with enforcing a strong Texas policy against

restraints on alienation, rather than a true application of the rights described in the text of the Act and in *Greene*. Clearly admitted in *Lemar*: “The rule is well established that it is not the policy of the law of this state to favor restraints upon alienation of property.”³⁷ In the eyes of the Court, as soon as the benefits under the Act were characterized as a property right, they should be assignable.

While this is an easy exception to remember, it does muddy our understanding of how the Court views the rights of the owner of the soil. *Greene* tied it closely to surface ownership, and *Lemar* said “not necessarily.”

B. The Agency Relationship

The Relinquishment Act, as clarified by *Greene*, creates an agency relationship between the owner of the soil and the State of Texas.³⁸ The owner of the soil acts as agent for the State of Texas for leasing purposes, yet the scope and duties of this relationship have been a source of controversy.³⁹ There are even questions about whether the surface owner’s obligation extends beyond the execution of the lease.⁴⁰

What is certain is that the agency is transferred along with the soil, and that the right of the owner to engage in leasing activities is not easily revoked.⁴¹ The agency is attached to the land and transferred along with the land. It is a right incident to ownership of lands subject to the Act.⁴²

1. Fiduciary Duty of the Agent

One question arising from the ill-defined agency relationship is the standard owed by the owner of the soil to the State. This is a particularly interesting question, as this relationship was essentially forced upon surface owners; given the economic benefits, however, they would gladly take the trade-off.

The issue of the scope of duty was addressed by the Texas Supreme Court in *State v. Durham*.⁴³ In that case, the State sought to impose a fiduciary duty on the surface owners of lands subject to the Relinquishment Act.⁴⁴ Under the facts, the State alleged that the surface owner/lessor entered into a “sham transaction” with the intent to defraud the State.⁴⁵ The Court concluded that the owner of the soil was not the State’s “general agent for all purposes,” but within the scope of the Relinquishment Act “the surface owner is the State’s agent to the extent that the State’s assets are entrusted to the control of the surface owner, who must not abuse that trust.”⁴⁶ The agent owed a fiduciary duty to the state which would be violated by self-dealing.⁴⁷

A 1985 amendment to the Relinquishment Act, codified in Texas Natural Resources Code Section 52.189(b), clarified the standard owed by the surface owner to the State:

An owner of the soil owes the state a fiduciary duty, a duty of utmost good faith . . . and requires him to fully disclose any facts affecting the state’s interest and must act in the best interest of the state.⁴⁸

The statute goes on to state that any conflict of interest “must be resolved by putting the interests of the state before the interests of the owner of the soil.”⁴⁹ As stated in a Memorandum titled *Texas General Land Office Guidelines for Leasing Relinquishment Act Lands*,

When the Commissioner determines that an owner of the soil has breached any duty or obligation, the Commissioner may request that the Attorney General file an action or proceeding [which may result in the

forfeiture or agency rights of the owner of the soil.⁵⁰

The main takeaway from this discussion of duty is that conflicts of interest should raise a red flag in the eyes of a landman or attorney. A primary way in which this manifests itself in Relinquishment Act leases is through separate provisions for surface damages. Commonly in this scenario, the amount of bonus and delay rentals are lessened in favor of specific payments for surface use or surface damages. Clearly, this creates a conflict because the agent has an interest in the surface while the state does not.

This additional surface payment conflict is directly addressed by the statute, where it states that the payment of bonus, delay rentals and royalties “shall be in lieu of all damages to the soil.”⁵¹

However, it is important to note that there is an “Authorized Damages” clause in the current State lease form which states:

[L]essee shall pay the owner of the soil for damages caused by its operations to all persons, property, improvements, livestock, and crops on the lease premises.⁵²

There were more issues regarding the duties of the agent before the addition of Section 52.183. Included in the 1939 Amendment, the Section declares that no lease is effective, “until a certified copy of the lease is filed in the land office.”⁵³ This allowed the GLO to act as a leasing watchdog, with the power to refuse to accept leases for filing if they contain provisions inconsistent with the State’s interest. It also permitted the promulgation of a State lease form.⁵⁴

As a result, the leasing process has simplified significantly. The State form is used with the common one-fourth royalty on

terms that the State has indicated they will accept. In practice, the true agency duties of the owner of the soil take place in the negotiation of bonus and delay rental payments which are truly specific to the market and the individual’s skills in negotiation.⁵⁵

2. No Collateral Agreements & Top-Leasing

It is worth noting here, as it relates to the duties of the owner of the soil as agent and the protection of the State’s interest, that agreements collateral to the approved lease are not allowed. According the GLO Guidelines:

Participation by the owner of the soil in the bonus, rentals and royalties is in lieu of surface damages and any such collateral agreement could render the lease invalid and subject the surface owner’s agency rights to forfeiture.⁵⁶

Likewise, top-leasing is “prohibited.”⁵⁷

3. Execution by the Agent

According to the GLO Guidelines, the owner of the soil must execute the lease as agent for the State.⁵⁸ Notably:

An agent of the surface owner, including an attorney-in-fact, cannot execute a Relinquishment Act Lease, unless a power of attorney expressly authorizes the attorney-in-fact to execute a Relinquishment Act Lease.⁵⁹

If the power of attorney does authorize the execution of a Relinquishment Act Lease, it shall be submitted to the GLO concurrently with the lease.⁶⁰ Furthermore, “both the surface owner and the attorney-in-fact shall

owe the state the full fiduciary duty as provided by law.”⁶¹

If the owner of the surface is a corporation, the lease may be executed by a duly authorized officer or agent.⁶²

4. Extended Scope of Duty?

The Texas Supreme Court case, *Scott v. Exxon Corp.*, raised the issue of whether an undivided interest owner of the soil was entitled to a proportionate share of the proceeds received by the State as part of a settlement of a suit involving an oil and gas lease covering lands owned in part by Exxon.⁶³ While the factual basis for the underlying suit is not material to the agency issue, Exxon as partial surface owner (and actually a defendant in the original action) filed a counterclaim against the State and other surface owner, asking the court to award Exxon part of the settlement.⁶⁴

In its analysis, the Court reiterated the rule that the landowner acquires no estate in the oil and gas.⁶⁵ Strictly construing the statute in favor of the State on the grounds of public policy, the Court held that Exxon was not entitled to share in settlement proceeds because (1) this was separate from the “damage to the soil” rationale set out in *Greene*, and (2) because Exxon chose not to join the State and other surface owner in prosecuting the suit against the lessee and therefore was not offering any service as an agent which would require compensation.

The primary rule derived from *Scott* is that the owner of the surface is not necessarily entitled to a share of the proceeds received by the State as part of a settlement on an oil and gas lease in which the owner had an interest. But perhaps more interesting is that the Court leaves the door open for an expanded scope of the agency. As noted by

Ernest E. Smith and Jacqueline Lang Weaver:

There is some question as to whether the surface owner’s agency extends beyond executing the lease. As one commenter has observed,⁶⁶ language used [in *Scott*] . . . implied that a landowner’s agency power continues after a lease has been executed and that its exercise may entitle the landowner to additional compensation. Such a position, if ultimately adopted by the courts, would extend the scope of the landowners agency power beyond that previously assumed to exist . . .⁶⁷

The Court, in *Greene*, centered the rationalization for payment under the lease as compensation for surface use and damage. Compensation for activities as an agent that go beyond the initial entering of a lease seems beyond the scope of the Relinquishment Act as defined by *Greene*. Nonetheless, the door is open as the unique relationship between the surface owner and the state is far from clearly defined.

5. Missing Owner & Revocation of Agency

One of the most common scenarios related to the leasing of Relinquishment Act Lands is the process of leasing lands in which the owner or owners of the surface are unavailable or not participating. Given the location of many of these tracts, this can pose a real issue for lessees, as technically the surface owner, as agent, has the sole right of leasing the land in the best interests of the State.

a. Unavailable Owner

The Relinquishment Act addresses this scenario specifically in Section 52.186.⁶⁸ When the owner of the surface is deemed

unavailable by the terms of the statute, the oil and gas can be leased under the procedure for leasing unsold surveyed public school lands.

Subsection (b) explains the requirements in which an owner may be legally deemed unavailable.

First, those searching for the owner must submit a “written affidavit to the commissioner stating that the party has been unable to locate said owner,” stating the legal description, the “extent of the interest” and type of mineral which the affiant is unable to lease.⁶⁹ The affiant must also attest that he has “diligently searched the county clerk’s records and the tax assessor’s records to determine the name, identity, and last known place of residence of the owner of the soil...”⁷⁰

Next, the Commissioner provides written notice to the owner of the soil explaining the consequences of finding him “unavailable;” the notice is sent to the owner’s last known address and provided by publication.⁷¹

The owner of the soil has 30 days to contact the GLO, upon which time he will be deemed unavailable to act as the State’s agent and the School Land Board may lease the State’s interest.⁷² But, if the owner notifies the Commissioner in writing that “he can and will act as the state’s agent,” then his agency will be reinstated.⁷³

There is a two-year redemption period, such that if the owner of the soil appears within two years, he shall be entitled to one-half of all royalties “theretofore paid or thereafter to be paid” under the lease, but only if he shows that the information contained in the aforementioned affidavit was either inaccurate or that a diligent search would have determined his whereabouts.⁷⁴

Lastly, upon the termination of a lease under the circumstances just described, the rights of the owner of the soil “shall be ipso facto reinstated.”⁷⁵

b. Revocation for a Refusal to Lease

While the process for removing the agency powers of an unavailable owner of the soil are clear and laid out in the statute, the situation of a refusal to lease is less clear, as it does not fall into the statute’s strict definition of unavailability.⁷⁶

However, the discussion of the Texas Supreme Court in *State v. Standard* contemplates inaction from the agent as grounds for revocation of the agency authority:

The only express statutory authority for forfeiture of the leasing authority of the surface owner is . . . 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 not present here such as the fraud of the agent, or his failure or inability to act.⁷⁷

The refusal to lease would be a failure to act in the best interest of the State, so it would follow that this would be grounds for a revocation of the leasing power. The Texas Administrative Code sets out grounds for legal action against an agent who has breached his fiduciary duty to the State.⁷⁸ In this scenario the Commissioner may request that the attorney general file suit to forfeit the surface owner’s agency rights.⁷⁹

CONCLUSION: Was it All Worth It?

The Relinquishment Act is a unique Texas law that offers a look into the history of the State. As we discussed, the Act was a direct

response to a practical monetary concern at the turn of the 20th century, but the impact of the Act is very relevant in oil and gas operations today.

While we hope this paper is helpful in understanding the background of the act and its foundational concepts, there are many more resources for landmen and attorneys including the GLO Energy Business Website. The GLO has posted guiding documents intended to help companies, attorneys and individuals navigate the complex act. If you deal with the Relinquishment Act or are simply interested, these documents are worthy of your attention.

As discussed, the Relinquishment Act was enacted to remedy the problem of surface owners hindering leasing of State mineral interests in West Texas. At the time, it seemed like a good solution to garner the cooperation of the surface owners by providing them incentive to lease the State minerals. A win-win, right?

There was certainly a benefit for the State, but there was a greater cost. The State, in effect, relinquished half of its income from mineral interests in those lands, being assets which were intended to fund public schools. It is no wonder, then, that the Act was aggressively challenged at its outset.

Perhaps it was the result of a naïve period of oil and gas law, in which it was harder to understand how two conflicting estates, surface and mineral, could possibly coexist. But as with mineral estates severed from the surface across private lands in the State, the law has maintained the dominance of the mineral estate while providing some assurances to surface owners.

In retrospect, it appears the Act was an unnecessary gift for surface owners, divesting the State of great wealth. The result

is a complex and somewhat misleading act, and a unique relationship between private surface owners and the State of Texas.

¹ Tex. Const. art. VII, § 2.

² Tex. Const. art. VII, § 4.

³ *Schwarz v. State*, 703 S.W.2d 187 (Tex. 1986).

⁴ *Id.* at 190-191.

⁵ *Id.* at 191.

⁶ Act of May 16, 1907, ch. 20, § 2 (6f), 1907 Tex. Gen. Laws 490.

⁷ See Op. Tex. Att’y Gen. No. 0-4970 (1943), at 7.

⁸ *Id.*

⁹ Judon Fambrough, Mineral Law West of the Pecos, *Tierra Grande (Magazine)* (April 2013).

¹⁰ See *Greene v. Robison*, 117 Tex. 516, 8 S.W.2d 655 (1928).

¹¹ Diana Davids Hinton & Roger M. Olien, *Oil in Texas: The Gusher Age, 1895-1945*, pg. 153 (University of Texas Press 2010) (2002).

¹² *Greene* at 531.

¹³ See *State v. Magnolia Petroleum Co.*, 173 S.W.2d 186 (Tex. Civ. App.–San Antonio 1943).

¹⁴ *Greene* at 523-524.

¹⁵ *Id.* at 524.

¹⁶ *Id.* at 526.

¹⁷ *Id.*

¹⁸ *Id.* at 527.

¹⁹ *Id.* at 527-528.

²⁰ *Id.* at 529.

²¹ *Id.* at 530.

²² *Id.* at 531.

²³ *Id.*

²⁴ *Id.* at 531-532.

²⁵ *Id.* at 532.

²⁶ *Id.* at 533.

²⁷ *Id.*

²⁸ See *Greene*.

²⁹ *State v. Magnolia Petroleum Co.*, 173 S.W.2d 186 (Tex. Civ. App.–San Antonio 1943, writ. ref’d w.o.m.).

³⁰ *Id.*

³¹ *McDonald v. Dees*, 15 S.W.2d 1075 (Tex. Civ. App.–El Paso 1929).

³² *Lemar, et al. v. Garner*, 121 Tex. 503 (1932).

³³ *Id.* at 509.

³⁴ *Id.* at 513.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ See Tex. Nat. Res. Code Ann § 52.172 (Vernon 1985).

³⁹ 1 Ernest E. Smith and Jacqueline Lang Weaver, *Texas Law of Oil and Gas* § 2.3[C][1][b] (LexisNexis Matthew Bender 2015).

⁴⁰ *Id.*

⁴¹ Tex. Nat. Res. Code Ann § 52.189(c) (Vernon 1995).

⁴² *Smith and Weaver* § 2.3[C][1][b].

⁴³ *State v. Durham*, 860 S.W.2d 63 (Tex. 1993)

⁴⁴ *Id.* at 64.

⁴⁵ *Id.* at 65.

⁴⁶ *Id.* at 66.

⁴⁷ *Id.*

⁴⁸ Tex. Nat. Res. Code Ann § 52.189(b) (Vernon 1995).

⁴⁹ *Id.*

⁵⁰ Guidelines for Leasing Relinquishment Act Lands, Texas General Land Office, available at <http://www.glo.texas.gov/energy-business/oil-gas/mineral-leasing/leasing/index.html> (September 2015).

⁵¹ Tex. Nat. Res. Code Ann § 52.182 (Vernon 1978).

⁵² Relinquishment Act Lease, Texas General Land Office, available at <http://www.glo.texas.gov/energy-business/oil-gas/mineral-leasing/leasing/index.html> (Revised July 2016).

⁵³ Tex. Nat. Res. Code Ann § 52.183 (Vernon 1977).

⁵⁴ *Smith and Weaver* § 2.3[C][2].

⁵⁵ *Id.*

⁵⁶ GLO Guidelines at 2.

⁵⁷ *Id.*

⁵⁸ *Id.* at 3.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Scott v. Exxon Corp.*, 763 S.W.2d 764 (Tex. 1988).

⁶⁴ *Id.* at 765.

⁶⁵ *Id.* at 766.

⁶⁶ Note, 20 Tex. Tech. L. Rev. 203, 216-18 (1989).

⁶⁷ *Smith and Weaver* § 2.3[C][1][b].

⁶⁸ Tex. Nat. Res. Code Ann § 52.186 (Vernon 1993).

⁶⁹ *Id.* at § 52.186(b)(1).

⁷⁰ *Id.*

⁷¹ *Id.* at § 52.186(b)(2).

⁷² *Id.* at § 52.186(b)(3).

⁷³ *Id.*

⁷⁴ *Id.* at § 52.186(b)(4).

⁷⁵ *Id.* at § 52.186(c).

⁷⁶ *Id.* at § 52.186(b)(2).

⁷⁷ *State v. Standard*, 414 S.W.2d 148, 153 (1967).

⁷⁸ 31 Tex. Admin. Code § 9.22(2)(C)(ii).

⁷⁹ *Id.*