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**Duhig Beyond Texas**
A Comparison of Overconveyance Rules Among the States
Overview

- What is *Duhig*?
- When do we have a *Duhig* problem?
- Hypothetical examples
- Exceptions to *Duhig*
- Mini-workshop
- State by state comparison
- Preventative and curative solutions
“It’s a Piece of Junk!”

http://www.youtube.com/watch?v=xLeXSA8uCI&feature=relmfu
The *Duhig* Rule is applied to conveyances of mineral ownership in which the owner of a fractional interest reserves a share of the mineral estate without also stating that there are outstanding interests.

Effect: Estops the Grantor from claiming the total fractional share of minerals he or she reserved in the deed.
Duhig v. Peavy-Moore Lumber Co.

- *Duhig v. Peavy-Moore Lumber Co.*, 144 S.W.2d 878 (Tex. 1940)
<table>
<thead>
<tr>
<th></th>
<th>Pre-Duhig</th>
<th>Applying Duhig</th>
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</thead>
<tbody>
<tr>
<td>O:</td>
<td>1/2</td>
<td>O: 1/2</td>
</tr>
<tr>
<td>Duhig:</td>
<td>1/2</td>
<td>Duhig: 0</td>
</tr>
<tr>
<td>Peavy-Moore:</td>
<td>0</td>
<td>Peavy-Moore: 1/2</td>
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Where full effect cannot be given to both the interest granted and the interest reserved, priority will be given to the interest granted.

If the Second Grantor overconveys by warranty deed, the overconveyance amounts to a breach of said warranty, and will come out of the Second Grantor’s interest.
1. Determine the mineral interest which is **outstanding** at the time of the conveyance (of the Original Grantor)

2. Determine the mineral interest that is purportedly being **conveyed** (by the Second Grantor to the Grantee)

3. Determine the mineral interest that is purportedly being **reserved** (by the Second Grantor)

4. Add the purported conveyance, the purported reservation, and the outstanding mineral interest
Add The Interests

1. Mineral interest **conveyed:** ½
2. Mineral interest **reserved:** ½
3. Mineral interest **outstanding:** ½
4. Total: 150%

O conveys to Duhig: Reserves ½ of the minerals

Duhig conveys to Peavy-Moore Lumber Co.: Reserves ½ of the minerals

Peavy-Moore Lumber Co.
Do the Interests Add to More Than 100%?

If so, we have a Duhig problem...

http://www.phrases.org.uk/images/apollo13-tagline.jpg
The Interests Add To More Than 100%... Now What?

**Rule:** Where full effect cannot be given to both the interest granted and the interest reserved, priority will be given to the interest granted.

- Original Grantor’s (“O”) interest remains untouched
- The Grantee’s interest comes out of the Second Grantor’s portion
Applying the Rules

O conveys to Duhig:
Reserves ½ of the minerals

Duhig conveys to Peavy-Moore Lumber Co.:
Reserves ½ of the minerals

O: ½
Duhig: 0
Peavy-Moore: ½
Hypothetical 1

O conveys to A: Reserves 1/3 of the minerals

A conveys to B: Reserves 1/3 of the minerals

O: 1/3
A: 0
B: 2/3
Hypothetical 2

O conveys to A: Reserves 3/8 of the minerals

A conveys to B: Reserves 1/8 of the minerals

O: 3/8
A: 0
B: 5/8
Hypothetical 3

O conveys to A: Reserves 3/8 of the minerals

A conveys to B: Reserves 7/8 of the minerals

O: 3/8
A: 1/2
B: 1/8
Hypothetical 4

O conveys to A:
Reserves $\frac{7}{8}$ of the minerals

A conveys to B:
No reservations

O: $\frac{7}{8}$
A: 0
B: $\frac{1}{8}$
“Duhig is a shield, not a sword”

- Estoppel principle

- After acquired title
  - BUT... subsequent to the deed conveying, if the Second Grantor later acquires an interest in all or part of the minerals, the mineral interest acquired by the Second Grantor immediately inures to the benefit of the Grantee
Exceptions To *Duhig*

1. Quit-claim deeds
2. Oil, gas, and mineral leases
3. Partition deeds
4. Express provisions of royalty, bonuses, and rentals
5. “For all purposes”
1. Quit-Claim Deeds

*Duhig* rests on a breach of warranty theory

– Quit-claim deeds do **not warrant** anything:

> “A deed that conveys a grantor’s complete interest or claim in certain real property but that neither warrants nor professes that the title is valid.”

“Even though a lessee knows a lessor owns less than the full fee title to the premises on which a lease is sought, he often, if not usually, prepares and insists upon a lease which purports to convey the entire fee in order to make certain that no fractional interest is left outstanding in the lessor. He is protected against the possibility of being forced to pay royalty on a greater interest than that actually owned by the lessor by the inclusion of a standard proportionate reduction clause in the lease.”

- McMahon v. Christmann, 303 S.W.2d 341, 346 (Tex. 1957)
3. Partition deeds

- In order for *Duhig* to apply, there must be a conveyance of a mineral interest.

- But, a “*partition merely dissolves the tenancy in common between the parties* . . . Thus, in a partition deed no conveyance occurs and, therefore, the *Duhig* rule does not apply to partition agreements.”

4. Express provisions of royalty, bonuses, and rentals

*Benge v. Scharbauer*, 259 S.W.2d 166 (Tex.1953)

O conveys to Scharbauer:
Reserves \(\frac{1}{4}\) of the minerals

Scharbauer conveys to Benge, save and except \(\frac{3}{8}\) of the minerals and \(\frac{3}{8}\) of the payment of all bonuses, rentals, and royalties

Benge
4. Express provisions of royalty, bonuses, and rentals

O conveys to Scharbauer: Reserves ¼ of the minerals

Scharbauer conveys to Benge, save and except 3/8 of the minerals and 3/8 of the payment of all bonuses, rentals, and royalties

Benge

<table>
<thead>
<tr>
<th>Mineral Interests:</th>
<th>– Apply <em>Duhig</em> –</th>
<th>– Do Not Apply <em>Duhig</em> –</th>
</tr>
</thead>
<tbody>
<tr>
<td>O</td>
<td>1/4</td>
<td>1/4</td>
</tr>
<tr>
<td>Scharbauer:</td>
<td>1/8</td>
<td>3/8</td>
</tr>
<tr>
<td>Benge:</td>
<td>5/8</td>
<td>3/8</td>
</tr>
</tbody>
</table>

Bonuses, Rentals, Royalties:

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</table>
4. Express provisions of royalty, bonuses, and rentals

“The rule of the Duhig case, in order to remedy the breach of warranty, takes from the grantors part of what the deed purported to reserve to them, but that rule should not be extended to change the express agreement as to what interests the grantors shall receive in bonuses, rentals and royalties under leases to be executed by the grantee.”

- Benge, 259 S.W.2d at 169
5. “For all purposes”

"And being the same land described in Warranty deed from The Federal Land Bank of Houston to W. C. Windsor, recorded in Vol. X-2, Page 119, Deed Records of Marion County, Texas, reference to which is made for all purposes."

- *Harris v. Windsor*, 294 S.W.2d 798, 799 (Tex. 1956)

- Not a description
- Provides notice that the deed is subject to another reservation
“Well, You Didn’t Ask.”
State by State Comparison

State overconveyance rules generally fall into one of two categories:

1. States that have explicitly adopted the *Duhig* rule by name, or applied the principle without citing *Duhig*

2. States that have no law yet regarding a *Duhig* scenario, but apply “estoppel by deed” principles, upon which *Duhig* is based
• Expressly adopted, but the rule could be limited for “subjective considerations.”

• Does not apply to quitclaim deeds

  – Hill v. Gilliam, 682 S.W. 2d 737 (Ark. 1985)

Peterson v. Simpson, 690 S.W.2d 720 (Ark. 1985)

1938: O conveys to A, reserves ½ of minerals

(2 conveyances in between)

1948: C conveys to D, reserves ½ of minerals

(4 conveyances in between)

H conveys to I, no reservations

O: ½
C: 0
I: ½
Arkansas

The court uses an “objective” interpretation, BUT... the court leaves the door open for future subjective interpretations:

➢“Our decision in this case does not change the general rule that subjective considerations may be taken into account in reformation cases involving the original grantor and his immediate grantee.”

- Peterson, 690 S.W.2d at 724
Colorado

• The Colorado Supreme Court has applied the concept of *Duhig*, but not by name.

• Appellate Courts have recognized *Duhig* by name.

• Subsequent decisions demonstrate a reluctance to fully apply *Duhig* principles.

O conveys to A: Reserves ¼ of the minerals

A conveys to B: Reserves ½ of the minerals

O: ¼  
A: ¼  
B: ½
In *Brown v. Kirk*, 257 P.2d 1045 (Colo. 1953), the Supreme Court of Colorado applied *Duhig* principles, but did not explicitly adopt *Duhig*.

- In *Appling v. Fed. Land Bank*, 816 P.2d 297, 301 (Colo. App. 1991), the Court of Appeals, Division Three, recognized that *Duhig* was applied in *Brown v. Kirk*: “*Brown* represents the application of the *Duhig* principle.”
A reluctance to fully apply *Duhig* principles ...

In *Appling*, the Court stopped short of applying *Duhig* to the current case based on procedural grounds:

“We refuse to consider these issues. Barth has taken no cross-appeal of the trial court’s determination . . . as an appellee that has not pursued a cross-appeal, [Barth] is precluded from presenting these additional issues.”

- *Appling*, 816 P.2d at 301.
Explicit adoption of *Duhig* in an unreported case:

O conveys to Dickson: Reserves 2/3 of the minerals

Dickson conveys to Grabs: Reserves 1/16 of the minerals

O: 2/3
Dickson: 0
Grabs: 1/3
• “Apparently the *Duhig* rule has never been considered in Kansas. The rule appears logical, however, and provides a method of construing all such deeds consistently.”

• As an unreported case, *Grabs v. Dickson* is not binding precedent, and is only persuasive authority.
However, Kansas provides the following statute:

“Every conveyance of real estate shall pass all the estate of the grantor therein, unless the intent to pass a less estate shall expressly appear or be necessarily implied in the terms of the grant.”

• *Duhig* is not cited by name, but the same rule applies as in Texas.

• Court of Appeals
Louisiana

Trial court level...

O conveys to A: Reserves ½ of the minerals

A conveys to B: Reserves ½ of the minerals

O: ½
A: ¼
B: ¼
The Court of Appeals reversed...

O conveys to A: Reserves ½ of the minerals

A conveys to B: Reserves ½ of the minerals

O: ½
A: 0
B: ½
Bottom line: Louisiana has precedent at the appellate level for *Duhig*, which would likely be applied by all Louisiana courts.

- No contrary authority
• *Duhig* is cited by name by the New Mexico Supreme Court, but has not been expressly applied.


http://geography.about.com/library/photos/blzz22.htm
“Reading all of the provisions of the Price-LeMond deed together makes it clear that there was conveyed to LeMond \( \frac{15}{32} \) of the minerals unburdened by the Kitchen royalty interest. Price reserved from the LeMond conveyance \( \frac{17}{32} \) of the oil and gas mineral fee, subject to the entire burden of the Kitchen royalty interest. The covenant of warranty does not affect or impair that title so reserved.”


\[
\frac{15}{32} + \frac{17}{32} = 100% 
\]

No *Duhig* problem
North Dakota

• North Dakota has expressly adopted *Duhig*, but with limitations
  - *Acoma Oil Corp. v. Wilson*, 471 N.W. 2d 476 (N.D. 1991)

• Limited by *Gilbertson v. Charlson*, 301 N.W.2d 144 (N.D. 1981)

• See also: N.D. Mineral Title Standards §3-07

http://xfinity.comcast.net/blogs/tv/files/2012/09/fargo1.jpg
**Limitation:**

*Duhig* does not apply when Grantee has *actual* knowledge

- *Gilbertson v. Charlson*, 301 N.W.2d 144 (N.D. 1981)

Grantee already owned a 1/3 interest in the land prior to the conveyance

```
O -> A (1/3) -> A
    |       |
    v       v
B (1/3) -> A
    |       |
    v       v
C (1/3) -> A
```

Intestate Succession

Reserve: 50% of oil and gas
Note: *Sibert v. Kubas*, 357 N.W.2d 495, 497 (N.D. 1984) limited *Gilbertson* to "its application to the peculiar facts of that case wherein the grantee, prior to the disputed conveyance, owned an outstanding mineral interest in the property conveyed."

- Reaffirmed support for *Duhig*
• Cites and applies *Duhig* with the same result as in Texas


• See also:

“Where the conveyance represents that the grantor is the owner of a particular interest in property and such interest is conveyed by the deed, the grantor is estopped by his general warranty to claim that the deed conveyed a less estate than grantor's complete ownership.”

Wyoming

- Wyoming has expressly adopted *Duhig*
  - *Body v. McDonald*, 334 P.2d 513 (Wyo. 1959)

- Notice is completely irrelevant
Wyoming

O conveys to A: Reserves ¼ of oil and gas

A conveys to B: Reserves ¼ of oil and gas

BUT... B executes a mortgage to A, acknowledging A’s ¼ interest

Traditional *Duhig*:

<table>
<thead>
<tr>
<th>O:</th>
<th>¼</th>
</tr>
</thead>
<tbody>
<tr>
<td>A:</td>
<td>0</td>
</tr>
<tr>
<td>B:</td>
<td>¾</td>
</tr>
</tbody>
</table>

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

Notice is completely irrelevant!

• A argued that the case was distinguishable from *Duhig* because actual knowledge existed, and B even admitted actual knowledge.

• “But inasmuch as purchasers of real property usually examine the title thereto, it is highly probable that the purchasers in those cases had knowledge of an outstanding mineral interest just as is true in the case at bar. While conjecture, it is not unlikely that the matter was not considered worthy of attention either by counsel in those cases or by the courts rendering the decisions.”

   - *Body v. McDonald*, 334 P.2d 513, 517 (Wyo. 1959)
Estoppel by warranty – generally precedes *Duhig* principles

For example...

**Louisiana:** See *Dillon v. Morgan*, 362 So. 2d 1130 (La. Ct. App. 1978), citing *Hodges v. Long-Bell Petroleum Co.*, 121 So.2d 831 (La. 1960) for the premise of an estoppel by deed or estoppel by warranty theory.
Estoppel by Deed

These states have not specifically adopted *Duhig*, but follow “estoppel by deed” principles, upon which *Duhig*’s rationale is based.

**Estoppel by deed definition:**

“Estoppel that prevents a party to a deed from denying anything recited in that deed if the party has induced another to accept or act under the deed.”

Estoppel by Deed States

Montana


Nebraska


Ohio

http://gosu02.tripod.com/sitebuildercontent/sitebuilderpictures/blockoleaf.gif
Estoppel by Deed States

Case Law

Montana

– Hart v. Anaconda Copper Mining Co., 222 P. 419 (Mont. 1924)

Nebraska

– Hagensick v. Castor, 73 N.W. 932 (Neb. 1898)

Ohio – “estoppel estate”

Estoppel by Deed States

Pennsylvania

West Virginia

http://www.ushistory.org/tour/independence-hall.htm

http://www.nydailynews.com/sports/college/mountaineer-mascot-kills-bear-musket-article-1.1215664
Case Law

Pennsylvania

– *Jordan v. Chambers*, 75 A. 956 (Pa. 1910)

West Virginia

– See also *W. Va. Code § 36-1-10* (2013)
Arguments for:

- Protect bonafide purchasers

Arguments against:

- The examiner and the court must usually completely ignore constructive and actual notice.

- May give Grantee more than he or she bargained for

George A. Snell, Ill, Dallas Bar – Energy Section Luncheon: Is *Duhig* Done? A Rebuttal (May 18, 2011)
Are Grantors out of luck?
- Use a Quit-Claim Deed

- Use “For all purposes” – reference prior deed
  - *Harris v. Windsor*, 294 S.W.2d 798, 799 (Tex. 1956)
Language excepting a specifically described interest
- Identify the previously reserved interest!

Language excepting in a general manner all previously recorded mineral interests and other encumbrances
Prior to distributing any proceeds from production attributable to the Subject Land...

1. Stipulation of interest and cross-conveyance
   - Record the document to give third parties notice

2. Proper division orders reflecting the actual interests of the parties
Recognizing *Duhig* Issues

1. The instrument is a warranty or mineral deed
   - As opposed to a quit-claim deed

2. Less than the entire mineral ownership is being transferred
   - Look for a mineral reservation by the Second Grantor

3. The Second Grantor owns less than the entire mineral interest at the time of conveyance

4. Nowhere in the deed does the Second Grantor indicate that he is excepting from the warranty any prior reservations or conveyances
   ➢ “For all purposes” or other deed references

Recognizing *Duhig* Issues Checklist

ALL FOUR MUST BE MET FOR *DUHIG* TO BE AT ISSUE...

- Is the instrument a warranty or mineral deed?
  - If the instrument is a quit-claim deed, no *Duhig* issues will arise

- Is less than the entire mineral ownership is being transferred?
  - If the whole mineral estate is being transferred, no *Duhig* issues will arise

- Does the Second Grantor own less than the entire mineral interest?
  - If the Second Grantor owns the entire mineral interest, no *Duhig* issues will arise

- Does the deed from the Second Grantor indicate that he is excepting from the warranty any prior reservations or conveyances or record?
  - If the deed excepts prior reservations or conveyances of record, *Duhig* will not apply
“You can’t ride... very far.”

http://www.youtube.com/watch?v=SWo-vDVajns&feature=relmfu
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Cited Sources

1. *Duhig v. Peavy-Moore Lumber Co.*, 144 S.W.2d 878 (Tex. 1940)
5. *Benge v. Scharbauer*, 259 S.W.2d 166 (Tex. 1953)
6. *Harris v. Windsor*, 294 S.W.2d 798 (Tex. 1956)
22. *Hart v. Anaconda Copper Mining Co.*, 222 P. 419 (Mont. 1924)
28. W. VA. CODE § 36-1-10 (2013)