

**THE GENESIS OF TITLE:
LAND GRANTS, PATENTS &
STATE OWNED MINERALS**

MARK K. LEAVERTON

Rash, Chapman, Schreiber, Leaverton & Morrison L.L.P.

2112 Rio Grande

Austin, Texas 78705

Phone: (512) 477-7543

Email: mleaverton@rashchapman.com

2nd Texas Mineral Title Examination Course

May 14 & 15, 2015

JW Marriott Hotel, Houston, TX

MARK K. LEAVERTON
Rash, Chapman, Schreiber, Leaverton & Morrison, L.L.P.
2112 Rio Grande
Austin, Texas 78705

Biographical Information

Mark is a Lubbock boy who received his Bachelor of Business Administration with Honors from Texas Tech University in 1972 and his Doctor of Jurisprudence from the University of Texas School of Law School in 1974. He was admitted to the State Bar of Texas in 1974 and the State Bar of Pennsylvania in 2011 and is Board Certified in Oil, Gas and Mineral Law (1985 - Texas Board of Legal Specialization). Mark's primary area of practice is oil and gas which includes title examination for oil and gas exploration and production projects and the purchase and sale of producing properties; preparation of contracts and instruments; and acting as an expert in oil and gas cases. He has been a speaker before State Bar and oil and gas industry seminars and workshops and is the co-author (together with Michael H. Atnipp) of *Kanes Manual of Oil and Gas Forms* published by Dos Manos Publishing Company ©1989 and 1990. Mark is a Partner with the Austin firm of Rash Chapman Schreiber Leaverton & Morrison LLP which specializes in oil and gas matters including the preparation of title opinions, due diligence work on oil and gas property sales, and representation of clients before State of Texas agencies including the Railroad Commission and the Texas Commission on Environmental Quality.

Mark has been heavily involved in Christian ministry through his church, Young Life, Fellowship of Christian Athletes, Community Bible Study, and Community Bible Study International. He and his wife, Vicki were married on December 21, 1974 and have a son, David, and daughter, Lindsey, and 4 fabulous granddaughters and 1 stinky grandson.

Mary Anna M. Turner
Attorney At Law
Phone: 512-922-4601
E-mail: maryannaturner@gmail.com

Born and raised in West Virginia as a coal mining attorney's daughter, Mary Anna attended Vanderbilt University on a full academic scholarship, graduating in 1999 with high honors in Political Science. She received her J.D. in 2003 from the University of Tennessee College of Law where she served on *Tennessee Law Review* and was president of Christian Legal Society.

Mary Anna moved to the Promised Land (a/k/a Texas) in May 2003, the day after graduating law school, and spent 7 years in the estate planning and charitable trust arena before shifting her focus to oil and gas. She has done field landwork in the Eagle Ford Shale, Permian Basin, New Mexico, and Colorado, in addition to in-house due diligence for acquisitions and divestitures. Mary Anna currently lives in Austin where she practices oil and gas law.

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	SOVEREIGNS, PAST & PRESENT.....	1
A.	The Spanish Crown, c. 1720-1821	1
B.	Mexican Rule: State of Coahuila y Texas, 1821-1835	2
C.	Republic of Texas, 1836-1845	3
D.	State of Texas, 1845-present	4
E.	Spanish Legal Legacies in Texas	4
III.	THE TEXAS PUBLIC DOMAIN	5
A.	Texas General Land Office: Establishment & Purpose	6
B.	Distribution Process: Land Certificate, Survey & Patent.....	6
C.	Land Grant System: 1836-present.....	6
1.	Headrights	6
2.	Military Land Grants.....	7
3.	Empresario Colonies	8
4.	Pre-Emption Acts	8
5.	Loan & Sales Scrip.....	9
6.	Internal Improvement Scrip	9
7.	Railroad Grants	10
8.	State Capitol.....	11
D.	Support for Education	11
1.	Permanent School Fund	11
2.	Permanent University Fund.....	12
3.	Asylum Fund.....	13
4.	The End of the Public Domain, <i>Hogue v. Baker</i> (1898)	13
IV.	LAND CLASSIFICATION SYSTEM & MINERAL RESERVATIONS	13
A.	State Mineral Reservations	13
B.	Land Classification System.....	14
C.	The Relinquishment Act Period.....	15
D.	Sales Act of 1931 & The Free Royalty	17
V.	THE GLO TODAY.....	17
A.	Purchasing Public Lands: The Process	17
1.	Awards	17
2.	Excesses & Deeds of Acquittance.....	18
3.	Vacancies	18
VI.	CONCLUSION	19

THE GENESIS OF TITLE: LAND GRANTS, PATENTS & STATE OWNED MINERALS

I. INTRODUCTION

Texans tend to be a confident bunch. But it hasn't always been this way. After the Battle of the Alamo, when the young Republic of Texas organized her first government in 1836, she had \$55.68 in her treasury and 251,000,000¹ acres of land within her borders. Talk about land rich and cash poor. Land records were so vital to the functioning of the early Republic that, in 1842, a canon was fired at the first Texas General Land Office in what came to be known as the "Archive War." TEX. GLO, "Hist. Pub. Lands," at 14-15.

Faced with heavy war debt, wounded veterans to pay, canals to construct, ditches to dig, and a new nation to settle and cultivate, the Republic had to rely on her one and only resource to address all these needs: LAND. Almost immediately land became the currency of the day as a complex land grant system quickly developed to finance all of the budding nation's needs. Issuing grants based on headrights and military service, as well as in exchange for loan and sales script, Texas made the most of her wide, open spaces well past annexation to the United States in 1845. By 1898 the Texas Supreme Court declared the State's unappropriated public domain to be depleted, with 216,314,560 acres of public land having been distributed within the 62 years since independence. *Id.* at 20-21.

Of course, all these new land grants meant that the Lone Star State now had thousands more title

¹ See TEXAS GENERAL LAND OFFICE, "History of Texas Public Lands," p. 9 (Sept. 2010), available at: http://www.glo.texas.gov/what-we-do/history-and-archives/_documents/history-of-texas-public-lands.pdf. (For the sake of brevity, this source will hereinafter be cited within the text as "TEX. GLO, 'Hist. Pub. Lands.'")

records to keep track of, including many patents issued by the Texas General Land Office (GLO). Tracing a clear chain of title on any tract of land through various periods of Texas history raises many complicated questions and controversies both above and below the surface – literally.

If you are going to be a real, authentic, and capable title attorney, you need to start at the beginning. Understanding the foundation of Texas titles requires learning "from whence they cometh." As life emanates from our Creator, Texas title emanates from the government – in this case Spain, Mexico, Republic of Texas, and State of Texas.

II. SOVEREIGNS: PAST & PRESENT

A. The Spanish Crown: c. 1720-1821

Spain first laid claim to the territory that is now Texas in 1519, but it was not until 1716 that permanent occupation began. In 1720, the Spanish Crown granted the first official land title to a tract within Texas, and in 1727 the territory of Texas officially became subject to the Spanish monarchy as a province of New Spain. Aloysius A. Leopold, LAND TITLES AND TITLE EXAMINATION (Texas Practice), 3rd ed., §1.1.

When the initial group of 16th century Spanish explorers to Texas did not stumble upon readily accessible mineral riches, the Court of Madrid showed little interest in the area until the French established an outpost at Matagorda Bay in 1685, claiming the area for France. TEX. GLO, "Hist. Pub. Lands," at 1. In order to protect their own interest, the Spanish quickly sought to establish a presence in East Texas. *Id.* In 1690, Spanish missionaries established the first Spanish mission and presidio in Texas near the current site of Nacogdoches. This was the first of a number of mission-presidio settlements that Spain would establish in East Texas, followed by others in the 1700s near the headwaters of the San Antonio River and La Bahia (today known as Goliad). *Id.*

Farming and ranching operations also developed along the Rio Grande near both El Paso and Laredo (although neither area was within the territory that would become the New Spain Province of Texas). The Spanish Crown classified all land as arable or pasture land, and meted out land grants accordingly. Ranchers received a league of land (4,428.4 acres) to allow ample room for grazing, and farmers received a labor (177.1 acres) of land. The Spanish measurement of the *vara* (33 1/3 inches) took root in Texas and was later adopted by the State of Texas as its official unit of land measurement. *Id.* at 2.

The oldest remaining record of a Spanish land grant in Texas was the 1720 title to the San Jose Mission in San Antonio, still on file at the Texas General Land Office. Records of approximately 60 land titles from the Texas Province of New Spain remain on record with the GLO of Texas, most of them for lands near Nacogdoches. The GLO has fewer than ten records of land titles from the San Antonio and Goliad areas, most likely because formal grant proceedings in the Texas Province of New Spain were not frequent since the process of perfecting title received directly from the Spanish Crown could be long and arduous. *Id.* at 2-4.

Spain's overseas possessions were considered royal domain belonging to the Spanish monarch, not property of the Spanish nation. Formal title to land in overseas territory could only be perfected by the king's confirmation after following a lengthy process beginning with subdelegates at the level of local provincial government. Ranchers could, alternatively, establish prescriptive rights against the Royal domain after 10 years of "squatting." As demonstrated by the lack of official Spanish land grants, squatting was frequently their chosen method. *Id.* at 2-4.

Until 1819, most of the land granted by the Spanish Crown was in the form of large grants, with all grantees being Spanish subjects, only 5,000 of whom lived in Texas by the end of the Mexican War for Independence. In 1819, Spain

opened up Texas to foreign settlement. This prompted native Missourian, Moses Austin to seize the opportunity. Austin had formerly been a Spanish subject while living in Louisiana, so he was likely viewed with favor by the Crown. In 1821, he contracted with the Spanish government to bring 300 families, known as Austin's "Old 300" into Texas to establish a colony. *Id.* at 5.

B. Mexican Rule: State of Coahuila y Texas, 1821-1835

Colonization plans were delayed when the Mexican War for Independence ended and Agustin de Iturbide took control of the new independent Mexican nation. In the meantime, Moses Austin died of pneumonia in June, leaving his son, Stephen F. Austin, to renegotiate the contract with the new Mexican Sovereign. He successfully lobbied for the passage of the Imperial Colonization Law of 1823, and even though he was the only empresario to take advantage of it before Iturbide's reign ended, Austin's colony was so successful that it paved the way for extensive settlement. *Id.* at 5-6.

In 1823 a federal republic was established, and in 1824, the Mexican congress united the former provinces of Coahuila y Texas into one state in the new federation. The Mexican National government would not recognize Texas as an independent state within the federation because it was settled almost exclusively by settlers from the United States, a circumstance that could lead to disloyalty or even rebellion. Still, Mexican colonization laws provided inexpensive lands that attract settlers from the U.S., where empty acreage was much more expensive at the time. Under the State Colonization Law of March 24, 1825, a head of a family could obtain one league of land (4,428.4 acres) for \$117 or \$0.38/acre, and in the state of Coahuila y Texas, payment was due within six years, with the first payment not due until the fourth year. By contrast, in the United States under the land law of 1820, land cost

\$1.25/acre, with a minimum required cash purchase of 80 acres. *Id.* at 6.

In addition to the cheaper acreage which Mexico offered, the Panic of 1819 in the United States, one of the greatest economic depressions of the 19th century, gave Americans incentives to settle in the Mexican border state of Coahuila y Texas. From 1824 to 1836, a nearly 16 million acres were granted to settlers by the land commissioners in each empresario colony. *Id.* With only 10% of the Mexican state's population being Mexican, concerns abounded that Texas independence, or annexation to the United States, was inevitable. By 1830 this led the Mexican Congress to enact a ban on further immigration from the United States, a measure which probably fomented more dissent than it quelled. *Id.* at 7-9.

Tensions mounted until, on April 31, 1835, Mexican federal troops disbanded the Coahuila y Texas legislature, deposed state authorities and, in effect, declared martial law. *Id.* at 6; LEOPOLD at §1.1.

C. Republic of Texas, 1835-1845

By November 7, 1835, Anglo residents of Texas set up a provisional government and ordered a suspension of all Mexican land operations, declaring that any land titles issued after November 13, 1835 would be invalid. After the Declaration of Texas Independence on March 2, 1836, the founders of the young Republic quickly adopted a new Constitution calling for the creation of a General Land Office to house all land records and determine which lands had valid land titles from Spain and Mexico and which lands remained vacant. TEX. GLO, "Hist. Pub. Lands," at 9-10; LEOPOLD at §1.1.

In December 1836, the first Congress boldly claimed the Rio Grande River as the western border of the Republic, even though, under Spanish and Mexican rule, no territory below the Nueces River had ever been included in Texas. This shift to the southwest would add

significantly more unappropriated public domain to the yet-to-be-appointed land commissioner's jurisdiction. TEX. GLO, "Hist. Pub. Lands," at 9. The first Land Commissioner, John Borden, a surveyor who laid out the town of Houston within Stephen F. Austin's Mexican colony, was appointed in June 1837. All land titles, surveys and documents were now public property, and Borden was charged with collecting all records of Spanish and Mexican land titles, as well as maps and surveys, from every local land commissioner who had operated under Mexican rule in Coahuila and Texas. Until the first GLO opened its doors on October 1, 1837, Borden had to store all the land records in the homes of his friends.

The GLO quickly began issuing land grants to settlers in exchange for cash or loans, as well as land in exchange for bonds or promissory notes which the cash-strapped Republic had previously issued to raise funds for the basic functions of government. *Id.* at 13-14. As a result, within one decade of winning independence, the Republic of Texas had distributed approximately 41,570,733 acres of unappropriated public domain, transforming from a nation dominated by large landholders into one populated by many small farmers and merchants – meaning a lot more land records in the archives! *Id.*

With the Mexican invasion and capture of San Antonio in 1842, President Sam Houston invoked executive emergency powers and ordered that the seat of government and the archives (housed in the GLO) be temporarily moved from Austin to Washington-on-the-Brazos to stay out of harm's way. President Houston noted that any damage to the archives would be very costly to the young Republic. *Id.*

Austinites suspected that this was a ploy on Houston's part to eventually move the capitol back to the city that bears his name, so they protested. Unfazed, President Houston ordered a group of Texas Rangers to go to Austin under cover of darkness to remove the Archives. Under the direction of Land Commissioner Thomas Ward, they loaded up three wagons full

of records outside the GLO. As they did so, a cannon was fired at the office, and a band of vigilantes pursued the Texas Rangers' wagons all the way to Williamson County. Having been ordered by Houston to allow no bloodshed, the Rangers surrendered the records. The vigilantes took them back to Austin but did not return them to the GLO for two years. Land Commissioner War ended up closing the GLO for a year, concluding that without the land records, it was impossible to carry out the GLO's daily business functions. *Id.* Although the Archive War may have been bloodless, it was by no means costless to the new nation.

D. State of Texas, 1845-present

In 1844, the Republic of Texas, still burdened with debt and influenced by its largely Anglo population, submitted an annexation treaty to the United States Congress which proposed that Texas give 175 million acres of its public domain to the United States government in exchange for the United States assuming \$10 million of the Republic of Texas's debt. *Id.* at 15. Congress rejected the treaty on the grounds that the public domain of Texas was unlikely to be worth \$10 million, but the U.S. did not reject the idea itself of statehood for Texas. *Id.*

Texas was annexed on December 29, 1845, retaining both her full debt and all of her public lands. Aside from the 13 original colonies, Texas stands alone as the only state in the Union that kept its entire public domain upon annexation to the United States. *Id.* (With other states, an "Enabling Act" was part of the standard procedure of statehood, requiring that all unappropriated public lands be forever disclaimed to the federal government for its disposition.) It is because of this that the State of Texas remains the Sovereign over its public domain, vested with the authority to grant patents. "Every patent for land emanating from the State shall be issued in the name and by the authority of the State, under the seal of the state." TEX. NAT. RES. CODE § 51.243.

From the GLO's perspective, this likely made

the transition from the Republic to Statehood a much more seamless one than it might otherwise have been, at least in terms of the process of issuing patents for unappropriated land. The Texas State Constitution of 1845 recognized all valid land titles issued by Spain, Mexico and the Republic of Texas, and the State made no changes to the administration of the public domain. Land titles to 4 million acres issued by the Spanish Crown and 22 million acres issued by the Mexican government before November 13, 1835 are still recognized as legal in Texas. *Id.* at 15.

Clearly defining the boundaries of the new State of Texas was a gradual process. In 1848 when the Treaty of Guadalupe Hidalgo ended the Mexican-American War, Texas's southern boundary was confirmed as the Rio Grande River, not the Nueces River, which added to the State of Texas significant acreage that it had never had while under the Spanish or Mexican Sovereigns. *Id.* The Compromise of 1850 clarified the western boundary of Texas as well, when the State of Texas ceded 67 million acres of territory, included in present day New Mexico, Colorado, Wyoming, Kansas and Oklahoma, to the United States in exchange for \$10 million in federal bonds to reduce its remaining debt. *Id.*

E. Spanish Legal Legacies in Texas

In 1840, the Congress of the young Republic adopted much of English common law, but in a few key areas of property law retained Spanish civil law. Community property laws are an enduring legacy in Texas today of Spanish rule, as are certain laws preventing the forced sale of property. *Id.* at 4.

Of particular importance to any examination of mineral rights is Texas's retention of the Spanish law on submerged lands. Public ownership of submerged coastal land extended to three marine leagues (10.4 miles) from shore under Spanish law. *Id.* Other states in the United States that adopted English common law have rights in submerged land up to three miles from shore, but

the State of Texas retains the 10.4 mile boundary, a fact that is very important to offshore drilling and sets Texas apart from other states on the Gulf coast. *Id.*

The Spanish Crown's reservation of all minerals when granting lands within the public domain is also a very important legacy, as well, and one which will be discussed at greater length later in this paper.

III. THE TEXAS PUBLIC DOMAIN

The terms *public domain* and *public lands* are often used interchangeably even in official documents addressing title issues relevant to this paper. Discerning the distinctions between the two terms can be difficult, particularly because their usage appears to have evolved through the decades of Texas history. As the public domain has decreased dramatically in size through various land grant programs and other allocations, the concept of what the public domain encompasses has become somewhat more specific.

With the Act of Feb. 23, 1900, the Texas Legislature dedicated all the unappropriated land remaining in the public domain to the Permanent School Fund. LEOPOLD, at §7.3, n.2. Under the Constitution of 1876 and subsequent statutory authority, the remaining "public domain of Texas has been divided into Public Free School Lands, Asylum Lands, and University Lands, with all other lands being designated public lands. Unappropriated public domain is set apart and granted to the permanent school fund of the state." [emphasis added] LEOPOLD, at §7.3. *Schendell v. Rogan*, 63 S.W. 1001, 1002, 1003 (Tex. 1901).

On the state level, examples of designated public lands would likely include Texas state parks and recreational areas, wildlife areas, and other property set aside for state government use. Similarly, on the federal level, although Texas contains almost no federal lands relative to most other western states, public lands would include

those under the jurisdiction of the United States Department of Defense, Fish and Wildlife Service, National Park Service, and Forest Service. Neither the Bureau of Land Management (BLM) nor the Bureau of Indian Affairs (BIA) claim any federal lands within Texas, mostly likely because Texas retained its entire public domain when joining the Union, relinquishing control of no lands to the federal government and thereby making the Texas public domain less accessible to claims by federal agencies. *See generally*: NATIONALATLAS.GOV, Federal Land Map, Texas, at: <http://nationalatlas.gov/printable/images/pdf/fedlands/TX.pdf> (link last accessed on Mar. 28, 2013) and NATIONALATLAS.GOV, Federal Land Map, U.S., at: <http://nationalatlas.gov/printable/images/pdf/fedlands/fedlands3.pdf> (link last accessed on Mar. 28, 2013).

Aloysius Leopold offers further explanation of the distinction between *public domain* and *public lands*. Relying on case law he states: "The term 'public domain,' in regards to lands held by the State of Texas, refers to public ownership. This meaning is also applied to the term 'public lands.'" LEOPOLD, at §7.7. He goes on to point out that the beds and channels of navigable streams or bodies of water which are held in trust by the State for the use of the public generally are not "ordinary public lands." *Id.* As such, the beds and channels of navigable streams were never intended by the Texas Legislature to be included in the Permanent School Fund. *Id.*

This would mean that the School Land Board does not have the authority to execute an oil and gas lease on acreage which includes navigable rivers and streams, even if the surrounding acreage is part of the PSF. This conclusion seems to run contrary to Section 11.041 of the Texas Natural Resources Code, which states explicitly, "In addition to land and minerals granted to the permanent school fund under the constitution and other laws of this state, the permanent school fund shall include: the mineral estate in river beds and channels."

This apparent contradiction is one that any mineral examiner would want to consider

carefully and possibly research further when assessing the mineral ownership of public lands which include navigable rivers and streams.

A. Texas General Land Office: Establishment & Purpose

The Texas General Land Office, established in 1836 by the Republic, is the oldest state agency of Texas. As the Archive War serves to remind us, in the early days of the cash-strapped young Republic, the GLO may have been more important than the national treasury. The original stated duties of the GLO: managing the public domain, collecting and keeping land title records, providing maps and surveys, and issuing land titles on behalf of an entity the size of Texas both were and are an enormous set of responsibilities. LEOPOLD, at §§4.1, 4.6 - 4.15.

As the unappropriated public domain has been depleted, the duties of the GLO have evolved, but it remains a critically important revenue-producing and record-keeping agency in Texas state government. In recent years, the GLO has spent around \$45 million per year while earning nearly \$800 million per year for the benefit of the public education system in Texas through the Permanent School Fund. *See generally* TEXAS GENERAL LAND OFFICE, http://www.glo.texas.gov/what-we-do/energy-and-minerals/oil_gas/index.html, link last accessed Mar. 28, 2013.)

B. Distribution Process: Land Certificate, Survey & Patent

Understanding the timeline of title in the early days of the Republic and the State of Texas requires a closer look at the steps involved for both the Sovereign and the aspiring landowner. For every land title issued, there were typically three basic documents that would be filed and kept on record at the GLO: land certificates, field notes, and land patents. Both the Republic of Texas and the State of Texas issued certificates, usually by way of a County Board of Land Commissioners or the General Land Office, entitling a grantee to a certain number of acres of land in the unallocated public domain.

LEOPOLD, at §§2.32-2.34. The land certificate indicated what statute authorized the grantee to claim the land (e.g., military service, settlement headrights, empresario contract, scrip or outright purchase), but it was not connected to any specific parcel or location. It was the grantee's responsibility to find his own land, which did not even have to be in the same county which issued the certificate, and then pay to have it surveyed. The land certificate conferred the right to possession to its recipient but did not divest the Sovereign of full title. *Id.*

Once the grantee had the surveyor's field notes of his chosen acreage, which would contain the legal description of the tract detailed in metes and bounds and clearly identifying its location, the grantee could file these notes with the GLO and apply for a patent. With the issuance of the patent, the land was officially severed from the public domain and ownership vested in a private party. *Id.*

Land certificates could be both sold and transferred, with assignable rights to locate, survey and patent the land. Some certificates were conditional, giving the grantee the right to occupy a portion of the public domain while fulfilling a certain requirement (e.g., three years of residence and/or building a house or barn on the property), while others were unconditional. *Id.* at §2.34. Such conditions largely depended on the type of land grant or land scrip used to obtain the land.

C. Land Grant System: 1836-present

In its 10 years of existence, the Republic of Texas distributed approximately 41,570,733 acres of the public domain, the largest portion of which was composed of headrights grants to settlers.

1. HEADRIGHTS: 36,876,492 acres

Headrights, both conditional and unconditional, were issued by the Boards of Land Commissioners in each county to encourage immigration. LEOPOLD, at §2.5

First-class headrights: Issued to settlers who arrived on or before Texas Independence on March 2, 1836. The heads of families received one league and one labor of land (4,605.5 acres) and single men age 17 and older received one-third of a league of land (1,476.1 acres). The acreage allotments for the heads of families remained similar to those initiated by the Spanish crown. *Id.* at §2.8.

Second-class headrights: Issued to immigrants who arrived after the Texas Declaration of Independence and before October 1, 1837, conditioned on remaining on the land for three years. Heads of families received 1,280 acres and single men received 640 acres. *Id.* at §2.11.

Third-class headrights: Issued to immigrants who arrived between October 1, 1837 and January 1, 1840. The Republic granted 640 acres to heads of families and 320 acres to single men, conditioned on three years of residence in the Republic. *Id.* at §2.14.

Fourth-class headrights: The Republic issued certificates to immigrants arriving between January 1, 1840 and January 1, 1842, with all conditions repealed in 1842. Heads of families received 640 acres and single men received 320 acres. *Id.* at §2.17.

2. MILITARY LAND GRANTS

The Republic did not have funds for pensions to reward its veterans from the Revolution, so land grants were the obvious solution to reward war heroes and to provide for their widows.

Bounty Grants: 5,354,250 acres

A total of 7,469 bounty grants were awarded for military service during the Texas Revolution, with 320 acres granted for every three months of service, up to 1,280 acres. From 1838 to 1842, soldiers guarding the frontier were eligible for awards of 240 acres. LEOPOLD at §§2.21-2.23.

Battle Donation Grants: 1,162,240 acres

In 1837, a total of 1,816 donation warrants were issued for participation in specific battles during the war for independence. Participants in the siege at Bexar and the battle at San Jacinto, as well as the heirs of those killed at the Alamo and Goliad were eligible for 640 acres. *Id.*

Military Headrights

Special grants issues to soldiers arriving in Texas between March 2 and August 1, 1836 who were permanently disabled in the course of their military service or who received an honorable discharge, as well as to the heirs of soldiers killed with Fannin, Travis, Grant and Johnson. *Id.*

After statehood and until 1855, Texas continued to issue bounty warrants and donation certificates to veterans of the Texas Revolution. When fire destroyed the records needed to prove the claims of veterans and their heirs in 1855, the process was suspended until 1857 when the legislature established a Court of Claims to verify unpatented land certificates and prevent fraudulent claims. TEX. GLO, “Hist. Pub. Lands,” at 18. The Court of Claims expired in 1861, and after that point, no further veterans’ certificates were issued except by special act of the legislature. *Id.*

Republic Veterans Donation Grant: 1,278 certificates and 1,377,920 acres

In 1879, in response to widespread need among Revolution veterans and their heirs, the legislature passed a 640-acre Veteran Donation Act to give land to veterans, their widows, and signers of the Texas Declaration of Independence who would swear under oath their indigence and physical disability. In 1881, the indigence requirement was removed and the allotted acreage was increased to 1,280 acres, with the certificate conditioned only on proof of three months of military service to the Republic. The State repealed the grant in 1887 out of concern that the public domain would soon be exhausted.

Confederate Scrip Certificates: 2,647,040 acres and 2,068 certificates

In 1881, the legislature granted certificates for 1,280 acres to disabled or indigent Confederate veterans or widows of those killed in line of duty in the Civil War. Grantees were also required to survey an equal amount of acreage for the Permanent School Fund (PSF) since half of the public domain was reserved at that time for the PSF. Texas repealed the act in 1883 due to a feared shortage of public domain. LEOPOLD, at §2.25. Only 1,726 certificates, amounting to 1,979,852 acres, were surveyed, and the remaining certificates (17% of those issued) were annulled in 1896 because the time limit for locating the land had expired. Many of the indigent recipients chose to sell their certificates for trivial amounts because, as vacant land became increasingly scarce, they could not afford to locate and survey land. TEX. GLO, "Hist. Pub. Lands," at 19. Interestingly, an 1868 act granted warrants to Texans who had fought in the Union Army, but no land was ever claimed under this law. LEOPOLD, at §2.25.

**3. EMPRESARIO COLONIES:
4,494,806 acres**

In 1841, the Republic of Texas adopted the Mexican empresario system of colonization contracts to encourage immigration to Texas, as well as to establish settlements on the frontier and other sparsely populated areas as a defense against Indian and Mexican raiders. *Id.* at §2.19. Four empresario colonies were established, with heads of families eligible for 640 acres of land, and single men received 320 acres. *Id.* at §2.20. As an incentive to organize and manage colonies, the Empresarios themselves received ten sections of land for every 100 colonists settled and up to half of the colonist's grants. TEX. GLO, "Hist. Pub. Lands," at 12. Colonists were to receive grants similar in amount and requirements to fourth-class headrights, with the requirements of building a house and cultivating at least 15 acres and the land had to be located within the confines of the colony. *Id.*

Fisher and Miller's Colony was established with a contract in 1842 and modified in 1844, allowing grants to 6,000 families. Miller's interest was taken over by the Society for the Protection of German Immigrants, a group of German nobleman who wanted to send settlers to Texas to combat overpopulation in Germany. Because the land allocated by the grant was far inland in Comanche territory, many of the settlers did not reach the actual area of the Fisher-Miller grant, but instead located at Fredericksburg or New Braunfels, two settlements that the Society had established as way stations on land between the coast and the grant. *Id.* at 13.

Castro's Colony, established in 1842, also brought around 2,100 German-speaking Alsatian farmers from France to settle west of San Antonio. *Id.* *Peters' Colony* in North Texas, the first phase of which began in 1841 with settlers from Kentucky and Tennessee, was successful in enticing settlers to come, however it was plagued with the problem of other land grantees attempting to settle within the boundaries of the colony. *Id.* In fact, the contract for *Mercer's Colony* (1844) was ruled invalid, partly because it overlapped with the territory set aside for *Peters' Colony*, but before this ruling colonists did claim 691,840 acres. *Id.*

The Republic of Texas repealed the "Empresarios Act" on January 30, 1844, after using it to convey nearly 4.5 million acres. *Id.* During the time it was in effect and land prices had risen, the population had increased from 38,000 to 130,000, although the Republic still faced financial woes and trouble with the Indians. *Id.*

**4. PRE-EMPTION ACTS:
4,847,136 acres**

The Republic of Texas passed the first pre-emption act in 1845, similar to the United States Pre-Emption Act of 1841, granting settlers the right to purchase up to 320 acres of land for \$0.50 per acre after three years of residence and the making of improvements

(e.g., building a barn). TEX. GLO, “Hist. Pub. Lands,” at 15-16. In 1853, the law was changed so that settlers only had to pay a \$12.00 filing fee. *Id.* In 1854, the state reduced to 160 acres the amount of land that one person could obtain. LEOPOLD, at §2.60. The goal of this was to ensure that the public domain was distributed to small landowners, rather than corporations or speculators, in order to avoid the problems seen in the days leading up to Texas Independence. *Id.* at §2.61.

The pre-emption act was repealed in 1856, reinstated in 1866, repealed with an Act of the State Legislature in 1889 and confirmed dead 1898 when the Texas Supreme Court declared the public domain depleted in *Hogue v. Baker*. *Id.* at §2.64. *See also, Hogue*, 45 S.W. 1004, 1006, 1007 (Tex. 1898.)

5. LOAN & SALES SCRIP: 1,329,203 acres

The Republic financed government operations by authorizing agents to sell various types of land scrip-certificates. Approximately 1,329,203 acres of land were sold through various types of scrip. TEX. GLO, “Hist. Pub. Lands,” at 13-14.

Funded Debt Scrip: Beginning on February 5, 1841, any holder of promissory notes, bonds, funded debt or any other liquidated claims against the government could surrender this for land scrip at the rate of \$2.00 per acre. TEX. GLO, “Land Grants,” at 5.

General Land Office Scrip: Beginning February 11, 1850, the GLO Commissioner was authorized to issue land scrip at \$0.50/acre for the liquidation of the public debt of the former Republic of Texas. *Id.*

Sales Scrip: Beginning February 11, 1858, the Land Commissioner was authorized to issue land scrip in certificates of at least 160 acres at \$1.00 per acre for the sale of the public domain. *Id.*

6. INTERNAL IMPROVEMENT SCRIP: 4,088,640 acres

Infrastructure for efficient transportation was critical to the economic development of Texas in the 1850s, allowing farmers, ranchers and merchants to move their products to market.

Under an 1844 law, a total of 27,716 acres were issued to road commissioners, surveyors and contractors for building a *Central National Road* from the Red River to the Trinity River in what is now Dallas. Other land grant incentives for the construction of roadways proved less effective, and very few applied for land granted for road construction. Land grants offered for other internal improvements proved far more effective. LEOPOLD, at §2.58.

Beginning in 1854, Texas issued scrip certificates for the *improvement of rivers and bayous* (*Id.* at §2.55), and the construction of *ship channels and ships* (steamboats, steamship and other vessels). *Id.* at §2.52. Scrip was also issued for the building of *irrigation canals and ditches* (*Id.* at §2.56) of at least three miles in length, resulting in the granting of another 584,000 acres in land. The construction of the ship channel across Mustang Island resulted in the issuing of 320 certificates for 620 acres each. Seven steamboats to Texas rivers and nine other ships resulted in the granting of almost 17,000 acres of land.

In 1858, the Land Commissioner began issuing certificates up to eight sections of land for the boring of *artesian wells* between the Nueces River and Rio Grande River, the land secured by the Treaty of Guadalupe Hidalgo. Larger grants were issued for deeper wells. (LEOPOLD at § 2.53)

In 1863, the Texas Legislature started issuing scrip for building *factories*, 320 acres for every \$1,000 of machinery installed. Wool and cotton producers were the primary recipients of 11,360 acres granted for the creation of industries, but much like the surface roadway grants, the factory land grants did not attract much interest. (*Id.* at § 2.54)

The state required recipients of land grants for internal improvements to have an equal amount of land surveyed and reserved for the state, causing some grantees to opt to receive only half of the acres to which they were entitled so they would not have to pay to survey land for the state. All legislation authorizing internal improvement scrip was repealed in 1882.

7. RAILROAD GRANTS: 32,152,878 acres

In 1852, the Texas Legislature chartered eight railroad companies and attempted to induce construction by granting the companies eight sections of land (equal to 5,150 acres) for each mile of railroad constructed. (EARLY LAWS OF TEXAS, art. 2365, § 5). It was widely believed that railroad construction would expedite the economic development of Texas and increase land values. Progress was slow, however, possibly due to the requirement that the railroad companies had to survey an additional eight sections of land retained by the State, for every eight sections of land which the State granted to the railroad companies. *Id.* In an effort to accelerate the process, the Texas Legislature, on January 30, 1854, passed the Act to Encourage the Construction of Railroads in Texas by Donations of Land, increasing the amount of land granted to 16 sections (equal to 10,240 acres) for each mile of railroad constructed. *Id.* at §§2-6. Land certificates were issued to each railway, giving them the responsibility to survey lands in the public domain into sections of 640 acres each, combined into square blocks of at least six miles. The sections were then to be numbered. The State would then issue a patent to the railroad company for all of the odd-numbered sections, while reserving all the even-numbered sections to the use of the State until appropriated by law. LEOPOLD at § 2.40.

Before the State actually granted land to a railroad company, however, the railroad was required to have completed construction on 25 miles of track. Only 492 miles of railway had

been completed by the time of the Civil War, an amount which only increased to 511 miles by 1870, since the war and Reconstruction diverted the nation's attention for much of the decade. TEX. GLO, "Hist. Pub. Lands," at 16.

The passage of the Constitution of 1869 presented a further obstacle by prohibiting the Legislature from making land grants except to actual settlers upon the land. LEOPOLD at § 2.39. EARLY LAWS, arts. 751-753. On March 18, 1873, the Legislature amended the Constitution of 1869, allowing the State to aid railroad construction with grants of up to 20 sections per mile of track constructed. On the same day, the Texas Legislature also designated for the first time its retained even-numbered sections of land for the benefit of the Public School Fund. The Constitution of 1876 further amended the State's policy by instituting the general law that all railroad companies would receive a grant of 16 sections of 640 acres each for every mile of railway constructed, with the even numbered sections reserved for the Public School Fund. *See generally* LEOPOLD at §§2.40-2.49.

Under the Constitution of 1876, the State granted 35,777,038 acres to a number of major railroads, including the International and Great Northern Railroad Company, but faulty grants, errors in the location of land and other problems reduced the total amount granted to 32,153,878 acres. TEX. GLO, "Hist. Pub. Lands," at 16-17. From 1873 to 1881, the Texas & Pacific Railroad, for example, built a total of 972 miles of railway, entitling it to land grants of 12,441,600 acres, however the State only fulfilled the grant for the portion of the railroad east of Fort Worth, amounting to only 5,173,120 acres. The State claimed that the Texas & Pacific had not completed construction within the time frame required by the railroad's charter. The Texas Attorney General even filed suit against the railroad to recover additional acreage on the grounds that it was not properly located, reducing Texas & Pacific's acreage received to 4,917,074. S.G. Reed, *Land Grants and Other Aids to Texas Railroads*, SOUTHWESTERN HISTORICAL QUARTERLY, Apr. 1946, at 49.

Despite the controversies that plagued the railroad grant program from its inception, both with the Texas Legislature's ever-changing policies, as well as disputes between the State and the railroad companies themselves, the land grant program did result in over 3,000 miles of finished railroad track by 1880, an amount that doubled in the following decade. TEX. GLO, "Hist. Pub. Lands," at 16-17. In 1882 the Legislature rescinded all land grants to railroad companies out of concern that the state's commitment to various railways had exceeded the available lands. LEOPOLD at §2.46.

The legacy of the railroad land grants lives on, not just in the tracks still crisscrossing the State, but also in the ownership of land to the present day. Even after the Texas & Pacific merged into the Missouri Pacific in 1976, the Texas Pacific Land Trust, established in 1888 in the wake of the railway's bankruptcy, remained the largest private landowner in the state of Texas, owning the surface estate of 966,392 acres at the end of 2006. *See* "Texas and Pacific Railway," HANDBOOK OF TEXAS ONLINE available at <http://www.tsahonline.org/handbook/online/articles/eqt08> (last accessed Mar. 20, 2013).

8. STATE CAPITOL: 3,000,000 acres

The Constitution of 1876 authorized the allocation of three million acres of the public domain in West Texas to be sold to finance the construction of a new state capitol in Austin. *Id.* at §2.57. In 1879, acreage spanning ten counties in the Texas Panhandle was set aside for this purpose. *Id.* After fire destroyed the existing Texas Capitol in November 1881, a group of Chicago investors, led by brothers Charles B. and John V. Farwell and known as the Capitol Syndicate, stepped up to the plate to fund construction of the new Capitol. *Id.* Upon completion of the red granite structure in Austin in 1888, the final cost to Capitol Syndicate was \$3,244,630.60. The undertaking cost them over \$1.08 per acre, even though the West Texas land at the time was being sold for \$0.50/acre. Despite this, the undertaking proved to be their claim to fame, at least temporarily, as they used

the lands to establish the famous XIT Ranch, which was the largest fenced cattle range in the world in the 1880s. (William Elton Green, "Capitol," *Handbook of Texas Online*, available at www.tsahonline.org, last accessed Mar. 15, 2013.)

D. Support for Education

1. PERMANENT SCHOOL FUND

With the School Law of 1854, the Third Texas Legislature established the Special School Fund with over 42 million acres from the public domain and \$2 million (taken out of \$10 million in United States Treasury bonds that Texas received in the Compromise of 1850). The original purpose of the Special School Fund was to establish a public school system, but the Texas Legislature soon started using the principal in the fund to meet unrelated needs, such as building railroads and state prisons and purchasing weapons for the Confederacy. TEX. GLO, "Hist. Pub. Lands," at 16-18. *See generally* LEOPOLD at §§2.72-2.84. TEX. NAT. RES. CODE § 11.041.

With the upheaval of the war and Reconstruction, the issue was put on the back burner until the Act of March 18, 1873 reaffirmed that half of the remaining public domain was to be set apart for public schools, and that this was to be achieved by allocating all alternate, or even-numbered sections from grants made to railroads or other corporations, to the public school fund. This was affirmed in Art. 7, § 2 of the Constitution of 1876 which also officially renamed the school fund the Permanent School Fund (PSF) and placed strict guidelines on the fund's use. It was established as a perpetual fund for the endowment of K-12 primary education. The State's counties also received grants of land to use for the support of local public schools for which land revenues are invested by the counties. LEOPOLD at §2.82.

In 1876, Texas still faced financial woes and debt remaining from the Civil War. At the same time, a post-war influx of Southerners created an increased demand for new land. With 20

million acres of PSF land remaining and 56 million acres of unappropriated public domain still available, largely in West Texas, the legislature sought to sell the unappropriated land quickly. In 1879, they passed the “Fifty Cent Act,” which established the price of fifty cents per acre for public land in 54 counties of West Texas. TEX. GLO, “Hist. Pub. Lands,” at 20. Settlers could buy a maximum of four sections with residence required in most counties, or eight sections with no residence required in other counties (primarily in west Texas.) Half of the proceeds would go the PSF and the half would help to retire the public debt. TEX. CONST. OF 1876, art. VII, §2.

From 1876 until 1898, land sales and leases produced the bulk of revenue for the PSF. By the turn of the century, however, the unappropriated public domain was nearly depleted. Fewer sales and the impending oil boom meant that most of the PSF’s revenue began coming from mineral leases executed on the same lands in the early 20th century. In 1900, an act was passed “to define the permanent school fund of the State of Texas, to partition the public lands between the PSF and the State and to set apart for the PSF the residue of the public domain for the benefit of public schools.” Until the Legislature mandated competitive bidding in 1905, the amount of land that could be purchased, as well as the price and eligibility requirements varied considerably. *Weatherly v. Jackson*, 71 S.W.2d 259, 266 (1934). By 1905, however, there was very little left that was available for purchase.

The School Land Board (SLB) was established in 1939 by the 46th Texas Legislature to manage the sale and mineral leasing of PSF lands. The SLB has the authority to approve land sales, trades and exchanges, and the purchase of land on behalf of the PSF. It is composed of three members, with the current Land Commissioner always serving as Chairman, and two citizen members, one appointed by the Governor and the other by the Attorney General, with each serving a two-year term.

2. PERMANENT UNIVERSITY FUND

The Congress of the Republic of Texas set aside 50 leagues (221,400 acres) of land in 1839 to fund higher education. LEOPOLD at §2.72. Using this endowment and an additional \$100,000 of United States Treasury bonds, the Texas Legislature passed an act in 1858 establishing the University of Texas. This act also set aside for the University one out of every ten sections of land that had been reserved for state use under the 1854 Act to Encourage the Construction of Railroads in Texas by Donations of Land. *Id.* In the Texas Constitution of 1876, the state confirmed the previous university land grants but replaced the 1/10 allotment from the railroad land with a million acres of previous unappropriated land in West Texas. In 1883, when the University of Texas opened, supporters of the school persuaded the Texas Legislature to set aside another one million acres for the endowment, also in West Texas. Skeptics considered this West Texas acreage to be of little value and a foolish decision. TEX. GLO, “Hist. Pub. Lands,” at 18.

In 1895, the Legislature gave the Board of Regents exclusive control of the sale and management of university lands, including the right to set prices on such land. TEX. EDUC. CODE ANN. §§ 65.39 and 66.41(formerly, Art. 2596, VATS). Because of this, the various general Sales Acts passed after April 1895 applied only to public school and asylum lands. The same Legislature also enacted a Mineral Act perpetuating the authority of the GLO Commissioner over mineral interests allocated to the PUF. In 1901, the Texas Legislature provided for the Board of Regents of the University of Texas to conduct a mineral survey of all lands belonging to the public schools, university, asylums or the State (Acts 1901, Chapter 28) and giving the Board of Regents for the first time, exclusive control of all minerals belonging to the University, and removing the PUF from under the umbrella authority of the PSF (Acts 1901, Chapter 102). *See generally*, LEOPOLD at §§2.72-2.74.

Mineral classification of university lands took on renewed importance in 1923 when big things finally started happening on the previously maligned West Texas acreage. After many failed attempts, much pumping, and a final deadline for leasing, oil started spewing from the Santa Rita No. 1 well in Reagan County. David F. Prindle, "Oil and the Permanent University Fund: The Early Years," *Southwestern Historical Quarterly* 86 (October 1982). At long last, it was proof that the two million acres of West Texas allocated to the PUF were a rich resource after all. By 1925, production was such that the Permanent University Fund was growing by more than \$2000 per day. Because the oil profits were treated as principal rather than income, the proceeds from Santa Rita and other nearby wells were reinvested in the PUF and led to a skyrocketing endowment for the university system in Texas. Leases on oil and gas in university lands are now governed by a board known as the Board for Lease of University Lands. TEX. EDUC. CODE ANN. §§ 65.61 and 66.80. *Schendell v. Rogan*, 63 S.W. 1001 (Tex. 1901).

3. ASYLUM FUND

The 52 million acres of land appropriated for education included 407,000 acres dedicated to the support of eleemosynary schools (i.e., charity asylums that receive support from donations or gifts). LEOPOLD at §2.71. An 1856 Act granted an additional 100,000 acres of the public domain to each of four asylums, described at the time as a "lunatic asylum," a "deaf and dumb asylum," a "blind asylum," and an "orphan asylum." *Id.* Subsequent school land sales acts also applied to eleemosynary institutions, although by 1912, the State had sold all land dedicated to the support of charitable asylums. TEX. GLO, "Hist. Pub. Lands," at 18. As with the public school lands in the PSF, any asylum lands where the State reserved an interest in the minerals continue to be managed by the GLO. LEOPOLD, at §2.71.

4. THE END OF THE PUBLIC DOMAIN

The Texas Supreme Court, in its landmark 1898 decision, *Hogue v. Baker*, declared that there

was no more vacant, unappropriated land in the public domain of Texas. *Hogue* at 1005. The petitioner, Hogue, a private citizen, sought to file the field notes for his pre-emption certificate at the GLO, but when he did so, it became clear that the half of the public domain not reserved for the PSF had been exhausted, giving Hogue no recourse in fulfilling his pre-emption claim. The Constitution of 1876 would not permit invading the half of the public domain reserved to the PSF for any other purpose. TEX. CONST. OF 1876, art. VII, § 2.

In the course of investigating Mr. Hogue's pre-emption claim, Land Commissioner A.J. Baker discovered that the PSF had actually not even been given the full one-half of the public domain guaranteed by the Constitution. TEX. GLO, "Hist. Pub. Lands," at 20-21. In response, Baker refused to issue any more land patents until the PSF was given all the acreage it was due. The Legislature ordered a complete audit which revealed that the PSF was short of the amount it should have had by 5,902,076.67 acres. *Id.* The State of Texas only possessed 5,884,896.40 acres of unappropriated land, which it gave to the PSF in 1900, constituting the last land grant made by the State of Texas. *Id.* To compensate for the difference in acreage, the Texas Legislature paid the PSF \$17,180.27, based on an estimate of the land's value at \$1 per acre. *Id.*

After 62 years of operation, the land grant systems of the Republic and the State of Texas had distributed a total of 216,314,560 acres of surface interest. *Id.* at 21. In the century ahead, Texans and the GLO would shift their focus to that which lies beneath the surface.

IV. LAND CLASSIFICATION SYSTEM & MINERAL RESERVATIONS

A. State Mineral Reservations

Somewhat surprisingly by today's standards, it was salt and not oil that first turned mineral rights into a hot-button issue in Texas. In 1840,

the Republic of Texas deviated from its adoption of English common law when it retained the Spanish Crown's policy of reserving all mineral rights unto itself when conveying public land. TEX. GLO, "Hist. Pub. Lands," at 18. The State of Texas continued the same practice without incident until the Civil War when salt was in short supply. At the time, the Texas Legislature attempted to void a patent which the GLO had issued in 1847 on land in Hidalgo County containing La Sal del Rey, a large salt lake with an enormous salt deposit. *Id.* The State's actions stirred up a sufficient furor that the Constitution of 1866, the Constitution of 1869 and the Constitution of 1876 all contain provisions releasing subsoil mineral rights to the surface owners. TEX. CONST. OF 1866, art. VII, §39; TEX. CONST. OF 1869, art. IX, §9; TEX. CONST. OF 1876, art. XIV, §7 (repealed 1969).

The Texas Legislature reversed this pattern however, with the passage of various Sales Acts from 1883 to 1889, all of which had the polar opposite effect. The Sales Act of 1883 states that, "the minerals on all lands sold or leased under this Act are reserved by the State for the use of the fund to which the land now belongs." (Acts 1883, Ch. 88, §§ 3 and 88.) This paved the way for a wave of conflicting Texas legislation and judicial rulings on the subject of the State's reservation of mineral rights that took off in the late 1800s and reached a fevered pitch after the turn of the century in the wake of Spindletop.

Contrary to the Sales Acts of the 1880s, the Texas Legislature, in the Mineral Release Act of 1895, released the rights of the State to all minerals in lands granted prior to that time. REV. STAT. OF 1895, art. 4041. Ironically, in the same year, the Texas Legislature also passed The Mining Act of 1895 which provided that "all school, university, asylum and public lands containing valuable mineral deposits were reserved from sale except as provided by the Act, and an applicant for purchase was require to make an oath that there were no minerals therein." LEOPOLD at §7.11. The effect was to

reserve to the State all mineral interests in the mineral classified land. LEGIS. ACTS. 1895, Ch. 127. The constitutionality of the Mineral Release Act of 1895 was questioned (although not successfully) in several law suits in subsequent decade involving mineral classified land, as well as public lands sold prior to 1895, but with an express mineral reservation. The argument was that application of the Mineral Release Act of 1895 to mineral classified lands could result in an unconstitutional relinquishment of such land to private individuals.

In 1912, the Texas Supreme Court attempted to reconcile these mixed messages in *Cox v. Robison* when it held that the constitutional relinquishment and release of mineral rights in 1876 was intended to be curative in nature and retrospective, rather than prospective, in its effect. *Cox*, 150 S.W. 1149 (Tex. 1912). The *Cox* court also recognized the constitutionality of the 1895 Mineral Release Act, a concept that was reaffirmed in 1919. *Greene v. Robinson*, 210 S.W. 498 (Tex. 1919). In 1919, the Texas Legislature also passed an Act validating the purchasers' titles to the minerals in all sales of public school, university and asylum lands made under the authority of the Acts of 1883, unless the mineral rights in those lands were specifically reserved by the State at the time of sale.

B. Land Classification System

In 1883, the Legislature created the State Land Board (not to be confused with the School Land Board established in 1939 to manage the PSF), providing for the classification, sale and lease of lands set aside for the benefit of the "School, University and Asylum Funds." In order to set a sales price, the State Land Board was directed to classify lands as agricultural, pasture, or timberland. This was the same 1883 Legislative Act which provided that, "the minerals on all lands sold or leased under this Act are reserved by the State for the use of the fund to which the land now belongs." Acts 1883, Ch. 88, §§ 3 and 88. For this reason, a *mineral* classification for

PSF lands sold for surface use was unnecessary, since the mineral interest of PSF lands was reserved to the State.

Interestingly, the internal records of the GLO contain a resolution of the State Land Board from June 1, 1886, indicating that no valid classifications were ever made by the Board under this 1883 Act. A.T. Mullins, "Classification of Texas Public Lands," at Sept. 28, 1954 (unpublished manuscript, on file with the Texas General Land Office). Not dissuaded by this lack of compliance, the Texas Legislature, in the Sales Act of 1901 (ch. 125) explicitly assigned to the Land Commissioner the duty to notify all county clerks in writing as to the classification and valuation of each section of land in the clerk's respective county. Unlike in preceding Acts, no specific classifications were enumerated, but shortly after the enactment of the Sales Act of 1901, records indicate that many tracts in Pecos and Reeves Counties were given dual classifications, and that the classifications of *mineral* and *dry grazing* started being used regularly.

Also in 1901, the Texas Supreme Court held in *Schendell v. Rogan*, that unless land classification documents contained the word *mineral*, the state did not retain mineral rights. Consequently, the state lost the mineral rights to all school land sold before 1901 – i.e., 91.4 % of state land. *Schendell*, 63 S.W. 1001, 1002, 1003 (Tex. 1901). This ruling prompted then Land Commissioner Charles Rogan to add mineral classifications to thousands of unsold tracts, thus preserving 7.4 million acres of minerals for the PSF.

The practice of dual classification of lands was later codified in the 1907 Sales Act. In that Act, the Texas Legislature provided that land classified as *mineral* might be sold for agricultural or grazing purposes as long as the application to purchase contained an express reservation of all minerals to the fund to which the public lands belong. Even though this act presupposes a mineral classification (rather than directly authorizing one), it has been considered by some to the first and only clear-cut provision

in any Texas legislation to authorize the Land Commissioner to give land a double classification. MULLINS, at 10.

Between 1901 and 1919, the state sold land both with and without mineral rights, so although the year in which land was purchased can provide some guidance as to the likelihood that the State reserved minerals, even the patent itself is not reliable evidence. A.W. WALKER, "The Texas Relinquishment Act," 1ST INST. ON OIL & GAS LAW AND TAXATION 245 (1949). Patents issued by the GLO prior to 1911 commonly lacked any reference to the mineral interest, even if the subject land was classified as mineral land. MULLINS, at 9-11. Even after it became standard practice to make such notes in the following years, references to mineral rights were often inaccurate, or at least vague and ambiguous, e.g., "[m]inerals in the above described land are reserved to the State as prescribed by law," without any further information as to what the current law was. *Id.* at 35-37.

As of 1954, it had been the practice of the GLO for over 25 years, whenever faced with an ambiguity over mineral classification, to consider final and official the last classification noted in the Classification Records for a particular tract. *Id.* These official records remain in the GLO today, and the GLO is in the practice of providing official Mineral Certificates, upon specific request, which will verify how a specific tract is classified in official GLO records. For a more complete history of the tract, the GLO will also provide a Certificate of Facts which includes additional significant title facts, such as the original award date, the patent, any deeds of acquittance, and any current oil and gas lease information. (As of 2015, Walter Talley is the GLO staff member in the Legal Division who issues all such certificates.)

C. The Relinquishment Act Period

In 1919, the Relinquishment Act, long the subject of much confusion and consternation, forever changed the discussion of State-reserved mineral rights. The Act is perhaps most clearly

explained in words taken directly from the Relinquishment Act Lands Lease Form available for download on the GLO's website: "The Relinquishment Act reserves all minerals to the State in those lands sold with a mineral classification between September 1, 1895 and June 29, 1931. Under the Relinquishment Act, the surface owner acts as the agent for the State of Texas in negotiating and executing oil and gas leases on Relinquishment Act land. The State surrenders to the surface owner one-half of any bonus, rental and royalty as compensation for acting as its agent, and in lieu of surface damages. The owner of the soil's agency power is somewhat limited, however, because the General Land Office publishes a standard Relinquishment Act lease form which must be used to lease Relinquishment Act land. Additionally, the General Land Office must approve the consideration paid for any Relinquishment Act lease and no lease is effective until it has been approved and filed in the General Land Office." TEX. NAT. RES. CODE §§ 52.171-52.185. See Tex. GLO, Relinquishment Act Leasing, available at: [http://www.glo.texas.gov/what-we-do/energy-and-minerals/_documents/oilgas/permittingleasing/relinquishment-act leasing/HROW_Tracts_Guidelines.pdf](http://www.glo.texas.gov/what-we-do/energy-and-minerals/_documents/oilgas/permittingleasing/relinquishment-act%20leasing/HROW_Tracts_Guidelines.pdf).

The following phrase taken from the above text underscores a critical reason for the Texas Legislature's passage of the Relinquishment Act: "The State surrenders to the surface owner one-half of any bonus, rental and royalty as compensation for acting as its agent, and in lieu of surface damages."

With the launch of the Texas oil boom in the early 1900s, the Legislature attempted to actively encourage oil and gas exploration on its lands with acts such as the Permit and Lease Act of 1913 and subsequent amendments in 1917. Under these acts, the lessee had only to pay the surface owner ten cents per acre annually in advance during the life of the lease as compensation for any and all surface damage that might result from oil and gas operations. Because the State had reserved the entire mineral interest to itself, the surface owner would in no way benefit from any actual production on the

land, and the ten cents per acre advance compensation for surface damage often proved wholly inadequate to cover actual damage. The result was such widespread and vehement resistance among landowners to oil and gas exploration, that they would often deny entry to lessees. In some parts, tensions even escalated to "threats of violence and danger of bloodshed." WALKER at 255-56.

The Texas Legislature knew that if oil and gas exploration were to continue on lands in which the State had reserved the mineral interest, the surface owners would have to share in the benefits. The Relinquishment Act was their first major step in this direction. *Id.*

Following the Act's passage in 1919, GLO patents contained a reservation of 1/16th of the minerals, leading the GLO and most attorneys in Texas to believe that 15/16ths of the minerals were relinquished to the surface owner. The Texas Supreme Court ruled to the contrary in *Greene v. Robison* in 1928 (8 S.W.2d 655, 658-659) and in *Empire Gas and Fuel Company v. State* in 1932 (47 S.W.2d 265). In *Greene*, the Court held that with regard to PSF lands sold before or after the Relinquishment Act, the surface owner acts only as the State's agent in executing an oil and gas lease, and that while the surface owner does participate equally in the royalties and bonus, the surface owner does not receive any fractional interest in the minerals. Still, this was a marked improvement from the decade prior to the Relinquishment Act.

Despite some inconsistencies in the mineral classification records at the GLO, most PSF land sold between 1901 and 1919 contained a mineral classification which effectively reserved all minerals to the State. This practice was established much more firmly in 1919, something which continued consistently until the Sales Act of 1931. As a result, from 1895-1931, approximately 6.3 million acres granted from the public domain and located mostly in West Texas and South Texas, came to be known as the "Relinquishment Act Lands."

D. Sales Act of 1931 & The Free Royalty

Beginning on May 29, 1931, the Sales Act of 1931, now codified as Section 51.011, et seq. of the Texas Natural Resources Code, changed the state's practice regarding mineral reservations in the sale of public lands. In contrast to the Relinquishment Act policies, this Act set aside a free royalty, or non-participating royalty interest (NPRI) free of all costs of production, to the State, usually 1/8th of the sulphur and 1/16th of the oil and gas and all other minerals, for all future sales of public land. According to the GLO, this has resulted in 855,000 acres of free royalty lands in Texas. LEOPOLD at §§7.13-7.18.

In 1937, the Texas Supreme Court affirmed that the State would bear no cost of production, sale or delivery of oil and gas under the Sales Act of 1931, and that the patentee owes the State a duty of good faith in leasing lands covered by this Act. *Wintermann v. McDonald*, 102 S.W.2d 167 (Tex. 1937). Although the patentee/landowner is not officially deemed the State's agent for leasing purposes under the 1931 Sales Act, as had been the case under the Relinquishment Act, the *Wintermann* court ruled that the effect of the landowner's good faith duty to the State, in procuring the specified free royalty, is basically the same as if the landowner were the state's leasing agent. *Id.* at §7.14.

The only significant change to the policy since the 1930s has been the 1983 enactment by the Texas Legislature of Section 51.054(a) of the Texas Natural Resources Code, permitting the SLB to set the state's free royalty at a minimum of 1/16th of oil and gas production, but allowing the State, in many cases, to negotiate an NPRI higher than 1/16th.

V. THE GLO TODAY

Today the GLO continues to sell PSF land under the authority of the School Land Board (SLB), although in the last century, its primary responsibility with regard to PSF land has turned

to managing and leasing the minerals on the 13 million acres for which it is responsible. In May 1914, the GLO received its first royalty payment from PSF lands from an oil and gas lease on Goose Creek field in Harris County. In the nearly 100 years since that time, the PSF has received over \$11 billion from oil and gas production on PSF land, all for the benefit of Texas public schools. The substantial royalties from oil and gas leases on PSF lands make the GLO one of only two state agencies that actually brings in more revenue than it spends each year.

Managing these mineral leases is one of the core functions of today's GLO. The State of Texas retains ownership of all minerals in and under mineral-classified public lands, as well as the corresponding executive rights (with the historical exceptions noted in the aforementioned sections). In 1955 the SLB increased its basic royalty on oil and gas from 1/8 to 1/6, and the Board for Lease of University Lands applied the same increase to their basic royalty on gas in 1960 and to their basic royalty on oil in 1961. By 1995, the minimum standard royalty for PSF lands was 6.25%. Currently, the GLO receives a royalty of 20 to 25 percent on most of its leases, both on and offshore. (*See generally* TEXAS GEN. LAND OFFICE, http://www.glo.texas.gov/what-we-do/energy-andminerals/oil_gas/index.html, link last accessed Mar. 28, 2013.)

A. Purchasing Public Lands: The Process

The process of buying PSF land differs from that of buying privately owned land. TEX. NAT. RES. CODE § 51.056. The SLB continues to govern the process, subject to terms established by Chapters 32 and 51 of the Texas Natural Resources Code, and the State retains ownership of all minerals and executive rights. The specific steps of the process are laid out in detail on the GLO website: http://www.glo.texas.gov/what-we-do/statelands/_documents/property-for-sale/Purchasing%20Instructions/Purchasing%20Instructions%20%20Sovereign%20Land.pdf.

1. AWARDS

The purchaser receives an *award*, a legal document recordable in county records which

carries with it the same basic rights as a contract for a deed. TEX. NAT. RES. CODE § 51.066. With the award, the buyer has right to possession of the land, but not full legal title. The right to legal title vests in the buyer when he has paid the purchase price and has met any and all other terms of the sale. At that point, the buyer has the option to apply to the State of Texas for a patent, signed by both the Governor and Land Commissioner, conveying full legal title. TEX. NAT. RES. CODE § 51.241.

2. EXCESSES & DEEDS OF ACQUITTANCE

Due primarily to past surveying errors, land that has previously been patented may contain more acreage than what is specified in the title or patent. This is called an *excess*. In such cases, the landowner may apply for a *Deed of Acquittance* which allows him to purchase the excess. TEX. NAT. RES. CODE § 51.246. The SLB sets the price for this excess acreage after having the land appraised at its current value, not its value at the time the original patent was issued. For this reason, purchasing an excess can be prohibitively expensive if the original patent was obtained many decades ago on land that has since become a producing property.

If the patentee, or his assignor, does decide to purchase the excess, he must submit an application for the Deed of Acquittance along with full payment and, in most cases, corrected field notes prepared by a credentialed surveyor. In return, the GLO will execute a Deed of Acquittance to the original patentee or his assignee with the same mineral reservation (or lack thereof) contained in the original patent. Owners of excesses are liable for local taxes on land even before the State has issued a deed of acquittance, since excess land is treated as sold land – i.e., the state has already divested itself of title with the original patent. *Cockerell v. Taylor County*, 814 S.W. 2d 892 (Tex. App. – Eastland 1991, writ denied). For this reason, excess lands are not considered part of the public domain because they are not “unsold lands.” LEOPOLD at §§5.20-5.21. A full application and complete instructions for purchasing an excess is accessible on the

GLO website: http://www.glo.texas.gov/what-we-do/state-lands/_documents/professional-services/Ins_App_to_Purchase_Excess_Acreage.pdf

3. VACANCIES

In contrast to an excess, a *vacancy* is unsurveyed, unsold land not covered by any patent or original survey. As such, it remains part of the public domain and, therefore, belongs to the PSF under the terms of the Constitution of 1876 and the Act of February 23, 1900, granting to the PSF all unappropriated public domain remaining in the State.

Vacancies are usually located in between original surveys, and they are usually the result of surveying errors for the adjacent tracts. Potential vacancies often come to light when land is re-surveyed for other purposes, revealing a gap between two older surveys previously assumed to be contiguous. Doctrines of adverse possession do not apply, nor does the Statute of Limitations operate against the state, in cases of land vacancies. This was made clear in 1934 with *Weatherly v. Jackson*, which interpreted the Texas Legislature’s intent in 1900 when it granted to the PSF all of the remaining unappropriated public domain. 71 S.W.2d 259, 265 (Tex. Com. App. 1934). The court stated that, “Land adversely possessed was not excepted. The intention was that all the public land not then disposed of should thereafter belong to the School Fund...[a]dverse possession of a part of the public domain could not serve.”

To combat land-grabbing or vacancy seizures, the 46th Legislature passed an Act on June 19, 1939, setting forth the terms on which the state will lease or convey title to a discovered vacancy to a citizen applicant. In 1940, land vacancies were estimated to amount to as much as 5% of the total area of the state, most likely occurring far more frequently in portions of the state where metes and bounds legal descriptions were used (as opposed to the rectangular system of surveying used in some counties in West Texas, where gaps between surveys would be more

readily apparent since land is laid out in blocks and/or townships in advance of settlement).

The GLO has the authority to determine when a vacancy exists, and the SLB has the authority to sell or lease certain property interests in the property at fair market value.

VI. CONCLUSION

Despite humble beginnings with an empty treasury and around 250 million of acres of empty land, the indomitable Texas spirit propelled her people to greatness. Although many in the United States Congress questioned whether the public domain of Texas was worth as much as the \$10 million state debt prior to annexation in 1845, the discovery of Spindletop proved them wrong in 1901.

As black gold has gushed ever since across the wide expanse of Texas and her lands have become more and more valuable, it has been confirmed beyond all doubt that understanding the origins of Texas title and the land classification attached to each tract are critical components in any examination of title.