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# 2012 Update: Developments in Natural Resources Law

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# RECENT DEVELOPMENTS IN ARKANSAS NATURAL RESOURCES LAW

**Thomas A. Daily**[1]

It has been uncommonly quiet on the natural resources litigation front recently. I am not sure why that is. Perhaps diminished natural gas prices account for some of that,[2] or it could just be random luck. Regardless, the absence of a lot of trees gives me time and space to discuss the forest in greater depth than normal.

This year's developments include two important *Strohacker* cases, so we will review the total entirety of the *Strohacker* Doctrine as it now stands. A second group of cases may reveal a tendency of the Arkansas Court of Appeals to avoid applying rules of property when it does not like the result of doing so. These two subjects have a thing in common. Both present difficulties to the mineral title examiner.

## TWO RECENT DECISIONS PROMPT *STROHACKER* REPRISE[3]

We will see, soon enough, where *Strohacker* has recently gone. First, though, for the in-depth *Strohacker* discussion which I promised above, I shall begin at the beginning.[4]

Arkansas' *Strohacker* Doctrine originated with the Arkansas Supreme Court's decision in *Missouri Pac. R.R. Co. v. Strohacker.*[5] There, a majority of six justices affirmed a chancellor's conclusion that the railroad,[6] the grantor in 1892 and 1893 deeds of lands in Miller County, in reserving "all coal and mineral deposits" did not

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[1] Member, Daily & Woods, P.L.L.C., Fort Smith, Arkansas; Adjunct Professor, University of Arkansas (Fayetteville) School of Law.

[2] Plaintiffs and plaintiffs' lawyers lose interest when the big money goes away.

[3] The author of this article also authored an amicus curiae brief in connection with the appeal of *Nicholson v. Upland Industrial Development Company, et al.*, infra and is a co-author of an article, *Still Fugacious After All These Years*, scheduled for publication in UALR Law Review. This section contains adaptations of portions of those materials.

[4] This article is neither the first, nor the best discussion of *Strohacker. See, e.g.* Gerald L. Delung, *The Arkansas Strohacker Doctrine–An Arkansas Rule of Property,* 9 Ark. Law. 85 (1975); Jaimie G. Moss, *The Strohacker Doctrine; Its Application in Arkansas Courts and the Need for an Updated Rule*, 64 Ark. Law Rev. 1095 (2011).

[5] 202 Ark. 645, 152 S.W.2d 557 (1941).

[6] Which held the original patent from the United States.

intend to reserve oil and gas.[7] From a careful reading of the court's recitation of the facts, it appears that the railroad's true subjective intent had more to do with protecting itself in the event of a mineral claim by its own grantor, the United States, than actually reserving anything of value to itself.[8] Subjective intent was not the determinant, however. The Court stated:

> If the reservations had been made at a time when oil and gas production, or explorations, were general, and **legal or commercial usage** had assumed them to be within the term "minerals", certainly appellant should prevail. As early as 1911 gas was referred to in this state as a mineral. *Osborn v. Arkansas Territorial Oil & Gas Company,* 103 Ark. 175, 146 S.W. 122. (Additional citations omitted) (Emphasis added)[9]

Thus, the Supreme Court reached its conclusion based, at least in part, upon the record of contemporaneous "legal or commercial usage" of the term "minerals" in 1892 and 1893. Interestingly, nowhere in its *Strohacker* opinion did the Court limit its conclusion therein to Miller County, where the lands at issue were located. The apparent location-based determination of the *Strohacker* Doctrine originated in a later case which will be discussed below.

Later in its *Strohacker* opinion, the Court cited supporting authority from other jurisdictions for the contemporaneous construction principle. Among those was the ancient Pennsylvania case, *Schuylkill Nav. Co. v. Moore.*[10] Quoting from *Schuylkill*, the Court stated:

> The best construction is that which is made by viewing the subject of the contract, as the **mass of mankind** would view it; for it may be safely assumed that such was the aspect in which the parties themselves viewed it." (Emphasis added.)[11]

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[7] Id. at 656, 152 S.W.2d at 563.
[8] Id. at 647, 152 S.W.2d at 558-59.
[9] Id. at 650-51, 152 S.W.2d at 561.
[10] 2 Whart. 477 (Pa. 1837).
[11] *Strohacker,* 202 Ark. at 655, 152 S.W.2d at 563.

That quotation from *Schuylkill* created uncertainty in *Strohacker* itself as to the precise objective standard required. "Legal or commercial usage" is the language of commerce, spoken and written by lawyers, bankers and merchants, all, by definition, knowledgeable, educated persons. Since the court is construing a legal document, a deed, a standard based upon contemporaneous usage by such knowledgeable, educated persons makes sense. After all, it is they who draft deeds.

Those same lawyers, bankers and merchants are, of course, part of the "mass of mankind" but they make up only a small portion of that mass. Much of the mass of mankind could not and should not be expected to understand the meaning of the language of a mineral reservation in a deed. Still, many today misread *Strohacker* to require a historic generic mineral grant or reservation to pass the "mass of mankind" test. I respectfully submit that is wrong, and the distinction between the "mass of mankind" test and "legal and commercial usage" is important.

Awareness of commercial developments and commercial opportunities comes to those who speak legal or commercial usage somewhat sooner than to most everyone else. Thus, all other things being equal, one would expect the body of thought of legal and commercial usage to include oil and gas as minerals well before it became known to the masses.

Another thing to be learned from *Strohacker* is that the time window of uncertainty as to the meaning of the unspecific mineral reservation, vis-a-vis oil and gas, was really quite small. *Strohacker* bracketed that window on the bottom by the year 1893, the date of the latest of the deeds construed in *Strohacker*, and 1911, the date of *Osborn v. Arkansas Territorial Oil & Gas Company*,[12] where the court first stated that oil and gas were included within the term "minerals."

The next of the *Strohacker* decisions was *Missouri Pacific R.R. Co. v. Furqueron*,[13] a case decided only about five years after *Strohacker*, with nearly identical facts. The latest of the *Furqueron* deeds was executed in 1894, as opposed to 1893 in

[12] 103 Ark. 175, 179, 146 S.W. 122, 124 (1912).
[13] 210 Ark. 460, 196 S.W.2d 588 (1946).

*Strohacker*, but the remainder was merely a replay.[14] The county was even the same, Miller County.[15]

The chancellor ruled that the *Furqueron* reservations did not include oil and gas.[16] The railroad had unsuccessfully urged the court to reverse and to overrule *Strohacker* as being "unsound and not in accord with the weight of authority."[17] In a brief opinion, the court declined to do that, instead quoting not from body of the *Strohacker* opinion, but from one of its headnotes*:*

> By excluding from deeds executed in 1982 and 1983 'all coal and mineral deposits' pertaining to lands in **Miller County**, the company no doubt had in mind, as did its grantees, only substances then commonly recognized as minerals and in view of evidence of such intent the language was not sufficient to reserve oil and gas.[18]

So *Furqueron* accomplished two things in the development of the *Strohacker* doctrine. First, it shortened, by one year, the beginning of the window of uncertainty, from 1893 to 1894. Second, by its above quotation from the *Strohacker* headnote, the court tended to emphasize the locale of the lands involved, Miller County. Somewhat inconsistently, the quoted headnote also seems to emphasize the railroad's subjective intent as a basis for the result, which is contrary to manner in which the *Strohacker* Doctrine has subsequently developed.

The next *Strohacker* case, *Carson v. Mo. Pac R. Co.*,[19] has little to do with the issue in the this discussion, because it involved bauxite, rather than oil and gas. Moreover, an analysis of *Carson* itself causes the reader to question whether its result[20] was reached because of *Strohacker*, or because removal of bauxite involved surface destruction, repugnant to deed's granting clause.

The next oil and gas case in the line of *Strohacker* decisions was *Brizzolara v.*

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[14] Id. at 461, 196 S.W.2d at 588.
[15] Id. at 463, 196 S.W.2d at 589.
[16] Id. at 462, 196 S.W.2d at 589.
[17] Id. at 463, 196 S.W.2d at 589.
[18] Id. (Emphasis added).
[19] 212 Ark. 963, 963, 209 S.W.2d 97 (1948).
[20] The nonspecific 1892 reservation was held not to include bauxite.

*Powell*.[21] The *Brizzolara* deed contained language identical to that in *Strohacker* and *Furqueron*. However, the date and location were different. The *Brizzolara* reservation was within an 1897 deed, three years after the later of the two deeds construed in *Furqueron*. The lands were in Johnson County, rather than Miller County. [22]

It is notable that *Brizzolara* is the only case in the *Strohacker* line, involving oil or gas, which resulted in a reversal of the chancellor by the Arkansas Supreme Court. However, that was not a reversal on the merits. Rather, the court determined that the parties and the chancellor had proceeded on the wrong theory and, so, remanded the case for additional proof. The chancellor had apparently decided that the 1897 reservation did not effectively reserve oil and gas, as a matter of law, relying upon *Strohacker* and *Furqueron*. In its opinion, the court first stated that the "rule of *Strohacker*" had:

> become a rule of property on which have been founded innumerable important transactions. To change the rule now would invalidate many titles acquired upon faith in the original decision. Consequently, regardless of our individual views as to the merits of the *Strohacker* rule, it is the unanimous opinion of the court that it has become a rule of property which should not be disturbed.[23]

Then the court continued, concluding that this "rule of property" was not a rule of law, at least not entirely. Rather, it incorporated a question of fact.

> The *Strohacker* opinion held that in the deed there construed, executed in 1892, the same language as is now before us did not as a matter of fact express an **intention** to reserve oil and gas. The *Furquerton* case, on similar proof, ruled that this same intention prevailed as to another Iron Mountain conveyance in 1894. Here, however, the question involves the **intent** with which these words were used in a different deed in 1897.[24]

I must respectfully question the *Brizzolara* court's conclusion that "innumerable" important transactions have been "founded" upon the *Strohacker* Doctrine. It just does not work that way. The *Strohacker* Doctrine does not provide any such instruction upon

[21] 214 Ark. 870, 218 S.W.2d 728 (1949).
[22] Id. at 871, 218 S.W.2d at 728.
[23] Id. at 873, 218 S.W.2d at 729-730.
[24] *Brizzolara,* 214 Ark. at 873-74, 218 S.W.2d at 730 (Emphasis added).

which transactions may be founded.

Rather, Arkansas mineral title examiners have learned from *Strohacker* and the cases which followed only that early unspecific conveyances or reservations of "minerals" cannot be confidently interpreted, one way or the other, where oil or gas is concerned. Occasionally, we might have taken a calculated risk that unspecific mineral conveyances or reservations made before about 1895 did not effectively convey or reserve oil and gas, and that those executed after about 1910 did. However, whenever our clients made, or make today, such a decision, they assume the risk that they may be proven wrong, after-the-fact, when litigation arising in some new county proves them to have been bad guessers.[25] Instead, in cases where the unspecific grant or reservation lies within the early window of uncertainty, most title examiners have cautioned producers to protect themselves by buying a policy of insurance, leasing both sides of the potential dispute (economic waste) and awaiting the result of time-consuming and expensive litigation (more economic waste).

Rules of property should bring certainty and predictability to real property law, so that transactions may be confidently founded thereon. The Arkansas Supreme Court has defined a rule of property as:

> [a] settled legal principle governing the ownership and devolution of property; the decisions of the highest court of a state when they relate to and settle some principle of local law directly applicable to title. In the plural, those rules governing the descent, transfer, or sale of property, and the rules which affect the title and possession thereto.[26]

Rules of property "have come into existence and have been continued because of the ever present need for stability and predictability" in the law of real estate.[27] A rule of property is rarely overturned because the bar has relied on such rule in drafting instruments and advising clients.[28] The fact-dependent *Strohacker* Doctrine is, in that

[25] See, e.g., the discussion of recent Federal cases, *Griffis, Froud* and *Robertson*, infra, and the Arkansas Supreme Court's decision in *Staggs,* infra, where the nonspecific reservations at issue occurred after 1930.
[26] *Gibson v. Talley*, 206 Ark. 1, 7, 174 S.W.2d 551, 554 (1943).
[27] *Kirkham v. Malone*, 232 Ark. 390, 396, 336 S.W.2d 46, 49 (1960).
[28] *Edmundson v. Estate of Fountain*, 358 Ark. 302, 312, 189 S.W.3d 427, 434 (2004).

respect, the opposite of a rule of property, or, at least, it leads to an opposite result.

*Brizzolara* provided no additional insight into the meaning of the *Strohacker* Doctrine. The *Brizzolara* court nowhere suggested that there might be some critical difference between the early state of legal or commercial usage between Johnson and Miller Counties. Indeed, references to "legal or commercial usage" are altogether absent from the *Brizzolara* opinion, as are any references to the "mass of mankind." Rather, the remand was to take proof of "intent."

Unfortunately, *Brizzolara* ended right there. The case never returned to the court and so we have no idea, to this day, whether or not a 1897 reservation of "all coal and mineral deposits" effectively reserved oil and gas in Johnson County (a county with a history of somewhat prolific gas production).

The next case in the *Strohacker* line was *Stegall v. Bugh*.[29] Unlike the previous cases, *Stegall* did not involve a reservation in a deed from a railroad. Rather, B. H. Stegall and his wife, the appellant's parents, conveyed lands in Union County in 1900 with a deed, the granting clause of which concluded "except the mineral interest in said lands."[30] The appellant's proof at trial tended to prove that his parents were aware of oil potential beneath the deeded lands and thus subjectively intended to reserve oil and gas by those words.[31] However, the chancellor ruled otherwise at trial and the Arkansas Supreme Court affirmed, seemingly departing from its "intent" based ruling in *Brizzolara*. Rather, the *Stegall* court returned to objective determination of contemporaneous "legal and commercial" usage which it had suggested, less clearly, in *Strohacker* and *Furqueron*.[32] Unfortunately, the court also repeated the "mass of mankind" quotation from the Pennsylvania *Schuylkill* decision, inferring, incorrectly, that legal and commercial usage and the vernacular of the masses were one and the same.[33] *Stegall* is surprising on another level. There are references within the *Stegall* opinion to evidence in the record tending to show that, by 1900, knowledge of oil and

[29] 228 Ark. 632, 310 S.W.2d. 251 (1958).
[30] Id. at 632-33, 310 S.W.2d at 252.
[31] Id. at 633, 310 S.W.2d at 252.
[32] Id. at 634, 310 S.W.2d at 253.
[33] Id. at 635, 310 S.W.2d at 253.

gas was general, and well within the legal or commercial meaning of the term "minerals."[34] Why, then, did the Appellant, Stegall, lose the case?

Here, as a theory, is a simple explanation, which illustrates another of the problems with the present *Strohacker* Doctrine. *Stegall* was an appeal from a chancellor's decision, as was every other *Strohacker* case. (The modern equivalent of a chancellor is a circuit judge sitting in equity.) These cases were really not decided by the Arkansas Supreme Court, at all, in the truest sense. Rather, the issue before the appellate court was simply whether the trial judge's factual conclusions were or were not clearly erroneous.[35]

Ours is a system weighted, deliberately, in favor of affirmance. Facts determined at trial are rarely reversed. *Strohacker*, rule of property or not, presents every case as a question of fact.[36] It is likely that if the chancellor had ruled in *Stegall* that oil and gas were within the legal and commercial meaning of the term minerals in Union County in 1900, his decision, though opposite in result, would likewise have been affirmed as not clearly against the preponderance of evidence. Such a system makes it near impossible to distill a reliable rule from which to determine ownership of oil and gas in a significant number of situations. An area of the law which most needs predictability is unnecessarily unpredictable.

Justice McFaddin authored the first of his two dissenting opinions in *Stegall.* That dissent begins with the heart of the matter:

> I think the time has come when this court should declare that by January 1, 1900 it was generally considered and understood that oil was a mineral.[37]

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[34] Id. at 637-38, 310 S.W.2d at 255.
[35] See *Brown v. Brown*, 373 Ark. 333, 284 S.W.3d 17 (2008) (An appellate court will not reverse a finding of fact by the circuit court unless it is clearly erroneous.); *Royal Oaks Vista, L.L.C. v. Maddox*, 372 Ark. 119, 271 S.W.3d 479 (2008) (Where a case is tried with the circuit court sitting as the trier of fact, the standard of review is not whether there is substantial evidence to support the findings of the court, but whether the judge's findings were clearly erroneous or clearly against the preponderance of the evidence.)
[36] See *Brizzolara*, 214 Ark. 870, 218 S.W.2d 728.
[37] *Stegall,* 228 Ark. at 636, 310 S.W.2d at 254.

Justice McFaddin then traced the line of *Strohacker* cases decided to that date (1958), observing its several internal inconsistencies. However, much of his *Stegall* dissent deals with uncontroverted facts which he said justified his conclusion above:

> (b) The next point is that prior to 1900 the oil fraternity generally understood that oil (i. e. petroleum) was a mineral. The record here before us shows that as early as 1887 and 1888 there were reported traces of oil in wells drilled in Sebastian County, Arkansas; (citations omitted) that oil had been discovered in Louisiana before 1900; and that gas had been discovered in East Texas as early as 1868. The record shows that in 1895 and 1896 oil had been developed in commercial quantities in the fields in Corsicana, Texas. If people in Sebastian County, Arkansas, and in North Louisiana, and in Corsicana, Texas, considered oil as a mineral in the years mentioned, why should the oil fraternity of Union County, Arkansas, be considered to be less intelligent?
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> (c) Then, there is the matter of general information. Publication of the Ninth Edition of the Encyclopedia Britannica was completed in 1889; and in Vol. 18 of that edition, beginning on page 72, there is an article of several pages on the subject of petroleum, which is called 'rock oil'. Likewise, in the same Ninth Edition of the Encyclopedia Britannica (publication completed in 1889) there is in Vol. 16 at pages 346 to 431, an exhaustive article on the subject of 'Mineralogy', which is the study of minerals. It is there stated on page 346: 'Mineral bodies occur in the three physical conditions of solid, liquid, and gas'. Then on page 430 of the same volume--in the index of minerals--petroleum is listed as Mineral No. 707; and on page 428, in discussing 'petroleum', it is again listed as a mineral. Let it be remembered that it was in 1889 that the Ninth Edition of the Encyclopedia Britannica completed its publication; and copies of this edition have been in Arkansas since before 1900. So, I make the point that by January 1, 1900 petroleum was considered as a mineral by general information; and we should now so declare.[38]

The final of the early Arkansas Supreme Court decisions in the *Strohacker* line of cases was decided 46 years ago in 1966. It was *Ahne v. Reinhart & Donovan Co.*[39]

*Ahne*, uniquely, involved a conveyance, rather than a reservation. In 1905, George Heim conveyed to Arkansas Anthracite Coal Company "all of the coal, oil and mineral" within certain lands in Logan County.[40] Thus the deed's language was a little different from that of previous reservations, since oil was explicitly mentioned.

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[38] Id. at 637-38, 310 S.W.2d at 255.
[39] 240 Ark. 691, 401 S.W.2d 565 (1966).
[40] Id. at 691, 401 S.W.2d at 566.

However, the dispute involved the ownership of gas, not oil.[41] The Arkansas Supreme Court characterized the issue to be decided in these terms:

> The issues joined presented a fact question as to whether gas was a commonly recognized mineral in Logan County in 1905 when the Heim deed was executed, and the fact question was submitted to the chancellor upon a comprehensive array of historical exhibits and was determined adversely to appellants. The case is here on appeal, **the dispositive question being whether the chancellor erred in his finding, as a fact**, that gas was a commonly recognized mineral in Logan County when the Heim deed was executed on July 26, 1905.[42]

The court then catalogued what it referred to as the most pertinent exhibits, made a brief analysis of its prior decisions, and concluded:

> Based upon our recitals as to the facts in this case and as to the applicable principles of law, we have concluded that **the finding of the chancellor that gas was a commonly recognized mineral in Logan County on July 26, 1905, is not against the preponderance of the evidence** in this case and that the judgment entered thereon should not be disturbed.[43]

Thus, as noted above, the findings of fact critical to the result were made, not by the Arkansas Supreme Court, but by the chancellor. That chancellor's ruling was not clearly against the preponderance of evidence, so it was affirmed. I suspect that had the chancellor ruled, on the same record, that gas was not a commonly recognized mineral in Logan County in 1905, that ruling would likely still not been against the preponderance of the evidence, either, and likewise would have deserved affirmance, though it would have been opposite in result.

In one rather frightening sense, these decisions have virtually no precedential value. They are simply affirmances of specific findings of fact, not decisions of law. Tomorrow, we could litigate the effect of a slightly earlier (e.g.1904) conveyance or reservation in the same county relatively unimpacted by *Ahne*, because that decision establishes nothing more than that a chancellor, based upon the record before him that day, did not make a call bad enough to deserve reversal.

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[41] Id. at 692, 401 S.W.2d at 566.
[42] Id. at 692, 401 S.W.2d at 566-67 (Emphasis added).
[43] *Ahne,* 240 Ark. at 697, 401 S.W.2d at 569 (Emphasis added).

*Ahne* made another contribution to our historical misunderstanding of the *Strohacker* Doctrine. The most direct statement that the doctrine has an element of location comes from the following paragraph from *Ahne*:

> Different factual situations have existed and may continue to exist as to what substances constitute commonly known and recognized minerals in various areas of the state. It was apparently for this precise reason that the court recognized the need for such a rule of construction as that announced in the Strohacker case.[44]

Unfortunately, it is that this very location-based factual analysis which opens the near endless combination of dates and places when and where this vital issue cannot be resolved without further litigation and the economic waste there associated.

Arkansas has 75 counties. Many of those contain known commercial oil and/or gas reserves. Some other, where such reserves are presently unknown, may be the site of the next big discovery. Were we to start with the premise that each of those had, potentially, its own separate legal and commercial usage, ending, abruptly, at the county line, and multiply that merely by the number of years between 1895 and 1911, we see the impossibility of the situation. [45]

Justice McFaddin would have agreed with the above statement. He concurred with the result reached by the majority in *Ahne*, but dissented from its reasoning, again urging that a bright-line date be established. Again he reviewed the prior decisions, accusing the majority of having "drifted like a 'ship without a rudder.'"[46] Justice McFaddin again demonstrated the lack of consistency in the majority's prior opinions, concluding:

> So we have gone from what the grantor intended, to what the parties intended, to what was generally understood in the locality, to what was understood in the particular county in which the land was located. It now seems that there will have to be a case brought to this court from each of

[44] Id.
[45] At least until the Arkansas Supreme Court's decision in *Nicholsen, infra,* it was apparently assumed by most Arkansas attorneys that the *Strohacker* Doctrine mandates a county-by-county fact determination, though the court has *never* really said precisely what geographic subdivision is appropriate.
[46] *Ahne*, 240 Ark. at 698, 401 S.W.2d at 569.

> the seventy-five counties in Arkansas to have determined when oil and gas were first generally recognized as a mineral, in each such county; and it is from that line of holdings that I must necessarily dissent. As I tried to point out in my dissent in Stegall, I insist that oil and gas were generally considered to be minerals in all of Arkansas as early as January 1, 1900. I wish this court would so state and put an end to this 'drifting like a ship without a rudder' course that we are pursuing on this question which is vital to property.
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> In short, I still insist that I was right in my dissent in Stegall v. Bugh, supra. I probably will not be on this court when another mineral reservation cases arises; but I predict that at some time the court must fix a statewide date when it was generally recognized that oil and gas were minerals. We have before us in the case at bar as fine a record as will ever be presented on this question; and I think this is the time when it should be done; and I would still insist on January 1, 1900, as such date--or, if the 'beginning of the century' is considered a more poetic date, then Jan. 1, 1901, would satisfy the situation.[47]

Two early federal court cases, arising out of Arkansas' Western District, further illustrate the inconsistency with which the *Strohacker* Doctrine has been applied. They are *Mothner v. Ozark Real Estate Co.*[48] and *Western Coal and Mining Co. v. Middleton*.[49] Those two cases, both affirmances of decisions of U.S. District Judge John E. Miller, reached results which are factually irreconcilable. In *Mothner,* Judge Miller held that an 1897 non-specific Johnson County reservation included oil and gas, relying to some extent upon exploration in Sebastian County as early as 1888 and commercial production in that county in 1902. Then, in *Middleton*, Judge Miller held that a 1904 nonspecific reservation in the very same Sebastian County did not reserve oil and gas, a result difficult to imagine. Both of Judge Miller's conflicting decisions were affirmed by the federal court of appeals, because, according to the appeals court in each case, neither decision was against the clear preponderance of the evidence.

I mention *Mothner and Middleton* not because they are, in any respect, binding Arkansas precedents. Rather, these cases further illustrate the impossibility of predicting ownership of oil and gas following a non-specific mineral reservation in a given chain of title. That unpredictability, the opposite of the needed clear rule of

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[47] Id. at 700, 401 S.W.2d at 570-71.
[48] 300 F.2d 617 (8th Cir. 1962).
[49] 362 F.2d 43 (8th Cir. 1966).

property, is exactly the problem.

I am aware of no reported *Strohacker* decision during the time of the Arkansas Supreme Court's opinion in *Ahne* and the Eighth Circuit Court's conflicting decisions in *Mothner and Middleton*, until 2010. The probable explanation for that void is that the period between late 1960's and 2010 saw somewhat less Arkansas oil and gas exploration. Exploration and production did not cease altogether, but there was no oil or gas boom in process either. As we are all aware, that changed around 2004 with the discovery of the Fayetteville Shale Play which brought a high level of exploration activity to several previously inactive counties.

With that new economic activity, in new places, *Strohacker* litigation was sure to follow. At least three cases were filed in United States District Court, each involving nonspecific mineral reservations in deeds made in these new Shale Play counties. They were *Griffis v. Anadarko E&P Co.*,[50] *Froud v. Anadarko E&P Co.*[51]*.* and *Robertson v. Union Pac. R.R. Co. & XTO Energy Inc.*[52] *Griffis,* which controlled the ultimate results of the other two, is the most important of those.

Griffis had filed suit to quiet title to minerals beneath the surface of land which he owned in White County. Anadarko, as successor to the Missouri Pacific Railroad, owned whatever minerals were effectively reserved by the railroad in a nonspecific mineral reservation within a 1936 deed.

The Eighth Circuit panel, in an opinion by Judge Morris S. Arnold, held that the 1936 reservation effectively reserved oil and gas. Judge Arnold mentioned the *Strohacker* Doctrine, which he termed "interesting and surprisingly complex."[53] However, he determined that a *Strohacker* analysis was unnecessary, holding, on authority of the Arkansas Supreme Court's decision in *Sheppard v. Zeppa,*[54] that by the 1930's there was no issue, statewide, whether the term "minerals" included oil and gas,

[50] 606 F.3d 973 (8th Cir. 2010).
[51] No. 4:09-CV-00936-WRW, 2010 U.S. Dist. LEXIS 91515 (E.D. Ark. Sept. 1, 2010).
[52] No. 1-09CV00020-JLH, 2010 U.S. Dist. LEXIS 88557 (E.D. Ark. Aug. 24, 2010).
[53] *Griffis,* 606 F3d at 974.
[54] 199 Ark. 1, 133 S.W. 860 (1939).

under Arkansas law.[55] Thus, no *Strohacker* analysis was required. Judge Arnold appeared grateful for that. In a subsequent opinion denying rehearing, Judge Arnold predicted that the Arkansas Supreme Court would agree with his conclusion.[56]

Judge Arnold's prediction soon proved correct. On April 12, 2012, the Arkansas Supreme Court released its opinion in *Staggs v. Union Pacific Railroad Company.*[57] *Staggs* involved a nonspecific mineral reservation contained within a deed executed by the railroad in Independence County in 1934. The Arkansas Supreme Court had little problem with that one, affirming the circuit court's holding for the railroad's successor. In its opinion, authored by Justice Danielson, the court made an analysis almost identical to that of the Eighth Circuit Court of Appeals in *Griffis.* One sentence of the opinion stands out. The court indicated that "…at some point[58] between 1905 and 1937, it became common knowledge in Arkansas that a reservation of mineral rights in Arkansas included oil and gas."[59]

Really, since the reservation in *Staggs* was contained within a 1934 deed, we know from the result in that case that a generic mineral reservation within or after 1934 effectively reserved oil and gas. Actually, as Justice Danielson's opinion suggests, the date was probably earlier, perhaps much earlier. Unfortunately, that is all we know for sure at this point. Surprisingly, the Staggs opinion, though important to the development of *Strohacker* jurisprudence, was not released for publication in the S.W.3d reporter.

Last year' other *Strohacker* decision, *Nicholson v. Upland Industrial Development Company, et al.,*[60] involved a much earlier mineral reservation. The deed construed in

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[55] The Eighth Circuit Appeals Court's opinion in *Griffis* could as easily have been based upon *Osborn v. Arkansas Territorial Oil & Gas Company*, 103 Ark. 175, 179, 146 S.W. 122, 124 (1912), which recognized that oil and gas were minerals in 1911, two decades before *Sheppard v. Zappa.*

[56] Order Denying Petition for Rehearing, *Griffis v. Anadarko E&P Co.,* No. 09-3117 (8th Cir. July 14, 2010).

[57] 2012 Ark. 156.

[58] Which the court did not define.

[59] *Staggs*, 2012 Ark. 156 at 5.

[60] 2012 Ark. 326, ____ S.W.3d ____.

*Nicholson* was executed by St. Louis, Iron Mountain and Southern Railway Company on February 16, 1903. Its reservation, "[a]lso reserving all coal and mineral deposits in and upon said lands," was identical to the language of reservation in *Strohacker* itself.[61] The *Nicholson* deed conveyed lands in White County, though it was actually executed and acknowledged in Pulaski County.

The landowners presented a simple argument: There was no evidence presented showing production of oil and gas, nor was there an instrument conveying, reserving or leasing oil and gas in White County, itself, prior to February 1903. Thus, they reasoned, under *Strohacker,* the 1903 reservation could not have included oil and gas. Their only witness was a seasoned landman who testified that his search of early White County records indicated no deeds or leases mentioning oil and gas had been filed for record on or before that date.

Upland, which ultimately prevailed, presented a much broader array of evidence. Through the testimony of its expert witness, an emeritus Arkansas State University distinguished history professor specializing in Arkansas history, Upland introduced numerous newspaper articles, advertisements, and books tending to show that by around 1900, residents, not only in White County but also in the area surrounding White County, were aware that oil and gas were minerals, potentially productive in Arkansas. Upland's expert testified that by 1900 these newspaper articles, advertisements and books were widely circulated in White County, which enjoyed daily rail service from Little Rock and St. Louis. The trains carried newspapers, which were read by White County residents who, according to census data, had a rather high literacy rate.

The landowners objected, without success, to all such testimony and exhibits. Among those objections was their contention that evidence of knowledge or practice beyond the actual borders of White County was irrelevant.

Nevertheless, the circuit court not only admitted Upland's proffered evidence but also found it to be persuasive, holding that, as a matter of law, oil and gas were within

[61] Supra.

the generic definition of minerals in the area including White County on February 16, 1903.

The Arkansas Supreme Court affirmed. The court's opinion directly rejected the landowners' notion that each *Strohacker* analysis was required to stop, arbitrarily, at its county line. Instead, the court recognized that the "area" where evidence of the knowledge of oil and gas as mineral was relevant, was just that, an area, and not precisely limited to the county containing the lands. Thus the court has focused future *Strohacker* inquiries more generally, inviting evidentiary presentations similar to Upland's presentation in *Nicholson.* We are now left to wonder exactly what "area" means, in terms of size and location.

The Arkansas Supreme Court concluded that the circuit court's decision in *Nicholson* was not clearly erroneous. Thus, it affirmed. I suspect, however, that had the circuit court held against Upland,[62] that decision would likewise have survived appeal.

The industry trade group, Arkansas Independent Producers and Royalty Owners, submitted an amicus brief in *Nicholson.* Its brief urged the court to announce a date-certain, after which a generic mineral reservation included oil and gas, everywhere in Arkansas, exactly as urged by Justice McFadden in his dissents in *Stegall* and *Ahne.* That effort was not successful. So it appears that *Nicholson,* like almost all of its predecessors, is just another affirmance of a lower court ruling which probably would have been affirmed had it gone the other way.

So, then, what does it all mean? Suppose you are examining record title and encounter a grant or reservation of "minerals" in an early deed, without specifying whether oil and gas are included. Here are a few pointers:

[62] I.e. that oil and gas were not within the generic meaning of minerals in White County and its surrounding area in February, 1903.

1. If the non-specific grant or reservation was in or after 1934,[63] oil and gas was included. There is no need to make any curative requirement unless you simply want your client to know that you are up on the law.
2. If the non-specific grant or reservation was between 1905 and 1934, there is a good chance that, by its date, oil and gas had become commonly known as minerals throughout Arkansas. Admittedly, the 29 years between 1905 and 1934 is a big, vague time window. Still, I personally feel that if the land you are examining is in the "area" of White County[64] or the "area" of Logan County,[65] it is a reasonably safe bet that the reservation included oil and gas. Still, it is theoretically possible that someone will re-litigate the issue, even within one of those "areas." In theory, that re-litigation could reach a different result, which might be sustained on appeal as not clearly against the preponderance of the evidence. That said, I have a hard time worrying about any grant or reservation in those "areas" after 1905. To be safe, I suggest a title requirement, explaining the status of Arkansas case law, and asking your client to soul-search before accepting the small risk that oil and gas was not covered in the grant or reservation.
3. If the non-specific grant or reservation was between 1900 and 1905, I recommend a stronger worded requirement, making clear that cases such as *Nicholson* and *Ahne* merely affirmed specific lower court holdings based upon specific records of the specific trials of specific cases. They did not lay down absolute rules of law, even within their affected counties or "areas." The risk of an opposite decision in the future should not be assumed by the title examiner. Should your client, after becoming informed, not be willing to assume that risk, it can obtain protective leases.
4. If the non-specific grant or reservation was earlier than 1900, I doubt that it effectively included oil and gas. However, we will not know for certain until

[63] The year of the *Staggs* deed.
[64] White County was the location of the reservation in *Nicholson*. Hopefully, its "area" includes the entire Fayetteville Shale Play.
[65] Logan County was the location of the deed in *Ahne*. Hopefully, its "area" includes the entire Arkansas Arkoma Basin Fairway.

and unless the specific reservation is litigated. I would construe the grant or reservation as not to include oil and gas, and make a requirement similar to that suggested in 3, above.

5. If you are examining lands in South Arkansas, and if the instrument's date is before about 1920,[66] I suggest that you make a requirement that your client determine for itself whether the non-specific grant or reservation did or did not include oil and gas. There has not been another South Arkansas *Strohacker* decision since *Stegall* was published in 1958. *Stegall* affirmed a chancellor's holding that oil and gas were not included in a 1900 reservation of "minerals." I personally believe that *Stegall* was wrongly decided. To me, the evidence described in Justice McFadden's dissenting opinion is precisely the type of evidence which led to the opposite result in *Nicholson.* However, without a case to rely upon, I am reluctant to make much of *Nicholson* in the context of South Arkansas. That part of the state is certainly outside of the North Arkansas "areas" of the more recent decisions. A title examiner should exercise caution dealing with *Strohacker* there until there is more definitive case law.

## REFORMATION EPIDEMIC BRINGS UNCERTAINTY TO TITLES

I was taught, long ago, that appellate courts have two distinct functions. One of those is to consider whether individual cases were wrongly decided and, if so, to straighten the matter out. The other function is to honor the rules of law so that our future behavior may be guided by those rules. Occasionally, those functions come into conflict. Sometimes, the strict application of a rule of law works hardship upon an individual litigant. I learned that, sad as it might appear, the rule of law is more important than the individual case. When courts bend the rules, yielding to the urge to reach the "right" result, they hand down bad legal precedents, which cause uncertainty as to the rules bent. Then, lawyers being lawyers, such uncertainty spawns needless,

[66] I intend to include a visit to the Arkansas Oil and Brine Museum in Smackover on my next trip to El Dorado. I hope to learn something from that trip which will allow me to narrow the above date, somewhat.

costly litigation. No business needs to work in an environment of uncertainty. The oil and gas industry is particularly vulnerable, for it must rely almost entirely upon the public land records to determine who owns what mineral interest. Judicial decisions which undermine the ability to rely upon those records are just plain bad for those in our line of work.

Recently, some of us have detected a tendency on the part of the Arkansas Court of Appeals to go along with lower court results which may be "right" in the social sense, but clearly violate what should be firm principles of law. Unfortunately, the Arkansas Supreme Court seldom accepts review of these decisions, so the bad precedents issue forth. Here are some recent examples.

*Dray v. Likens*[67] deserves mention. Here is a summary of its facts. Mid-Ark Property Management, Inc. developed a residential area in Crawford County. It contracted to sell adjoining tracts to Likens and Lee, who apparently were friends. Each contract called for Mid-Ark to include a water line easement across another tract, Tract 10, which separated the Likens and Lee tracts from the public road, to provide each tract with water service from the municipal water system of the town of Dyer. The deed to the Lees expressly included the promised easement, but the deed to the Likens failed to do so, apparently by mistake. The ditch was dug across Tract 10, and both lines were laid in the same ditch.

Later, Mid-Ark sold Tract 10 to the Hensons, who then sold it to the Drays. The Drays were unaware of the Likens' water line across their land, though they had record notice of the Lee easement, which was in the Lee deed. When the water lines were accidently dug up by a neighbor, the Drays, who apparently did not get along well with the Likens, sued to require removal of the Likens' water line.

The Drays lost. The trial court, affirmed by the court of appeals, held that since the water lines were in the same ditch, the Likens' water line was not a "burden" upon the Drays' land. The trial court thus retroactively reformed the deed from Mid-Ark to the

[67] 2013 Ark. App. 118.

Likens, so as to include the missing easement. The Drays, BFPs after BFPs, became burdened by an easement of which they had no actual or constructive notice.

It is easy to understand the social "correctness" of the result in this case. One can imagine that the Drays were being darn un-neighborly when they sought removal of a water line laid, in good faith, beside and in the same ditch with another line of which they had no right to complain. Still, it is the principle of the thing which needs protecting. Reformation of deeds, between the parties to those deeds, is one thing.[68] Ignoring the rights of BFPs, regardless what we think those rights are worth, is another. We do our business based upon record title. Who can we trust to make this distinction between a burden which is a "burden," and one which is not?

A far better result would have been to require the Likens to purchase an easement of necessity from the Drays. They could then have tried to collect that easement's cost from Mid-Ark, which apparently made the mistake in the first place. Of course, an easement of necessity should only be given in a case of true necessity. If the Likens can get water to their land another way, they should do so, perhaps putting any extra cost on Mid-Ark.

While we are complaining about reformation, let us look at *Mauldin v. Snowden*,[69] along with a later case between some of the same parties, *Longing Family Revocable Living Trust v. Snowden.*[70] In both of those cases the court of appeals affirmed circuit court decrees of "reformation" in favor of Snowden, not only against purchasers from the Snowdens, but also against persons who purchased from those purchasers.

The Snowdens owned no minerals when they conveyed to the Florys, without reservation, who later conveyed to the Mauldins, also without reservation. Likewise, the Snowdens owned no minerals when they conveyed to Tri.Con, without reservation, which later conveyed to the Longings, also without reservation. In each case, the Snowdens had once owned mineral interests which they conveyed to Cenark, a corporation whose stock they apparently owned. When the Snowdens reacquired those

[68] For a recent example, see *Lawrence v. Barns,* 2010 Ark. App. 231, 374 S.W.3d 224.
[69] 2011 Ark. App. 560, 386 S.W.3d 650.
[70] 2013 Ark. App. 81, ____ S.W.3d _____.

mineral interests from Cenark, both the Mauldins and the Longings claimed they had become the owners of those interests by operation of the Arkansas After-Acquired Title Statute.[71] The circuit court did not agree with that. In both cases, all deeds were judicially "reformed" to insert mineral reservations in favor of the Snowdens, who made the mistake in the first place.[72] In each case the trial court found, and the appeals court affirmed, that the Snowdens did not intend to sell those minerals which they later reconveyed to themselves. Likewise, the trial court found, and the appeals court affirmed that neither the Snowdens' immediate grantees, nor the second grantee plaintiffs, had expected to receive minerals. Probably we should feel empathy for the Snowdens for having accidentally given up mineral interests over a technicality. Still, that technicality comes from a perfectly good Arkansas statute which restates an ancient common law rule.

Last, I must mention the two cases, *Deltic Timber Corporation v. Newland*.[73] Those cases deal with a 1984 deed from Batson, the Newland's father, to Deltic, containing language [excepting] "all prior, valid reservations of record of oil, gas and/or conveyances of record of oil, gas and other minerals." In *Newland I,* the Arkansas Court of Appeals reversed the trial court's decision that such language effectively reserved a remainder interest owned, at the time, by Batson. Instead, the appeals court decided, *sua sponte*, that this commonly used phrase[74] was ambiguous. Thus the case was remanded for trial as to the parties' intent.

That trial came more than 25 years after the execution of the "ambiguous" deed. Unfortunately, most of those who could have been witnesses were dead, impaired or missing. Regardless, the result was a determination that the grantors had, indeed, meant to reserve their remainder interest.

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[71] A.C.A. § 18-12-501 (Repl. 2003).
[72] In *Longing*, the Mauldins did not even plead for reformation. No matter. They got it anyway, *sua sponte*.
[73] 2010 Ark. App. 276, 374 S.W.3d 261(2010) (*Newland I);* 2012 Ark. App. 271, ____ S.W.3d ____ (*Newland II).*
[74] The obvious purpose of the phrase is to protect a warranty deed's grantor from an inadvertent breach of warranty.

In its second appeal, *Newland II*, Deltic contended, citing additional authority, that the quoted phrase was not ambiguous. Deltic's arguments failed to persuade the court of appeals, which held that its prior determination of ambiguity, whether right or wrong, had become the law of the case and could not be reconsidered.

I am one of the attorneys who lost the appeals of *Newland I* and *Newland II*, as well as the trial in between them. Perhaps I am sounding like I have been eating rotten grapes. That is not my intent.

Here is the point. The phrase "all prior, valid reservations of record of oil, gas and/or conveyances of record of oil, gas and other minerals mineral" is not ambiguous. Calling it ambiguous simply calls into question the meaning of thousands of prior and future deeds which used, and will use, similar-to-identical exceptions.

I submit that what happened there is what happened in each of the other cases discussed in this section of this paper. The grantor or deed preparer made a mistake at the time of the conveyance, accomplishing something other than that which was intended. Then, to make things right between the parties, a court bent the rules to accomplish results.

*Newland I* and *Newland II* were not reformation cases. Had they been and had they reached the same result, their precedents would make a little more sense. Still, there is something a little shaky about reforming a twenty-five year old deed, is there not?

My point is simply that, while real people in real cases are important, the rules are important too. They should not be jeopardized in order to reach results, no matter how much we might wish for those results to happen.

## THE END IS NEAR

It may come as a disappointment that the subtitle above is unrelated to any known or imagined apocalypse. That would have been be a good guess, but incorrect. I refer, instead, to my hope for the timely adjournment of the current session of

Arkansas' most gun-totin-baby-birthin General Assembly, ever.[75] That particular rapture is not yet here, but do not give up hope. That tea-partying collection of elected citizens remains hard at its law-makin as the deadline for this article looms.

Take heart in this. The current Legislative obsession with guns and abortions has a side benefit. Aside from succeeding masterfully in making our once near-progressive state into a poster child of redneckary, this year's session has done little real harm, yet.[76]

We must stay wary. As Yogi taught: "it's not over, 'til it's over." Once the Legislature tackles the state's real problems, the usual array of bills, directed toward the oil and gas industry, could still come.[77] I will report further when I deliver this paper in a couple of weeks.

[75] Quite an accomplishment, you must agree.
[76] Unless you object to Arkansas taxpayers footing the bill for the unsuccessful defenses of clearly unconstitutional laws, including attorneys' fees for the ACLU's attorneys.
[77] I.e. mineral prescription, resurrecting void mineral tax forfeitures, etc.