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ENERGY IN THE LAW

Duhig: The Colorado Way

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Anybody who has examined mineral title for even a short period of time has probably had to ask themself and likely a colleague this often-dreaded question, "Is this a *Duhig* issue?" *Duhig* is a doctrine originally applied by a Texas court to a warranty deed whereby the grantor, then owner of all surface interest and an undivided one-half (1/2) mineral interest in a tract of land, purported to convey all the described tract subject to a reservation of a one-half (1/2) mineral interest.

The court was tasked with determining what if any interest the grantor reserved. In making its determination, the Texas court articulated what has become known as the *Duhig* doctrine or often just called *Duhig*. Essentially, *Duhig* states that where there is an outstanding mineral interest that is not accounted for in a deed, a grantor cannot purport to grant and reserve the same mineral interest, and if a grantor does not own a sufficient mineral interest to satisfy both the grant and the reservation, the grant must be satisfied first because the obligation incurred by the grant is superior to the reservation. In approaching the *Duhig* issue, the Texas court looked within the four corners of the document, and in doing so, the court recognized a conflict between the granting clause and the warranty to title associated therewith and the purported reservation of the grantor, and it resolved the conflict in favor of the grantee.

The Colorado courts have recently addressed a case which raises the classic *Duhig* question, in *Moeller v. Ferrari Energy*, 2020 COA 113. By a 1964 warranty deed Ferrari Energy's predecessor in interest conveyed to the Moellers' predecessor in interest a tract of land subject to the following reservation, "excepting and reserving to the Grantors herein an undivided 1/2 interest in and to all the oil, gas and minerals in, upon and under said land." Ten years prior to the execution of the warranty deed, a previous owner had reserved and retained an undivided one-half (1/2) mineral interest in and to the same lands. Following the execution of the 1964 warranty deed, both the Moellers and Ferrari or their predecessors in interest acted as though each owned a mineral interest in and to the concerned lands, including executing oil and gas leases, both of which were ultimately vested in PDC Energy, Inc. These competing claims led the Moellers, initially through PDC Energy, Inc., to file a quiet title action in the District Court of Weld County, Colorado.

In determining the ownership of the undivided one-half (1/2) mineral interest subject to the above quoted reservation, the district court examined the effect of the 1964 warranty deed. Like the *Duhig* court, the district court found the 1964 warranty deed to be unambiguous within the four corners of the instrument and, consequently, did not look to outside extrinsic evidence, including the previous mineral reservation. However, unlike the *Duhig* court, the district court determined through its review of the plain language of the instrument that the 1964 warranty deed reserved an undivided one-half (1/2) mineral interest to the grantors. Therefore, as result of the prior

reservation, the district court found the grantees received no mineral interest under the terms of the 1964 warranty deed.

The Moellers then appealed the district court's decision to the Colorado Court of Appeals, contending the district court erred in finding the 1964 warranty deed to be unambiguous and in quieting title to an undivided one-half (1/2) mineral interest in Ferrari Energy. The court of appeals then undertook a de novo review regarding the interpretation of the 1964 warranty deed.

In determining if the 1964 warranty deed was in fact unambiguous, following the holding in *Lazy Dog Ranch v. Telluray Ranch Corp*., 965 P.2d 1229, 1235-36 (Colo. 1998) and counter to the approach of the Texas court in *Duhig*, the court of appeals looked to various extrinsic evidence to determine if the 1964 warranty deed was ambiguous, stating "extrinsic evidence may be used to determine, as a threshold matter, whether the deed is ambiguous." Using this approach and focusing primarily on the reservation of an undivided one-half (1/2) mineral interest prior to the 1964 warranty deed, the court of appeals found the undivided one-half (1/2) mineral reservation included in the 1964 warranty deed to be subject to two different interpretations; it either reserved or conveyed the outstanding mineral interest. Consequently, the court of appeals found the 1964 warranty deed to be ambiguous, in contrast to the district court's determination. Of note is the fact that the court of appeals found the 1964 warranty deed to be ambiguous, not because it was so on its face, but because of the existence of a mineral reservation that occurred ten years prior, to which neither of the parties to the 1964 warranty deed were a party.

Next, because the court of appeals found the 1964 warranty deed to be ambiguous, in an approach differing from the *Duhig* court, the court of appeals once again looked to extrinsic evidence, this time in order to resolve the ambiguity. However, no further extrinsic evidence was available to show the intent of parties since both parties claiming an interest subsequently leased their claimed interest. Therefore, because its examination of extrinsic evidence failed to resolve the ambiguity created by the mineral reservation, the court of appeals relied on Colorado precedent and resolved the ambiguous reservation in the favor of the grantee. See *Clevenger v. Cont'l Oil Co*., 149 Colo. 417, 421, 369 P.2d 550, 552 (1962). Thus, the court of appeals overturned the district court's ruling and vested the Moellers with the undivided one-half (1/2) mineral interest not reserved prior to the 1964 warranty deed, leaving Ferrari Energy without any mineral interest in the concerned lands.

Though *Duhig* and the *Ferrari* case both analyzed the effect of a mineral reservation in a warranty deed under these circumstances, unlike the Texas court which relied on the existence of a warranty clause to reach its conclusion, the Colorado Court of Appeals did not discuss the warranty in its reasoning. It is therefore unclear whether the Colorado Court of Appeals would extend its interpretation to other forms of deeds, *i.e*. quitclaims and bargain and sale deeds.

While the Colorado Court of Appeals ultimately reached the same outcome as the Texas court in *Duhig*, the Colorado Court of Appeals used a completely different approach. Though the Colorado approach may appear to be more equitable, in that it attempts through the examination of extrinsic evidence to give effect to the intent of the parties, it also sets forth a less definitive doctrine which does little to clear up the issue when addressed by parties outside of the concerned document.

The doctrine put forth by the Colorado Court of Appeals emphasized the chain of title prior to the 1964 warranty deed. It looked to the mineral reservation from ten years prior to find

ambiguity in the 1964 warranty deed, and the parties to which were not parties to the ancient reservation. The *Ferrari* case has highlighted that while the four corners of a deed are important to determining intent, the court of appeals is willing to look to the chain of title leading up to a deed to assist in its interpretation.

For more information on the *Ferrari* case or the necessity of thorough title work, please contact Ryan McKee or Scott Petitmermet.