

UNIQUE TITLE ISSUES IN THE BARNETT SHALE

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- Title History of North Texas

Historically in Texas land titles come from four different sources; Spain, Mexico, the Republic of Texas and the State of Texas. Further most of the land titles in North Texas were obtained from the land grants in Peter's Colony.

- **SPANISH GRANTS**

- Spain first claimed land in Texas in 1519 along the Gulf Coast to the Rio Grande. Not finding great wealth, Texas was ignored until 1685 when La Salle claimed the land for France. To protect its claim, Spain attempted to populate the state. The first Spanish land grant was made in 1690 in East Texas. For the next 130 years Spain continued to issue land grants in large quantities to a small number of people in leagues (4,428.4 acres per league) with the wealthier people getting larger tracts. To encourage more settlers in Texas, in 1748, Spain allowed private agent's colonization grants to be sold to settlers. With the sale of the Louisiana Purchase territory to the United States, the Spanish government allowed more settlers private grants to prevent control by the United States. Until 1819, land grants were primarily awarded to Spanish subject. One of the first Americans to respond to the expanded colonization was Moses Austin. As compensation he was allowed four leagues of land for every 30 families he settled.

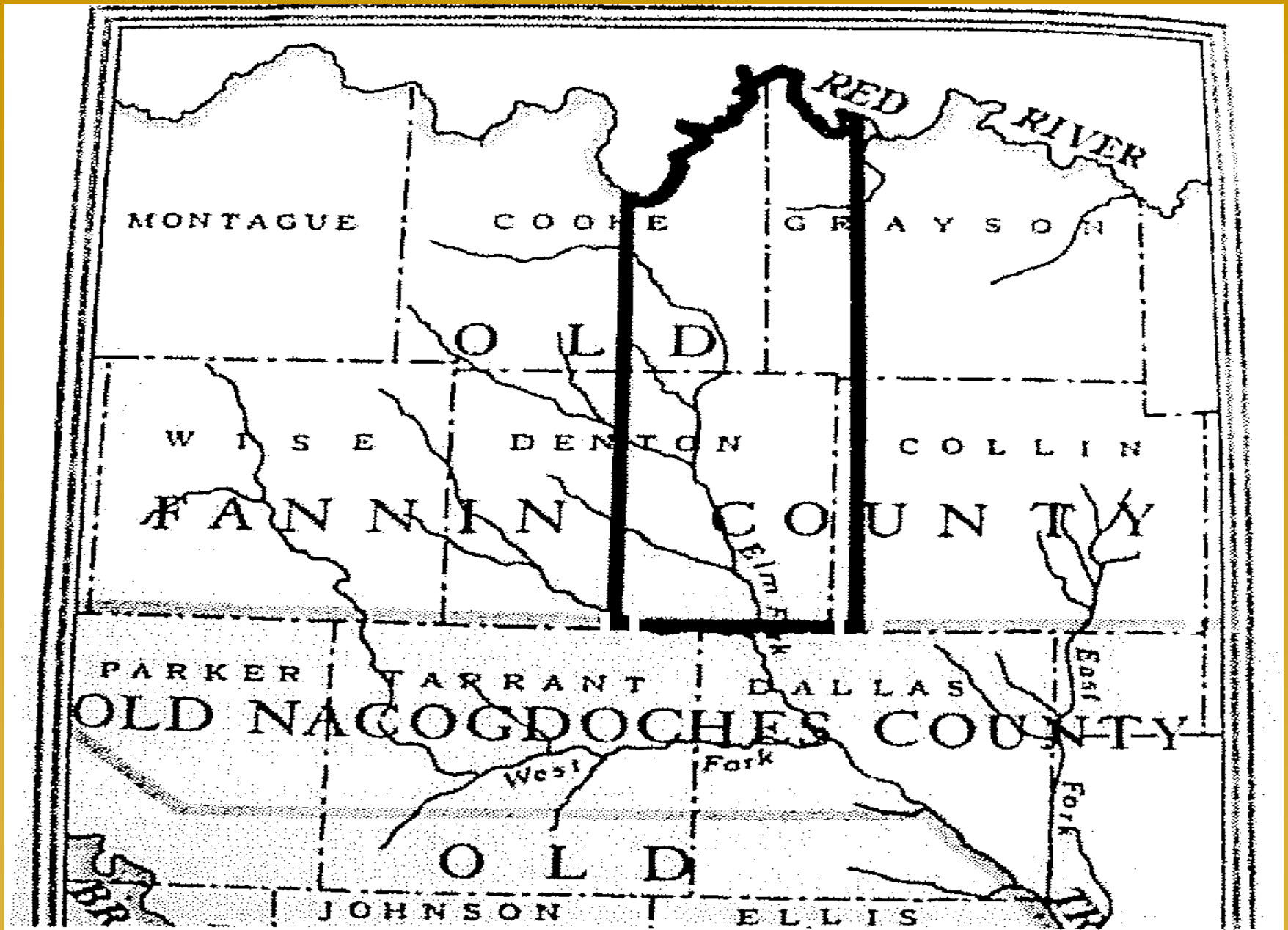
- **MEXICAN GRANTS (1821-1836)**

- In 1821 after Mexico became independent from Spain, Mexico continued the empresario system to recruit colonist. These agents brought about 50,000 settlers to Texas. After the death of his father, Moses Austin, Stephen F. Austin obtained the first contract from Mexico. The terms of this colonization was much more generous than that allowed by the Spanish. Initially each settler received one labor of land (177.1 acres) for farming and one league for grazing. Austin received 15 sitios (66,420 acres) for grazing and two labors for farming for every 200 families up to 600 families settled. As time went along, the size of the grants and compensation for the grants were reduced. Austin was the most successful of the empresarios. Initially he persuaded more than 1,100 families to come to Texas and received 22 sitios of land in payment. Later he settled 900 more families. There were several other empresarios that settled many parts of Texas. The Mexican land laws were very favorable to the settlers and the land hungry Americans flooded into Texas between 1821 and 1836. One big influence of Mexico was the Homestead Act which is somewhat followed today that prevented seizure of a home to secure payment of a debt.

- **THE REPUBLIC OF TEXAS (1836-1845)**

- Texas gained its independence, created a general land office to collect the land records to determine which land were covered by Spanish or Mexican titles and which land were vacant, and claims all the land down to the Rio Grande. When the republic government was formed, the treasury has only \$55.68 but thousands of acres in vacant land. Land was given to those that served in the military, defended against warring Indians, and to veterans that served revolution. These warrants and certificates granting this land initially were not transferable but later were. They were forwarded to the general land office where they were checked. If no conflicts were found, patents were issued to the owners. Later, the Republic passed headright acts to encourage additional settlers. These settlers could obtain from a league and labor down to 320 acres of land. Additional headrights programs were passed for other military service. In 1841, to encourage more immigration, the old empresario system was brought back. William. S. Peters and 19 associates were allowed to settle 600 colonists in North Texas. The first contract established boundaries of the colony from the Red River down through lands in portions of Cooke, Grayson, Denton and Collin Counties with each family to get 640 acres and single men to get 320 acres.

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- Due to insufficient unappropriated lands in this grant, a request for an extension of the boundaries was made. The second contract extended the boundaries approximately 40 miles south to include lands in portions of Tarrant, Dallas, Johnson and Ellis Counties.

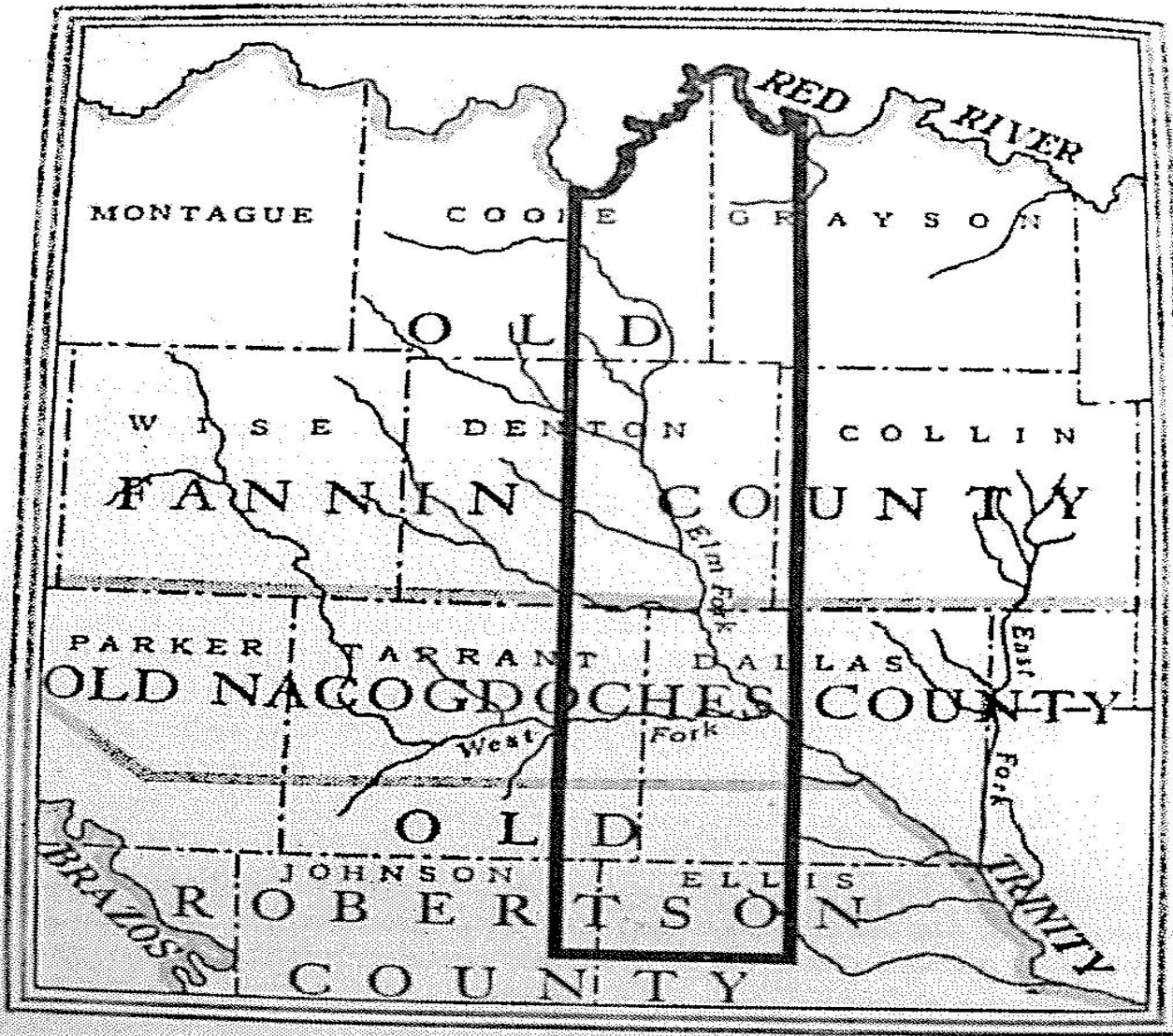
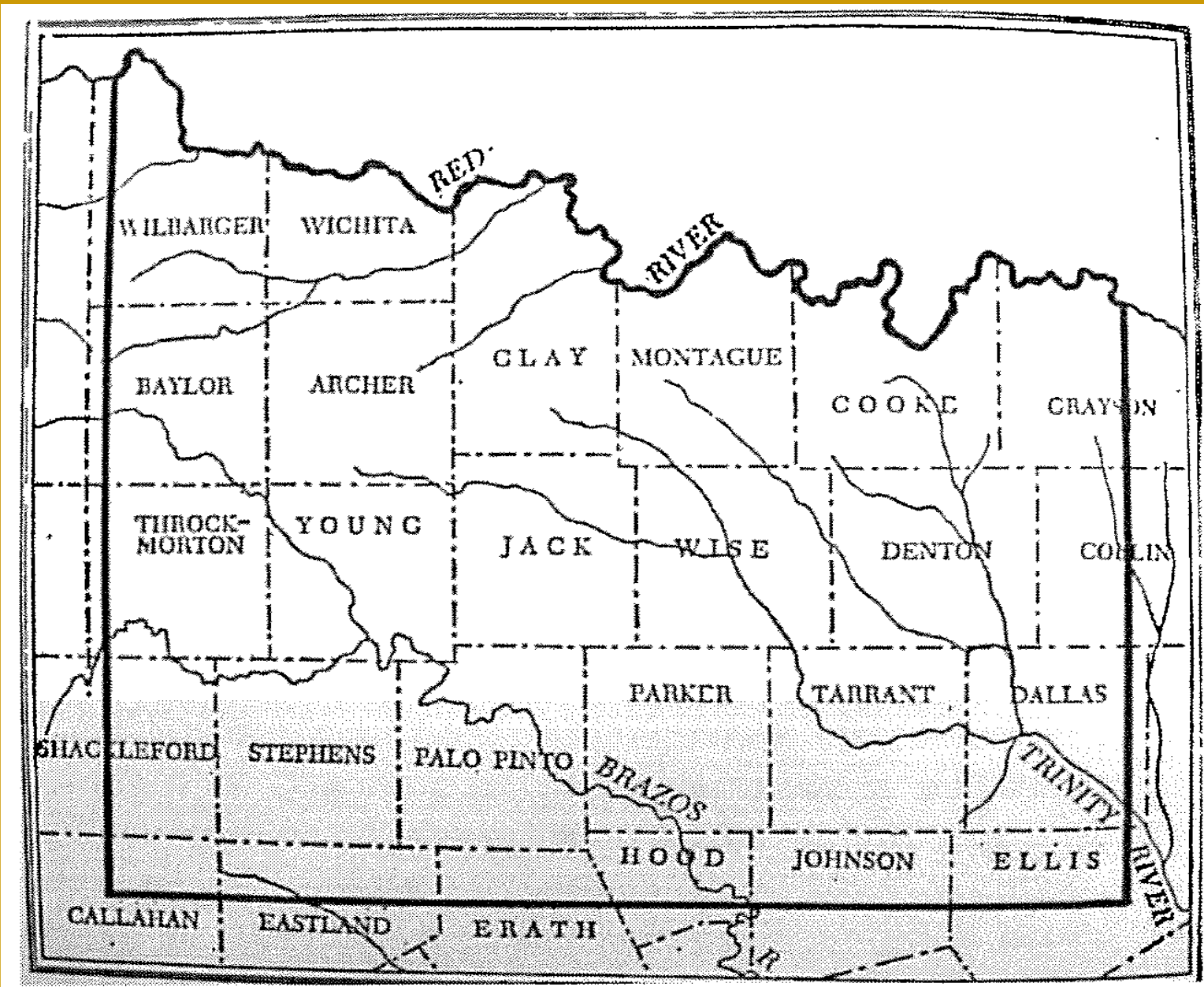


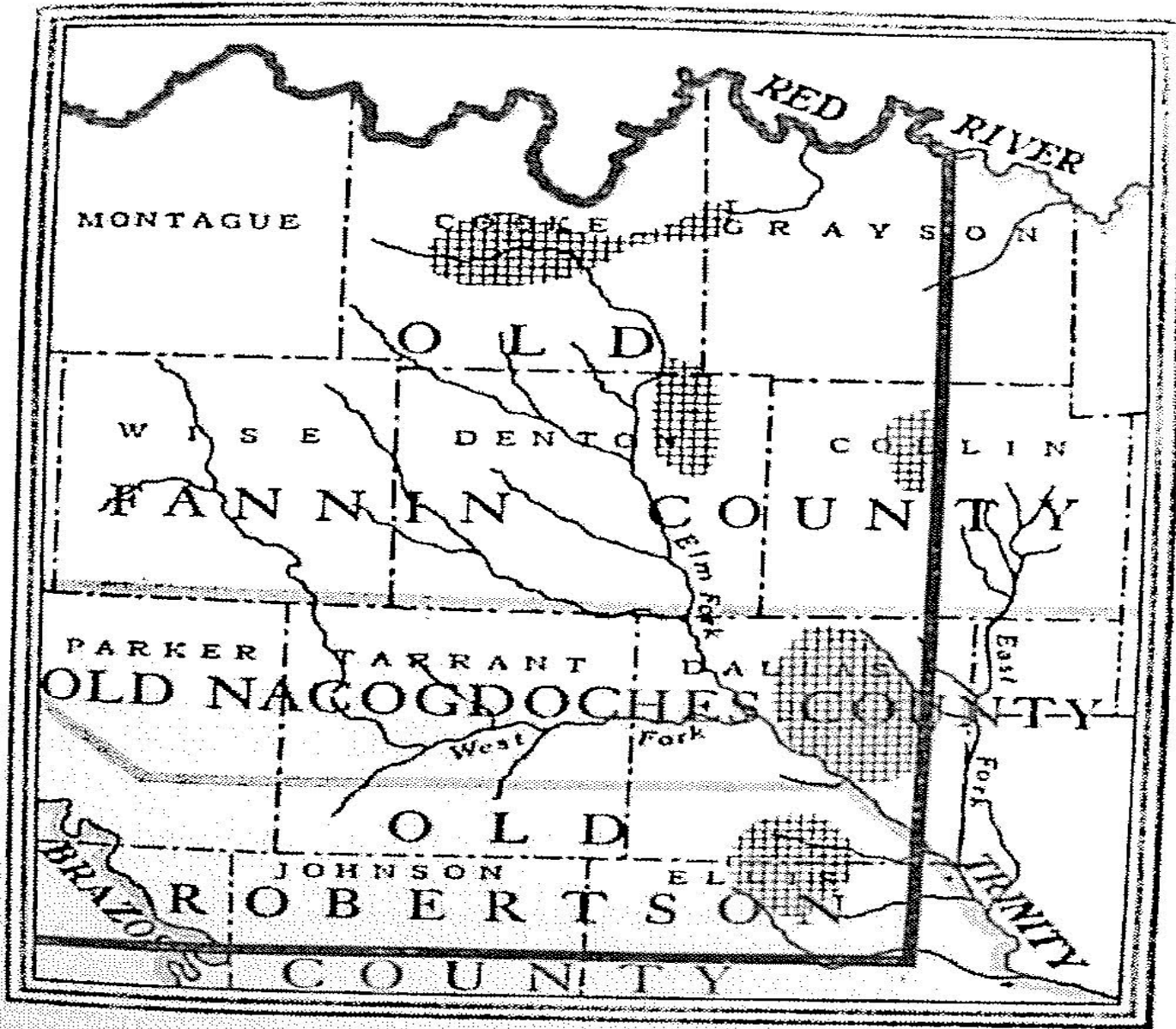
FIGURE 2

The Second Contract

- In 1842, the Republic extended the contract to the west with the western boundary being lands in portions of Wilbarger, Baylor, Throckmorton, Shackelford, and Callahan Counties.



- Further in early 1843, the colony was expanded to additional lands to the colony. The most settled areas were in Cooke, Denton, Collin, Dallas, and Ellis Counties.



- During this time, the counties referenced above as we know them did not exist. Most of these lands were then situated in Old Fannin, Nacogdoches, and Robertson Counties. However, many disputes erupted over title to the properties. Protests were held and demands were made that the legislature secure the settlers' claims. A compromise was reached in 1852 and the colonists were to have until the middle of 1852 to establish their claims. The colonists opposed the law and armed opponents showed up scheduled meetings to resolve the matter. A settlement was finally reached and the compromise law amended but it took nearly 10 subsequent legislative enactments over 20 years to bring finality to the land titles.

- **STATEHOOD (1845-Present)**

- When Texas became a state in 1845, it recognized all valid land titles previously issued by Spain, Mexico, and the Republic of Texas. The state also sold land to pay off debts. Further land grants continued to be made to settlers. Initially one could be granted 320 acres and if you lived on it and improved it, you could buy it for \$0.50 per acre. These pre-emption acts continued until 1898. Land was used for public improvements such as the construction of railroads, steamships and other vessels, industry, and ship channels and harbors. Former soldiers of the Texas Revolution and the Confederacy were rewarded with land. Land was allocated for the support of schools and was generally sold through competitive bidding. In 1898, the Texas Supreme Court declared there was no more vacant and unappropriated land. Lastly the capitol in Austin was build from the appropriation of approximately 3,000,000 acres of land located in the panhandle. This land eventually became the XIT Ranch. There were often many problems with the surveys of these lands. Many of the tracts were identified by field notes where the surveyor never visited the land. Other surveyors measured boundary distances by the revolving wagon wheel. Others determined distance by a “half day’s walk,” or “north three cigarettes on a donkey.” Surveys were inaccurate as a result of low pay, dishonesty, carelessness, and the treat of danger (Indian attacks). When the oil boom hit in the early 1900’s these inaccurate surveys led to may lawsuits and confusion.

<http://www.glo.state.tx.us/archives/history>

<http://www.tshaonline.org/handbook/online/articles>

- SELECTED TITLE ISSUES
- INTRODUCTION
- None of the title issues discussed are collectively unique. They have evolved as oil and gas law developed. The development of the Barnett Shale has created an economic boom for North Texas that has caused title issues come to the forefront concerning title to the minerals that underlie the urban areas. While there are more title issues that may affect property interests, I have chosen a few that are worthy of discussion. They are unique to mineral ownership and to operators concerning their ability to drill and operate in the close quarters of the urban areas.

- RESTRICTIVE COVENANTS AND DEED RESTRICTIONS
- These restrictions may limit an operator's use of the surface and subsurface for drilling an oil and gas well. These restrictions are normally of record and included in the deed conveying the property or in a separate instrument filed of record. These limitations will be enforceable if they are created prior to the severance of the minerals from the surface estate. *Dyegard Land Partnership v. Hoover*, 39 S.W.3d 300 (Tex. App.—Fort Worth 2001).

- NON-SURFACE USE

- An operator has the right to the reasonable use of the surface to conduct drilling operations subject only to limits imposed by the lease. Some of the problems can be avoided by the land owner if he enters into a surface use agreement. This agreement may provide for the non-use of the surface in drilling operations. A land owner should be aware that such agreement providing for surface damages will not require lessee to remediate subsurface contamination or damages. Unless the surface use provisions are contained in the lease, this agreement must be negotiated as a separate contract. *Humble Oil & Ref. Co. v. Williams*, 420 S.W.2d 133 (Tex. 1967); *Jones v. Getty Oil Co.*, 470 S.W.2d 618 (Tex. 1971) and *Fenner v. Samson Resources Co.*, Not Reported in S.W.3d, 2005 WL 2123043 (Tex. App.—Houston [1st Dist.] (mem.op.).

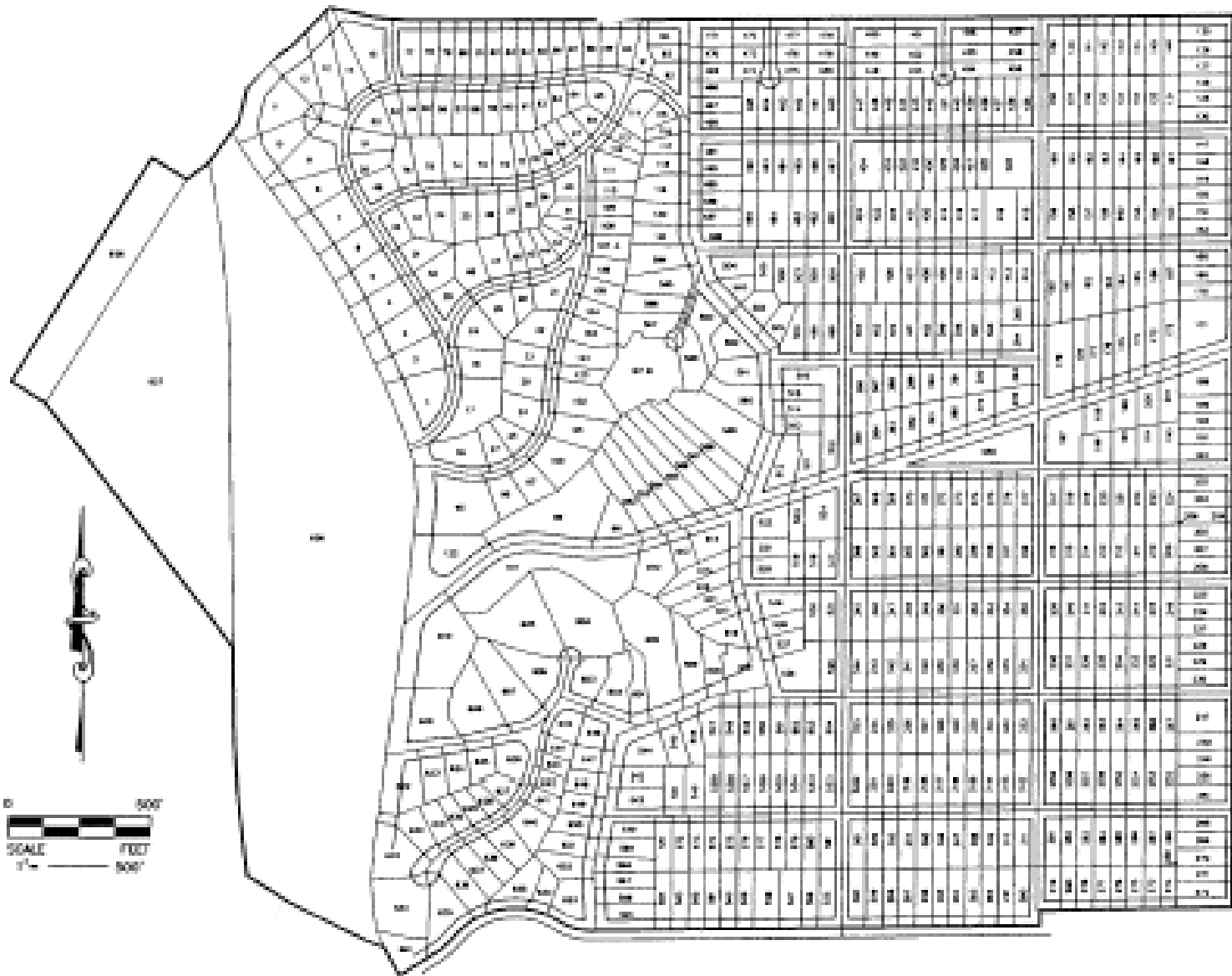
- DEEDS OF TRUST AND OTHER LIENS

- In most subdivisions, the properties are going to be subject to deeds of trusts securing notes financing each individual lot located within the subdivision. This deed of trust creates a lien on the property. Other liens may be created on the lots by home improvement loans, home equity loans, delinquent taxes, judgments, and other obligations. Under the chain-of-title rule, any operator is deemed to know all the facts of the liens included in this chain-of-title through which he acquires his oil and gas lease. For example, if a lot is pledged as collateral by a deed of trust securing a purchase money loan, and the owner subsequently leases the minerals under his lot, the lease will be subject to the deed of trust. If production is obtained under the oil and gas lease before the royalty can be paid, a subordination or a release of the deed of trust covering his property must be obtained. The same requirement applies to all other liens that may be filed on the property. If subordination or a release is not obtained, the operator may escrow and hold the royalty payments until such subordination or release has been obtained. Without a subordination, if the property is foreclosed, the lease may be terminated. *Williams v. Jennings*, 755 S.W.2d 874 (Tex. App. – Houston [14th Dist.] 1988); *Stowe v. Head*, 278 S.W.2d 120 (Tex. App.—Tyler 1987, no writ).

- STRIPS AND GORES

- Under Texas law, when a deed conveys land abutting a right-of-way, title to the center of the right-of-way also passes by the deed. *State v. Fuller*, 407 S.W.2d 215 (Tex. 1966); *Cox v. Campbell*, 135 Tex. 428, 143 S.W.2d 361 (1940); *Rio Bravo Oil Co. v. Weed*, 121 Tex. 427, 50 S.W.2d 1080 (1932); *Reagan v. Marathon Oil Company*, 50 S.W.3d 70 (Tex. App.—Waco 2001, no pet.). This general rule applies even if the description of the land terminates at the right-of-way, unless a contrary intention is expressed in plain and unequivocal terms. Under the strips-and-gores doctrine, it is presumed that a grantor has no intention of reserving a fee interest in a narrow, adjoining strip of land when such land ceases to be useful to the grantor after the conveyance. To overcome this presumption, the grantor must explicitly reserve in the deed with plain and specific language an interest in a narrow strip of land adjoining the conveyed land. *Cantley v. Gulf Production Co.*, 135 Tex. 339, 143 S.W.2d 912 (1940); *Cox v. Campbell*, 135 Tex. 428, 143 S.W.2d 361 (1940). This rule applies to city lots for they are adjoining streets and easements that were acquired by public dedication, easement or eminent domain. If the right-of-way is acquired by deed, this doctrine may not apply and the mineral interest underlying the interest may belong to the grantee.

Tarrant County, Texas



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- REFERENCES TO DOCUMENTS NOT FILED OF RECORD

- The chain-of-title doctrine may also affect instruments referenced in recorded documents. In the *Westland Oil* case, several sections of land were leased to the oil company. This oil company entered into a farmout agreement with a second company who in turn transferred these rights to a third company. The second company subsequently farmed out these same rights along with some other rights to a fourth company but referenced an operating agreement between the second and third company that was not filed of record. The third company drilled and earned assignments of oil and gas interests under its farmout. The fourth company brought suit against the third company claiming it did not have notice of the first farmout agreement since it was not filed of record. The court said that due to the operating agreement being referenced in the second farmout agreement, the fourth company was charged with knowledge of the first farmout agreement and took subject to it. *Westland Oil Development Corp. v. Gulf Oil Corp.*, 637 S.W. 2d 903 (Tex. 1982). These types of transactions usually affect the oil and gas operator more often than the land or mineral owners. If a landowner or mineral owner is examining title to the minerals underlying a tract of land and if extrinsic instruments are referenced in the public record but not recorded, a thorough search should be made to locate and examine the referenced instruments.

- RESERVED MINERALS
- While one may acquire a tract of land insured by a title policy, he may not know if he owns the minerals unless he conducts a title search. If the minerals are not present, they may have been reserved in a prior deed or conveyed to a third party. If one does not own the minerals, he is not entitled to royalties under a lease but may have his surface used for drilling purposes. *Humphreys-Mexia Co. v. Gammon*, 113 Tex. 247, 254 S.W. 296 (1923).

- POOLING AND UNITIZATION
- Most leases allow interests from one or more leases to be pooled into a drilling unit or unitized to cover an entire reservoir. This action in most cases is voluntary on the part of the operator. The pooling of interests may cause ones royalty interest to be only a portion of the royalty expected if not all of the lease is pooled. Smith and Weaver, *Texas Law of Oil and Gas* § 1.1.D (LexisNexis 2007).

- **CONCLUSION**

- In the Barnett Shale, urban area tracts are being drilled that have never been subject to oil and gas development. One may own the surface but not own the underlying minerals or one may own all the minerals under a lease but not receive all the royalty he feels is due. If one owns property, his surface acreage may be determined by title insurance but to ascertain ownership of his mineral interest, a title examination must be conducted.

- However, just remember, if you have a title problem under an oil and gas lease, the sure way to cure it, is to drill a dry hole.

Attributable to every attorney that has rendered a title opinion