John C. Stennis Institute of Government and Community Development

Southern Risk Management Education Center

School Boards & 16th Section Land:

Emphasis on mineral leases

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School Boards have extremely important general powers and duties that relate directly to the education of Mississippi's children, and most school board members seek election or appointment in order to help shape that education. But the powers of the boards are much broader, a fact of which the newly elected or appointed board member may be unaware. In this short document, we are going to examine the trustee's responsibility with regard to 16th section land, and in specific, mineral leases on 16th section lands. The *Mississippi Code Annotated* specifically discusses the meaning of "oil, gas and minerals" in the context of a 16th section lease at § 29-3-33 (j) (1972) (as amended).

The immense powers of school boards in Mississippi is set forth in *Mississippi Code Annotated* § 37-7-301 (1972) (as amended). In addition to powers and duties that relate directly to education and administration, school districts have the power, authority and duty to lease lands. Section 37-7-305 of the Code speaks specifically to leasing of lands for minerals. The section says, in pertinent part:

> The school board of any school district is hereby authorized and empowered, in its discretion, to lease lands owned by the school district, or any land the title to which is in the school board of the district in their trust capacity, for oil, gas and mineral exploration and development upon such terms and conditions and for such considerations as the school board, in its discretion, shall deem proper and advisable. However, no oil, gas or mineral lease shall be for a primary term of more than ten (10) years and said lease or leases shall provide for annual rentals of not less than One Dollar ($1.00) per acre and shall provide for royalties of not less than three-sixteenths (3/16ths) of all oil, gas and other minerals produced, including sulphur….Said leases shall specifically provide that no damage shall be permitted to existing school buildings or facilities thereto.

There are three (3) critical elements in this section:

- the notation of "in their trust capacity" in speaking of the board members;
- the limitation on the term and proceeds in the lease; and
- the specific language to protect school buildings and facilities from damage as a result of oil, gas and mineral exploration or capture.

TRUST CAPACITY. Probably the most important of these elements is the "trust capacity". Although everything that a board member does associated with his/her work on the board is done in a "trust capacity" this issue is often never discussed in depth in a school board meeting, and it should be. Someone who stands in a position of trust is someone who is obligated to take as much, if not more, care in the execution of the duties associated therewith than he/she does in caring for him/herself or his/her family. The duty of care of a trustee and the level of a trustee's responsibility has been of the highest order since well before the time of King Arthur (5-6 Century CE). British common law has long established that a trustee's duties to the trust beneficiaries are one of the law's "highest duties." In fact, a trustee is burdened with specific obligations that should make anyone thoughtful as he/she takes on such a role in his/her community.

This is because, among other things, 16th section lands, or lands granted in lieu thereof, constitute property held in trust for the benefit of the public schools and must be treated as such. *See, Mississippi Code Annotated* § 29-3-1 (1972) (as amended). The statute goes on to require a duty of the board members to manage the school trust lands and all funds arising from those lands as trust property.

The common law recognizes nine (9) duties inherent in a trust relationship that are thrust upon the trustee. These are:

1. The duty to administer the trust in accordance with the terms for the duration of the

trusteeship. A trustee is called upon to exercise the obligations *of loyalty, good faith, prudence and impartiality*.

2. The duty of loyalty is the obligation owed by the trustee that binds the trustee to act in the best interests of the beneficiary while refraining from placing their own interests above those of the beneficiary. *The duty of loyalty has long been recognized in the common law as the most fundamental duty owed by the trustee*. The term "loyalty" need not be stated; it is inherent in the relationship between the trustee and the entity that obtains benefit.

3. The trustee *should not delegate*. While he/she may employ agents, attorneys, and consultants, he/she has an affirmative duty to perform the acts that he/she can reasonably be required to personally perform; that is why he/she was elected/appointed.

4. The trustee has the *duty to keep and render accounts and to provide necessary transactional details*. School trustees do not usually consider this duty as their own. In most districts there is a clerk who takes care of claims dockets and payment of bills, etc. But it is the trustees, as a group, who enter into contracts and approve monthly claims dockets. They are fundamentally responsible to ensure that the accounts are being kept in an appropriate manner.

5. One of the reasons that the trustee has the duty to keep accounts is because trust *beneficiaries (e.g., the residents of the district) have the right to consider the trustee's actions*, including material facts, accountings and transactions.

6. A trustee has *the duty to exercise reasonable care and skill* in the execution of his/her duties and responsibilities, as he/she is a fiduciary.

7. A trustee has a duty to *take control of trust property and ensure proper designation and title* of trust property to secure the assets of the district.

8. A trustee has the *duty of impartiality*. This duty extends to the benefits and protection of each beneficiary. Trustees often focus on current beneficiaries (e.g., the residents of the school district and their enrolled children), but the trustees should also consider "successor beneficiaries" (e.g., the children of the next generation) and not behave impartially in favor of the current beneficiaries to the detriment of future beneficiaries.

9. A trustee *has duties to his/her co-trustees*. Each trustee has an obligation to participate in the trust administration and to exercise reasonable care to prevent his/her co-trustees from committing a breach. Likewise, when it appears to one trustee that his/her fellow trustee(s) has committed a breach of fiduciary duty, the trustee who uncovers the breach has a duty to co-trustees as well as trust beneficiaries to require the errant trustee to redress the breach.

LIMITATION ON TERM AND PROCEEDS. As a practical matter, the state legislature has placed limitations on the duration and terms of a lease. These limitations must be complied with. A departure from the legislative requirements is a breach of statutory duty. Recall that the statute provides that "…no oil, gas or mineral lease shall be for a primary term of more than ten (10) years and said lease or leases shall provide for annual rentals of not less than One Dollar ($1.00) per acre and shall provide for royalties of not less than three-sixteenths (3/16ths) of all oil, gas and other minerals produced, including sulphur." These are the minimum and statutory obligations of the trustee in entering into a mineral lease on 16th section land. This section was last amended effective July 1, 1987.

PROTECTION OF PROPERTY. Finally, the trustee must protect trust (district) assets. In addition, the statute requires that the district place in any oil, gas or mineral lease "…specific language to protect school buildings and facilities from damage as a result of oil, gas and mineral lease." Prudence dictates that stronger language may be considered, but the legislature establishes this as a minimum, the breach of which is, likewise, a breach of duty.

The legislature has defined classifications of land which may be leased by school trustees. These classifications are:

- forest land

- agricultural land
- industrial land
- commercial land
- residential land
- farm residential land
- recreational land
- catfish farming land
- other land (meaning any land not suitable for the other described purposes.

See, Mississippi Code Annotated § 29-3-33 (1972) (as amended). In this code section, the legislature has defined various issues of "oil, gas and minerals" relative to 16th section land. The section says, in pertinent part:

> (j) "Oil, gas and minerals" shall mean the following: (i) oil, gas, carbon dioxide and other gaseous substances; (ii) metals, compounds of metals, or metal-bearing ores; (iii) coal, including anthracite, bituminous, subbituminous, lignite and their constituent components and products and minerals intermingled or associated therewith; and (iv) sulphur, sand, gravel, fill dirt and clay, in, on and under the lands classified above. Such oil, gas and minerals shall be a classification of land separate and distinct from the classifications….

With respect to the oil, gas and minerals found in, on or under the lands classified for lease, the legislature gives specific direction for the school boards. *See, Mississippi Code Annotated* § 29-3-99 (1972) (as amended). This section authorizes a school board to demise and lease 16th section lands or in lieu lands, for exploration, mining, production and development by any method of oil, gas and minerals. The section mandates that the leasing be done by competitive bids only, made upon at least three (3) weeks public notice given in a newspaper of general circulation. It also requires the public notice to give an accurate legal description of the lands to be leased. This section was last amended and effective from March 16, 1993, and is more specific in its directions as to oil, gas and mineral leases than *Mississippi Code Annotated* § 29-3-1 (1972). Section 29-3-99 is set forth here *en toto*:

TITLE 29. PUBLIC LANDS, BUILDINGS AND PROPERTY
CHAPTER 3. SIXTEENTH SECTION AND LIEU LANDS IN GENERAL

Miss. Code Ann. § 29-3-99 (2014)

§ 29-3-99. Leases for oil, gas and mineral exploration, mining, production and development

> The board of education is hereby authorized and empowered, in its discretion, to let, demise and lease sixteenth section lands, included in the Choctaw Purchase, or the lands held in lieu of same whether located therein or elsewhere, reserved for the support of township schools, for exploration, mining, production and development by any method of oil, gas, and minerals, including (a) oil, gas, carbon dioxide and

other gaseous substances, (b) metals, compounds of metals, or metal-bearing ores, (c) coal, including anthracite, bituminous, subbituminous, lignite and their constituent components and products and minerals intermingled or associated therewith, and (d) sulphur, salt, sand, gravel, fill dirt and clay, upon such terms and conditions and for such consideration as the board of education, in its discretion, shall deem proper and advisable. Such leasing shall, except as hereinafter provided, be done by competitive bids only, made upon at least three (3) weeks public notice given by advertisement in a newspaper published in the county wherein such lands are situated, or if no newspaper be published in said county then in a newspaper having general circulation therein. Such advertisement shall give an accurate legal description of the lands to be leased, inviting sealed proposals thereon to be filed with the superintendent of education. Before bids are requested, the board shall prescribe the form of the lease and shall prescribe the royalty to be retained by the lessor, the annual rental to be paid by the lessee during the primary term of the lease, and shall have as subject to bid only the bonus to be paid by lessee, and, for leases of coal, the bonus to be paid by lessee for any renewal term as hereinafter provided. The lease form and the terms so prescribed shall be on file and available for inspection in the office of the superintendent from and after the public notice by advertisement and until finally accepted by the board. The board of education shall award the lease to the highest bidder in the manner provided by law. Said school lands shall not be leased for oil, gas, and minerals, including metals, compounds of metals, or metal-bearing ores, coal and clay, exploration, mining, production, and development for a bonus of less than One Dollar ($ 1.00) per acre and a renewal rental or renewal bonus of less than One Dollar ($ 1.00) per acre per annum during the primary term. Such lands shall not be leased for oil, gas, and other minerals for a primary term of more than five (5) years and so long thereafter as oil, gas or other minerals are being produced and mined from said lands, or so long as the lease is being maintained by other lease provisions, except that a lease shall in no event extend longer than permitted by Section 211 of the Mississippi Constitution. Such lands shall not be leased for coal for a primary term of more than twenty (20) years and so long thereafter as coal is being mined and sold or utilized by lessee from such lands or from adjoining lands within a mine plan which includes such lands or so long as mining operations are being prosecuted on such lands on a continuous basis; provided, however, that any lease of coal may provide for one (1) renewal term of not more than twenty (20) years from and after

expiration of the initial term upon payment by lessee of a renewal bonus of not less than One Dollar ($ 1.00) per acre. Any mine plan referred to in this paragraph shall not contain more than five thousand (5,000) acres. The royalties to be paid shall not be less than (a) on oil, one-eighth (1/8) of that produced and saved from said lands; (b) on gas, including casinghead gas or other gaseous substances produced from said land and sold or used off the premises or in the manufacture of gasoline or other products therefrom, the market value at the well of one-eighth (1/8) of the amount realized from such sale; (c) on coal mined on such land and sold or utilized by lessee, one-twentieth (1/20) of the market value at the mine of each ton of two thousand (2,000) pounds; (d) on all other minerals produced, mined and marketed, one-sixteenth (1/16) either in kind or value at the well or mine at lessor's election, except that on sulphur mined and marketed, the royalty shall be not less than Fifty Cents (50 cent(s)) per long ton, except, further, that on salt the royalty shall be not less than Five Cents (5 cent(s)) per ton mined. Lessee shall have free use of oil, gas, coal, and water from said land, except water from lessor's wells, unless lessor shall agree in writing to the use of water from lessor's wells, for all operations hereunder, and the royalty on oil, gas, and coal shall be computed after deducting any so used. In leasing said lands for the mining and removal of clay, sand, gravel and fill dirt, the bid shall be by the cubic yard truck measure and to the highest and best bidder, provided that these materials shall not be sold therefrom for less than the regular market price thereof, such price to include the value of the royalty provided for herein. The board of education shall not lease any sixteenth section land that was sold and conveyed in fee simple forever by a board of supervisors prior to 1890.

It is further specifically provided that such leases shall not be let at a special meeting of the board of education.

Leases for metals, coals, sand, gravel, fill dirt or clay may be executed covering land upon which leases are outstanding for the exploration, mining, and development of oil, gas, and other minerals, provided proper safeguards are incorporated in the lease for the protection of the other leaseholders. All such leases shall contain suitable provisions for adequate compensation to the surface lessee, if any, for any damage done to the leasehold estate in such lands and for the use of a substantial portion of the surface thereof for such mining and/or developing or processing purposes, and for rights of ingress and egress, and all such leases shall further contain suitable

provisions for adequate compensation to the board of education for any permanent damage done to the surface of the land or any timber thereon. Any future lease of said land after expiration of the present lease thereon will be subject to the rights of any lessee under provisions hereof.

If the lessor commits any error in the leasing procedure which renders the lease void or voidable, the lessee shall be entitled to recover the consideration paid to secure the lease.

No clay shall be leased nor removed within the boundary of any incorporated municipality as such boundary existed on January 1, 1964, nor within one hundred fifty (150) feet of any dwelling house which is either occupied or has been vacant less than ninety (90) days, without the written consent of the leaseholder of the surface from which such clay is to be leased or removed, regardless of classification of such lands.

HISTORY: SOURCES: Codes, 1930, § 6762; 1942, § 6600; Laws, 1926, ch. 318; Laws, 1930, ch. 278; Laws, 1942, ch. 150; Laws, 1962, ch. 363; Laws, 1962, 2d Ex Sess, ch. 19; Laws, 1964, ch. 406; Laws, 1978, ch. 525, § 39; Laws, 1981, ch. 397, § 1; Laws, 1992, ch. 486 § 7; reenacted, Laws, 1993, ch. 378, § 1, eff from and after passage (approved March 16, 1993).

Mississippi school districts are moving forward on mineral leases on 16th section lands. For example, the Amite County school board has already executed 18 leases on 16th section lands totaling $6.5 million. Three more tracts of land were up for bid in the September, 2014, regular meeting. The Amite County school board voted 4-0 Thursday to reject these oil and gas bids based on a recommendation of the Mississippi Secretary of State's office, which said the proposed oil royalties should be 25 percent instead of 20 percent. The Secretary of State manages oil leases and approval of all 16th Section land issues to ensure school districts receive fair market value for rental agreements, and that lease terms are in compliance with the law. (Amite County is in the Tuscaloosa Marine Shale shelf.)

Quick 16th Section Facts

Title to 16th section land is vested in the State of Mississippi, in trust, for the support of public education. As trust lands, the legal principles regarding the management of trust apply. The law imposes on those responsible for the management of trusts the highest care and attention.

The Mississippi legislature has placed jurisdiction and control over the leasing and day to day management of the land in the hands of the local school board.

The Secretary of State exercises general supervision of the local school districts' management of 16th section lands. Local districts must file copies of all leases and reports on income production and management in the Secretary of State's office. The Secretary monitors school district activity to ensure compliance with Mississippi law.

Rents for leases, including mineral exploration and mining rights, are set by competitive bid in the usual way as provided by statute. Agricultural leases, hunting and fishing leases are also set by competitive bid. Other lease classifications are set by a fair market rental value, based on appraisal of the land.

County Boards of Supervisors are required to approve the amounts of rent based on appraisal, but not the rental amounts in the leases in which rent is determined by competitive bid.

Sixteenth section land is subject to property taxes when it is leased, with the lessee being responsible for paying the property taxes.

Timber on 16th section land is reserved to the school district. The lessee is limited in the uses of timber located on the land. The lessee can cut and use timber for fuel and necessary repairs and improvements on the leased premises after obtaining prior written permission from the Mississippi Forestry Commission. A lessee cannot sell firewood, allow others to have a lease to cut firewood, use timber to maintain a leaseholder's home, barns, outbuildings or other lessee-owned improvements.

Sixteenth section land cannot be sold or swapped for other lands, except that it can be sold for industrial development. In that event, proceeds of the sale must go into the purchase of replacement land of like acreage and value.

Only the individual who holds a valid lease of hunting and fishing rights may hunt on 16th section land; hunting on 16th section forest land is not available to the general public. If the school district has not leased hunting and fishing rights on forest land, the school district is legally obligated to post the land to prevent hunting and fishing.

Notes on the Chickasaw Cession

The treaty with the Chickasaw Indian Nation which ceded land to the US government failed to specifically reserve 16th section land to educational purposes, and when the lands were later sold by the government, to provision for school trust lands was made.

The history of the Chickasaw Cession runs from 1832 to the present. A treaty of cession was made and entered into by General John Coffee, who was duly authorized by the President of the United States, and the whole Chickasaw Nation, in General Council assembled at the Council House, on October 20, 1832. The results of this treaty ceded the lands north of a line drawn from the southwest corner of Tunica County to the northwest corner of Lowndes County, embracing in whole or in part 24 counties Terms of this treaty specified that lands should be surveyed and sold at an agreed upon minimum price, proceeds from which were to go to the Chickasaw Indian Tribe. This treaty is known as the Pontotoc Creek Treaty and was ratified on March 1, 1833, after which the immediate survey was authorized and land sales begun.

As news spread that cheap land was available, it appears that buyers came and land sales were rapid, and it also appears that these rapid transactions contributed to the neglecting of 16th section reservation for the benefit of township schools. This mistake was noted and the United States Government, in an effort to correct this error, issued lands in lieu of those sold 16th sections in various parts of the State, most of which being given from lands the government owned in the Delta counties.

The total amount of land ceded in the Chickasaw Purchase was 6,283,804 acres. The 36th part of this amount was 174,555 acres, being the amount of land given in lieu of those 16th section sales. A review of the original survey approved February 8, 1838, reestablished the north boundary approximately three miles south of the Tennessee line and reduced the amount of acres to 6,071,169.2, but apparently the amount of lieu land remained constant. The Mississippi Legislature in 1848 authorized a 99 year lease "renewable forever" at a price not less than $6 per acre, the proceeds to be a charge upon the State to be held in trust. The total sale yielded approximately $1,047,330.

The 1856 legislature authorized the use of these funds at eight percent interest to be paid to the counties in the Chickasaw Cession on a per acre basis. Loans were made to various railroad companies at an interest of eight percent. A legislative act in 1863 authorized the railroads to pay their indebtedness in gold, silver, or treasury notes of the State into the State Treasury to be used to defray ordinary state expenses. In so doing, the state bound itself to pay the interest to the various counties in the Chickasaw Cession. The railroad companies eventually defaulted in payment or made settlements with worthless paper resulting in almost a total loss. Since this time, the State Legislature has appropriated monies representing the amount of interest lost due to these investment failures; however, the amount of interest has been reduced to six percent since enactment of the 1890 Mississippi Constitution, Section 212.

The amount of this Chickasaw Cession school money appropriated by the legislature annually is $62,191. (See Chapter 87 of the 1984 Laws.) This amount is disbursed in equal payments on May 1 and November 1. The above amount represents approximately 36 cents per acre per year paid to the counties in lieu of possible returns that could be realized if the 16th sections in the Chickasaw District were still available for the utilization of township schools.

The Legislature annually appropriates money in an effort to resolve the disparity between counties which have 16th section lands and the Chickasaw Cession counties which have no 16th section lands. Because of this disparity, in 1989 the 5th Circuit Court of Appeals established a formula for legislative appropriation which is disbursed to Chickasaw Cession school districts in July of each year. (From the Mississippi Department of Education website)

Mini-glossary of Oil, Gas and Mineral Exploration Terms

PRIMARY TERM: The number of years the mineral exploration and production company has to begin drilling a well and keep the lease in effect.

SECONDARY TERM: The secondary term of the lease begins when drilling begins and continues (generally) “so long as oil and gas are produced in paying quantities”, or “so long as operations are conducted” or “so long as a well is capable of production.”

GRANTING CLAUSE: This clause in the lease describes the extent of property rights granted to the company. For example, this clause will specify the rights for activities to explore and evaluate resources, produce, remove and sell resources, and construct other facilities and structures necessary for production (this can include facilities and structures on the surface or in the subsurface). The granting clause usually specifies the natural resource(s) that the company is permitted to remove and sell.

ASSIGNMENT CLAUSE: An assignment clause permits the company to sell or transfer its lease and rights under it to a third party.

LAND USE RESTRICTIONS: A land use restriction restricts the landowner’s use of the leased area for other purposes (e.g., hunting).

CHOICE OF LAW (OR VENUE): A choice of law clause or restriction in a lease requires that any lawsuit between the lessor and lessee be heard in a particular state, usually the state that the lessee chooses. For example, if the company is from Texas, the clause may require that any litigation be filed in the state of Texas and adjudicated under Texas law, even if the lease is on Mississippi soil and the other parties to the lease are residents of Mississippi.

TITLE: Title is technically defined as a bundle of rights which constitute ownership in property. The word “title” is also used to designate the means by which a property ownership may evidence his title or ownership (the acts, instruments or records which prove ownership, e.g., a deed).

STAND UP and SIT DOWN TITLE EXAMINATIONS: STAND UP examinations are title examinations that are obtained from direct examinations of the county records. SIT DOWN examinations are title examinations that are obtained from an examination of abstracts.

TITLE OPINION: A title opinion reveals an attorney’s conclusions concerning the ownership of a tract of land and its underlying minerals. They generally express who owns the property (surface) and underlying minerals, and contains reservations, qualifications and exceptions. Faulty title opinions can expose a title attorney to malpractice liability for material errors and omissions. Most attorneys will have malpractice insurance which will cover any errors.

The LANDMAN, ABSTRACTOR and the TITLE ATTORNEY: The landman will generally conduct a STAND UP examination by searching the indices in the land record books in the Chancery Clerk’s office, and run a chain of title. His search is not extensive (and he is often not an attorney). The landman will also often perform a SIT DOWN examination as well, from an abstract which has already been developed. Due to his expertise, the landman can often “cure” title defects, investigate “breaks” in the chain of title, and develop other facts from which some cures can be made that might require judicial intervention. The title attorney will examine the instruments which are located in the land records and prepare a title opinion which sets forth his opinion of the owners of the surface and minerals. This opinion will note the issues and irregularities set forth above. The abstractor searches records and files pertaining to a specific

property in order to find its *history.* This is generally referred to as a "chain". Abstractors will generally chain a title back at least 10 years, but more often 31 years. In abstracting for oil companies, the abstractor will usually go back to the sovereign (when the title was obtained from the state).

MARKETABLE TITLE: A marketable title is a title that is free from reasonable doubt, such that a prudent person, with knowledge of all salient facts and circumstances and their legal significance, would be willing to accept it. Title is generally NOT considered marketable if:

1. A reasonable chance exists that a 3rd party could challenge the validity of the title against the record owner;

2. Parol evidence (extraneous evidence such as oral testimony that is not included in a relevant written document) is necessary to remove doubt as to the validity and sufficiency of the owner's title;

3. The title rests on a presumption of fact that would probably become a fact issue to be decided by a jury in the event of a lawsuit;

4. The record discloses outstanding interests in the property that could reasonably subject the property owner to litigation or compel the owner to result to parol evidence to defend his title against outstanding claims; and/or

5. The property is unreasonably encumbered.

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