# ORAL ARGUMENT – 10/29/03
# 02-0455
# MOORE V GREER

DAVIS: The issue before the court in this case is the interpretation of a deed, a royalty conveyance. It is a question of law for the court.

The petitioner Moore purchased the royalty interest from a company called Steger Oil Co., who purchased from Greer, the respondent. In other words, the transaction at issue was not between Moore on the one hand and Steger on the other.

There is no dispute in the record that Moore had no notice whatsoever that Greer was claiming to own any interest in the property conveyed.

There are two lines of cases that have been followed in the state for 100 years in conveyancing. And they are different cases and they involved different grants of interest. The one line of cases is what the Texas Oil & Gas Ass'n in its amicus brief called the "adjacent acreage case." In the adjacent acreage cases a specifically described tract is granted, and then words similar to the effect "and everything contiguous or adjacent thereto that I own."

In the geographic grant line of cases that have been recognized for 100 years, the Holloway's line of cases, this line has two elements. It says my interest in the State of Texas, or my interest in the county, or my interest in a town, or my interest in a survey. It has no adjacent or contiguous language in it.

In this case we have a geographic grant. And I filed with the court this morning the specific language. But to summarize the language of the grant at issue it conveys the Six Frels gas unit, and then in addition to it conveys Greer's interest in Wharton county. The royalty and overriding royalty interest that she owned on a countywide basis.

The confusion from the CA and the thing that has gotten all of the title lawyers and the title companies sweating, is that the CA took the adjacent acreage case and decided a geographic grant deed on the precedent of an adjacent acreage case, and held that you cannot convey more land other than small strips that should have been included. And, therefore, the CA because of the confusion, although it cited the geographic grant cases, failed to see the distinction between the two lines of cases that have been running long in tandem and operating very well for at least 100 years.

SMITH: Is your position that this conveyance grants just royalty mineral interests or does it include her fee simple interest in tract 3 that she took from her mom?

DAVIS: Right.

SMITH: Is it just mineral interest or is it everything she owns in the county?

DAVIS: There is a case Allison v. Smith. In the deed they talk about mineral and royalty interest, and then later in the deed they talk about land. And then in the habendum and warranty clause they talk about mineral interests again. And this court said Wait. That's ambiguous. Are we talking about surface, or are we talking about minerals, or are we talking about minerals and surface? And I reread this for that question last night. I think this deed is very clear that it only deals with overriding royalties and minerals.

SMITH: So you're not making any claim of full ownership of tract 3?

DAVIS: No claim for the surface whatsoever. There is one place in the deed where it says "said lands." But it clearly references the royalty and override that precedes it. The said lands were described as royalty and override. So we don't have any surface issue.

The Texsoga(?) amicus brief I think is the best written in this case. It's short. It explains the policy of the adjacent two cases, and the geographic grant case. It explains why you do it, why they're different, and why the court has done what it's done in the past.

I think the Texas Civil Justice League amicus in support of the petitioner emphasizes the importance of the clarification because of the unsettling effect that this case could have.

When you look at the specific language of this conveyance, it conveys the Barnard survey in Wharton County, Texas. The next sentence, the grantor agrees to execute any supplemental interest for better description. And then the next sentence this is a geographic grant, in addition to the above described lands it is the intent of this instrument to convey and this conveyance does so and include all of grantor's royalty and overriding royalty interest in all oil, gas or other minerals in the above named county or counties where they are actually or properly described here and are not, and all of said lands are covered and included as fully in all respects if the same had been actually and properly described herein.

In the Holloway's case in 1939 this court faced a situation where a person over in East Texas had conveyed a tract in Liberty County and reserved ½ the minerals. Subsequently they conveyed another tract in Liberty County that was not adjacent to the first, and it contained in it a geographic grant that said in addition all of my interests in the above named county. And this court held that the purpose of the grant was to enlarge it. And it followed the Holloway's line of cases and the interest that the court held past was 30 times as much acreage is that which was specifically described, the quantum.

In the geographic grant cases and the precedent of this court, the quantum of the interest that passes has not been relevant.

HECHT: But can that be right? If somebody says I convey this little piece and everything else I own in the county, which is 100 times that much, why would you do that?

DAVIS: One of the reasons you would do it is like in this case. Mrs. Greer's interest was under 20 nonparticipating acres. That's what this case is arguing about. There's 20 acres of minerals. It just so happens after the fact, after she sold to Steger and after Steger sold to Moore, they drilled a big gas well on it. But the truth of the matter in a lot of these counties and the way we are getting land cut up, and tiny little mineral interest cut up, that's one reason you do it is it cost more to do the title work. There's a lot of utilities there.

HECHT: Well I could see if you said it without being specific - everything I own in a particular county. Then you don't really know whether that's a lot or a little. And as you say somebody might not want to go to the trouble to do all the title work. Although, I suppose they will have to do it at some point when there's a division order. But if you said these two acres and everything else, and everything else is hundreds of acres, it's harder to understand why a grantor would do that.

DAVIS: Well the two acres might be the ones that are producing. As in this case the Barnard survey unit was producing. The land outside of it was not. Here's another situation. For example a pipeline. Let's assume a big company with lots of pipeline wants to sell a particular gathering system. And they know it's in four counties. Well rather than draw a deed that gives the centerline of 896 easements they've taken over time from somebody, they just say we convey to you the such and such gathering system starting here and there, and in addition thereto we convey to y'all the easements in the following three counties. Asset acquisitions. Gifts to charities.

HECHT: Do you know in that situation whether anybody goes and tries to file that conveyance in the deed records?

DAVIS: Oh sure.

HECHT: So they eventually go do it.

DAVIS: They file that conveyance of record. Big oil and gas transactions now, asset purchases. Texas Consolidated Oil v. Bartells, 1954 is the most recent geographic grant case that is either a SC or a writ refused case. And in that case, the conveyance from Texas Consolidated Oils was all of the oil and gas interests that we have in the US, which includes mostly the states of Texas, Louisiana, Oklahoma, Arkansas, etc. And the court had before it a quarter section of land in Scurry county and they said that deed passed that quarter section.

PHILLIPS: How in the world could you search a title if there's this kind of record?

DAVIS: Well you have to file it. So the recording statute, if you want the protection of that, you've got to file a record in the county in every county in Texas. And a title examiner, the

first thing they do when they make a run sheet is look at the grantor/grantee index.

PHILLIPS: If I'm selling my house to J. Hecht, the title examiner is going to look at my name for the whole county and just see what else I have, and see if I still have the right to sell my house to J. Hecht, because maybe I sold it to your oil company last year.

DAVIS That's correct. And that may be why there are fewer and fewer title examiners. These are older fellows that are really dying off. This group that's really dying off they ate, slept and breathed Calloway's cases rule against perpetuity. But looking back Holloway's is everything I own in Liberty county. And the court said that's a sufficient description to _____. Sanderson, all the town lots that I own in the city of Mox, Texas. In 1937 the SC said that's sufficient.

Texas Consolidated Oil, all oil, gas and mineral interests not only in the US. 1954 writ refused.

Smith v. Westall, 1890 was a statewide conveyance. All land I own in Texas. And the court said that was good.

PHILLIPS: What about the chief's question as a practical matter. Let's assume in a will for example it leaves oil and gas interests to the heirs of so and so. And there may be grandchildren and great grandchildren not named specifically in the will who will inherit. And you go get one of these geographic grants from one of them. How do you go back and search the deed records - how do they show up in the deed records under those circumstances? How do you know?

DAVIS: What would show up is it would lead you to the probate.

OWEN: How would that happen? Let's say my last name was Smith, and I'm a woman. If I marry Dave and I inherit from my great grandmother, and I'm not named in her will.

DAVIS: They wouldn't find you. They would find the decedent.

OWEN: How?

DAVIS: Because the record title would go into your grandmother.

OWEN: I just say all land I own in Harris County. And so if they go to the Harris county deed records they are not going to find...

DAVIS: They are not going to find you. They are going to find your grandmother who died, and they are going to go...

OWEN: How do they know about that?

DAVIS: How do they know that she died?

OWEN: How do they know to look for my great grandmother?

DAVIS: If you follow the chain down, the record title will go to your grandmother and stop. And you inquire and find out she's dead. And then you hire the landman, and then you go do your inquiry. You go to the estate. And you get the will in the probate records.

OWEN: Well let's say I have creditors, and I just say look. I'm going to sign over everything I own to you in this county. And I do that. And the creditor has no idea who my grandmother is. They are not looking for anything specific. Starting with that grant from me to someone where do you go to find out what I own in a particular county?

DAVIS: It is not of record as you point out. But where you go in that instance is you do your affidavit of heirship. You do your homework.

OWEN: What affidavit of heirship?

DAVIS: For an oil and gas title examiner to...

OWEN: No. My creditors now want to find what I own. How do they go find what I own from my geographic grant to them?

DAVIS: I misunderstood your question. They have to do their homework. And the homework that they have to do is investigate who the heirs that are described in the ____ clause of the will. In other words, you go to the executor and say this ...

PHILLIPS: They have to trace her family tree.

DAVIS: That's exactly right.

PHILLIPS: And find out all her relatives and then go look at all of their wills.

DAVIS: That's correct. But if she had never conveyed they also have to do that too. Land men spend most of their time with wills tracing heirs.

OWEN: Well usually it starts on the other end. They want this piece of property or this area and then they go research it.

DAVIS: That's correct.

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RESPONDENT

CLAPP: I really believe if you analyze the cases, there are three lines of cases, not two. One line of cases is the adjacent acreage, the typical mother hubbard clause that you've read about, that picks up the strips and the gores and the undiscovered pieces of land. The second line of cases is the classic global grant. This is Smith v. Westall: all of my property in Brazoria county, all of my property in the State of Texas, or if I'm a pipeline company all of my pipelines in four counties. That's the classic global grant line of cases.

The third line of cases is what I call hybrid where you combine a specific grant, black acre, and then somewhere else in the deed you say and, oh by the way, I give you everything else in a county or a state or some geographic area. That's what this case is about. And there is not a long line of cases dealing with hybrid global grant deeds.

PHILLIPS: I understand from your brief your position is sometimes those can be valid and sometimes not, and we have to look at the particular language.

CLAPP: With regard to the hybrids, I"m going to argue right now that they ought not be valid.

PHILLIPS: You would have a bright line rule? You would have a specific description, then unless it's a strip and gore forget about it?

CLAPP: Yes. And if we look at the cases there are only three that deal with the kind of a hybrid where you have a specific property description and then a global grant. Holloway's is the one most on point, and I'm going to leave that till last. The other two are Cook and Witt v. Harlan. And those cases are actually a bit different.

Cook v. Smith was really about a quick claim deed. The deed that was being analyzed by this court in Cook v. Smith was a quick claim deed. The question was whether someone who had an earlier deed got cutoff by this quick claim deed to another party? And what the court decided was there was some language in the deed where the grantor said I hereby convey to you all of the property I own in this town, whether set forth herein or not. And the court said that was sufficient words of conveyance to create a conveyance of a specifically described lot. And that specifically described lot, in other words it was described in the deed Black acre. The court held that that was enough language of conveyance to make what was otherwise a quick claim deed a deed as to that lot. Because it was specifically described and because he said, and I hereby convey to you these lots that were set forth.

And the reason that was important was there was - he didn't own that lot. He had already sold it a few years back. And the question then was had he deeded it twice? And this court decided that he had.

That case was really the reverse of this case, and it involved applying this kind of language to a specific property description of property that you don't own. And that's not what

this case is about.

In Witt v. Harlan, the grant was I give you ½ of all the lands I own in Texas. It was a family conveyance. And the question in that case was how do we analyze a hybrid kind of property description? Because what he did he first said, I give you half of everything I own in Texas, and then he said some of which includes A, B and C. And he described Black acre A, Black acre B, and Black acre C. And the court held that that kind of a grant was a global grant because he used the words some of which include. In other words he clearly set forth the fact that he was giving a subset, a partial list. He didn't know everything he owned. But the initial grant was a global grant, a classic global grant. And then he gave a partial list of what he owned.

That case was also different because what the TC had held was that the global grant language conveyed all of his property, not just half. There was a TC judgment that said that boilerplate language that was so expansive actually conveyed everything he owned. And this court said no, that global grant that says ½ of everything I own is valid because it is a global grant. The intent of the grantor was plain and clear. And then the specifically described properties really didn't add anything to the deed.

And then in Holloway's v. Whatley, I submit to this court is the only case that directly deals with a true hybrid grant, and that was a grant of Black acre. And then language saying, and oh by the way, I give you everything else that I own in the county. And this court did hold that in that particular case the intent of the grantor was clear and it was a global grant.

PHILLIPS: And it's true the amount in controversy was 30 times greater than what was specifically described?

CLAPP: That's correct. My first argument with regard to Holloway's, and it's set forth in my brief, is that this deed is different. And it ought to be treated differently than the deed in Holloway's. Basically in Holloway's you had a description of black acre and then immediately thereafter was this expanding language: Not just this piece but everything else in the county.

And it brings it very close to Witt v. Harlan - you know ½ of everything I own in Texas and oh by the way I own these tracts. Very similar to that case although the order of the language was reversed.

PHILLIPS: I'm confused now, because that's the way I read your brief as asking us to pay real close attention to this language. Are you saying Holloway's wrong and we should overrule it?

CLAPP: That is one of my arguments. Yes. My first argument is that it can be distinguished. And my second argument is that it ought to be overruled. That it creates a problem. And that problem is one that has been brought up by the amicus briefs. We've talked about how title examiners examine property. When you have a classic global grant it creates a small problem but it's one that I think most title examiners have learned to handle and title companies and abstractors.

This oil and gas company has conveyed all of its land in Texas. Well you abstract it or you index it that way. But when you have a deed that conveys just black acre, a small piece of land, and then hidden in that deed is some other language, how does an abstractor index that deed and record that deed? It's recorded under that piece of property. And it doesn't get recorded under all the other property they may own in the county.

SMITH: But you would agree though that it's not hidden here, and Holloway's may be one sentence directly below the global grant. Here there's one sentence in between. I mean how are we to take that language - if we were just to read that language alone it looks as if it is a global grant and do you want us just to write it out or what do we do?

CLAPP: The language itself, I agree, is not hidden. It's plain and clear. It was hidden because it was in a pre-printed form.

There is not a long line of cases dealing with these hybrid grants. I only found three that truly deal with hybrid grants. There are not a lot of people out there that write these things and rely on things where you describe black acre and then a global grant.

PHILLIPS: Why shouldn't we though? I mean only good things could come out of it.

CLAPP: Why would you ever want to draw up a deed that grants a specific piece of property and then grants that piece of property and everything else. It doesn't make sense.

OWEN: Some of the older standard form oil and gas leases have a specific property description and then say and all the other interests I own in the county, or something broad like that.

CLAPP: I would disagree with that . I think you're referring to the mother hubbard language in oil and gas leases.

OWEN: No. There are contiguous ones. But I thought there was an old producers 88 pre-paid or one of those old leases that said we have a description of the specific property and all the land owned in the county.

CLAPP: I've never seen that. But the problem is best I guess illustrated by the amicus brief that Marks and ____ filed, that has all the other Steger deeds in Wharton County. If you look at that list of 23 deeds, two of them are the same people. In other words, Mrs. Jones conveyed her specific little black acre and everything else in Wharton County. And then two months later Steger went back to her and bought black acre B and paid her again. Now if he thought he was getting all of her property in Wharton county why did he go back and get a second deed? And that happened twice.

HECHT: The trouble with this argument is of course that we just disregard that sentence. But your argument is, if there is a specific description that sentence just does not mean

what it says.

CLAPP: If this court disavows what I'm calling a hybrid deed, then that would be correct.

HECHT: Under your theory of the case however we get there, if there is a specific description in there, then the sentence next after that that says it is the intent to convey everything, that doesn't mean that?

CLAPP: I think the CA below decided that very issue and said okay, if it's not a global grant (we don't think it's a global grant) what is it? Then they analyzed it under Jones V. Colle as a mother hubbard. I think that that language could be construed as a standard mother hubbard. If it were a small corner left out, or a strip or a gore, then it might be included by that language.

SMITH: What if your client had drafted this by herself in handwriting and put it in there and initialed it. What would be your position in that event?

CLAPP: First of all, I can't imagine a grantor drafting a deed that conveys black acre and then conveys everything else.

SMITH: Let's say she did. Would that be enforceable?

CLAPP: My argument regarding the overruling under what I'm arguing about Holloway's, it should not be allowed. It creates too many problems to allow that to happen.

OWEN: In some cases, for example, people own like the home place, and they can describe that. And people in Texas particularly have inherited over the years bits and tiny pieces of oil and gas interests that are spread out, not only in the county but all over, and you want to will that to your son or daughter. And so the testator hand writes out as J. Smith suggests, here is the home place and everything else I own in the State of Texas. Now why shouldn't that be effective?

CLAPP: I think it should be. And that's Witt v. Harlan. But the way you draft that deed is you start with _____. You say I give you everything I've inherited...

OWEN: But in my example they don't. They say I deed you the home place. It's the same thing described in the deed from so and so to me, and I also deed you all my oil and gas interests that I own in the State of Texas. Why shouldn't that be effective?

CLAPP: Because it should be drafted differently. It should be drafted as a global grant first: I give you everything I own in Texas.

OWEN: But I'm a testator. I'm not a lawyer. That's my intent. Why should the order make any difference? Why shouldn't we take the words at face value?

CLAPP: The order makes a difference because the language in deeds is very, very important. That's why lawyers should draft deeds and not grantors. There have been many a home drafted document that have created problems. But if we're going to allow global grants, and I haven't even talked about the fact that a global grant you don't know what's been conveyed. If you follow the line of cases that talks about the statute of frauds and the nucleus of description that's required and that deeds are void that don't have a description in them or some document from which you can determine a description those deeds are void. That's never been reconciled by this court with the line of cases that deals with global grants.

OWEN: If you say all the land I own in the county is valid. I've never understood logically why that was the case.

CLAPP: I've never understood that either. And this court's never addressed it. I think it is because it's so convenient. Allowing global grants accomplishes a lot of good things: estates, inheritances, title ____ work.

If you read the cases none of the true classic global grant cases really deal with third parties who have also been deeded the land.

PHILLIPS: You did not plead fraud or try to prove fraud specifically did you?

CLAPP: Yes.

PHILLIPS: What were all your theories and what happened to them? Undue influence.

CLAPP: Undue influence, mutual in estate, fraud, constructive fraud, misrepresentation, the whole gambit was pled in the TC. But Mr. Moore's attorney, Jad Davis, filed a motion for summary judgment saying, I'm a bonafide purchaser for value without notice. All of these defenses are cutoff. I own the minerals under the clear language of the deed. That motion was granted. The TC never actually heard any facts other than the summary judgment evidence.

SMITH: Do you have a cause of action against Steger?

CLAPP: Yes.

SMITH: And that's ongoing in the DC?

CLAPP: Yes. The cause of against him was severed and it's been abated pending the outcome of this appeal.

SMITH: But all those - unconscionability and fraud and all those are the type of allegations you have against him?

CLAPP: Those can be pursed.

SCHNEIDER: You're not saying this deed was ambiguous are you?

CLAPP: Yes, I am.

SCHNEIDER: Is it a rule of construction you're talking about?

CLAPP: One of the reasons that I believe the court below properly held that this was not a true global grant is because the language creates an ambiguity. This court held that in Smith v. Allison. If you look at Smith v. Allison, the language that was used was global grant language. It's not the adjacent property language. It's the true global grant language: the parties however intend this deed to include and the same is hereby made to cover and include not only the above described land, but also any and all other land and interest in land owned or claimed by grantor in said survey. Now it didn't say county. It said survey. Our surveys in which the above described land is situated or adjoining surveys.

Now this court held that that language was ambiguous. And what they did is they allowed parol evidence that was introduced at trial where the lady said, I didn't intend to grant this other land in the survey. I only intended to grant the described property.

So there is precedent for this court finding that this kind of language creates an ambiguity which allows the introduction of parol evidence about the intent of the grantor.

SCHNEIDER: So if it is you're looking at it as a rule of construction?

CLAPP: Yes. I believe this court can affirm the decision of the court below and accomplish good things. Because even if what Mr. Davis is saying is right, and it's going to create a little bit of confusion about how you are supposed to look at they hybrid deeds, I think that's a good thing.

HECHT: But you don't agree with the reasoning of the CA entirely because you've got these hybrid cases?

CLAPP: I think that's a fair statement. But if the opinion below is affirmed, then it will discourage people from drafting hybrid deeds. They are either going to draft a classic global grant, or they are going to convey specific property. The hybrid deed will get them into trouble because how do you know whether it's a mother hubbard clause, or a global grant clause? And you can distinguish the language in Holloway's from the language in Greer, but it's tough. And the court didn't really do that. They didn't really lay out a roadmap of the differences.

But I will submit to you that this kind of conduct, the drafting of deeds that includes a global grant after a specific piece of property especially in the oil and gas industry by these

land men who are going out and buying mineral interests from ladies like Mrs. Greer creates a problem. And that is going to cause instability. If this practice is promoted it's going to cause instability.

JEFFERSON: Is there a legislative answer to that? Could the legislature forbid hybrid grants like these? If they enter into and disturb contracts in other areas should we defer to them to look at this problem as a social policy problem?

CLAPP: I can't disagree with that. The legislature often tries to solve problems. But I believe that this problem is one best solved by this court in construing language in deeds. That's traditionally been a court function and not a legislative function.

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REBUTTAL

DAVIS: The legislature in 1999 passed a statute. It's property code §5.151 that curbs the conduct that one soliciting purchased mineral interests by mail when they send an instrument of conveyance in a draft what they have to do, or, otherwise, the conveyance is void. And that post-dates this situation. So the legislature has intervened there.

PHILLIPS: So when you purchase by mail you can't go to a global...

DAVIS: No. You can do a global grant. It just says in the letter you've got to put in bold type WARNING, which is really not any different than the warning placed on the bottom of this deed. It says consult your counsel. This could affect valuable legal rights. It just warns them. And then if they want to sign a deed and have it filed of record it's good.

OWEN: What about Smith v. Allison?

DAVIS: In Smith v. Allison the court held it was ambiguous. You could read the deed there and you could not tell whether they were conveying minerals...

OWEN: I don't see any distinction between that deed and this deed.

DAVIS: In the Smith v. Allison deed page 611, the court points out the ambiguity for two reasons. And the ambiguity there was, and really Smith v. Allison doesn't announce a rule of law. They tried the subjective intent of the grantor and the grantee to a jury trial in the TC and went back and forth. But the language of the Smith v. Allison deed - there is not a lot of difference in the language. But here's the difference. Because other parts of the deed rendered ambiguous the court said we're going to let the jury decide what the subjective intent of the parties was in this transaction.

PHILLIPS: What's wrong with the jury deciding this?

DAVIS: The jury should decide the subjective intent in the case of ambiguity. But whether or not it's ambiguous is a question of law.

OWEN: That's where I'm having my - how do we - what do we do with Smith v. Allison, because I don't see that that deed is any more or less ambiguous than this?

DAVIS: The global grant is not the part of Smith v. Allison where the court said there was an ambiguity. The court said there was an ambiguity because in the initial granting clause it says we're going to convey minerals. In the warranty and habendum clause it said we're going to convey minerals. But right here in Smith v. Allison, but also any other land and interest in land owned or claimed by grantor in said survey. And they said, Wait. Land means surface and minerals. And this grantor owned the surface and the minerals and only intended to convey the minerals internally, in other parts of the deed. There was a conflict on whether or not they were conveying minerals or surface.

PHILLIPS: Under a Smith type grant could you lose your homestead because you were selling a mineral interest?

DAVIS: Well if you're selling mineral interests you might lose the minerals under your home if they are not previously mortgaged or something.

PHILLIPS: If land is included and you have a global grant you could end up...

DAVIS: You can sell surface, or minerals or both under these. The problem I think is not the six or eight cases where this court has decided. The problem here is the thousands of deeds that might be 40 years back under other people's change of title that have never been brought to this court.

JEFFERSON: What's your response to the amicus reference to the other Steger letters? And counsel said this morning that not only did they have this global conveyance following the specific to one grantor, but sent that same letter twice as to two different pieces of property. That seems to suggest that they didn't believe their intent was to acquire all of the mineral interests in the county.

DAVIS: The amicus there indicates that the subjective intent of the grantor is, I didn't mean to sell this. I mean that's what the amicus says. It's the emotional side of argument. The law side of the argument when you find yourself as a subsequent grantee is, what is the objective intent as expressed in the document? And just like Mrs. Greer can try Steger at the TC level for fraud and all these other bad things, those folks can try him too. But if there's an innocent purchaser who comes long and buys, relying on the deed records - and I don't know all the facts in the amicus situation.

In the statute of frauds, the statute of frauds issue on specificity has been decided by this court. And the case is Pickett. Cited in our brief. And the global grant does not

violate because it has ownership and a geographic.