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The Executive Right to Lease Mineral Real Property in Texas before and after Lesley v. Veterans Land Board.

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ARTICLE

THE EXECUTIVE RIGHT TO LEASE MINERAL REAL PROPERTY IN TEXAS BEFORE AND AFTER *LESLEY V. VETERANS LAND BOARD*

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I. Introduction and History of the Executive Right to Lease..... 530
A. Introduction..... 530
B. History..... 532
II. The Modern Executive Right to Lease Oil and Gas Interests... 543
A. Definition and Nature of the Right..... 543
B. The Alienability, Duration, and Revocability of the Executive Right..... 545
C. The Duty of the Executive to the Non-Executives..... 547
D. The Different Duties Owed to Non-Executive Mineral Fee Owners and NPRI Owners..... 553
III. Factual and Procedural Background to *Lesley v. Veterans Land Board*..... 556

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A. Introduction and Factual Background 556
B. The District Court 559
C. The Eleventh Court of Appeals 560
IV. The Opinion of the Texas Supreme Court 562
A. Passage of the Executive Right 563
B. Self-Development by the Non-Executives 564
C. Duty of the Executive Right 564
V. Analysis of the Executive Right in Texas After *Lesley* 567
A. The Duty Owed by the Executive to the Non-Executives Generally 567
B. Commencement of the Executive Duty and Inaction by the Executive 570
C. Self-Development by the Non-Executive 572
D. Leasing the Non-Executive Minerals 583
E. Leasing the Executive Minerals 586
F. The Executive Right and Negotiation of Bonus 589
VI. Unanswered Questions and Opinions Thereon 595
A. Does the Executive Have to Lease Its Own Minerals? 595
B. Is There Now an Implied Covenant for the Executive to Self-Develop? 598
C. What Executive Duty Is Owed During Lease Negotiations? 600
D. What Happens When the Separated Executive Right Is Sold to Multiple Undivided Grantees? 602
E. When Does the Executive's Duty Become Effective? 603
F. Who Gets Paid the Bonus? 605
G. What About the Duty Owed to NPRI Owners? 606
Appendix A—Receivership As a Remedy 613

I. INTRODUCTION AND HISTORY OF THE EXECUTIVE RIGHT TO LEASE

A. *Introduction*

Components of a fee simple absolute ownership interest in a tract of real property are divisible in time, as in present and future interests, or in space, as in the severance of mineral interests from the surface interest or depth-dependent severances, or both. The mineral estate can be divided

further still, with one type of mineral, such as oil and gas, conveyed to one party and another type of interest, perhaps coal or uranium, conveyed to another. A fee simple absolute ownership interest in one of these specific categories of minerals, such as hydrocarbons, can be split further into more elemental components that relate to development and recovery of profits for development. In Texas, the mineral estate in a specific mineral, like uranium, or a particular group of minerals, like oil and gas, consists of five components: "(1) the right to develop (the right of ingress and egress), (2) the right to lease (the executive right), (3) the right to receive bonus payments, (4) the right to receive delay rentals, [and] (5) the right to receive royalty payments."[1] These attributes, when taken together, are often referred to as a "bundle of sticks," and it is recognized that individual "sticks" can be sold while others are retained.[2]

In addition to being defined as one of the five rights of a mineral owner, the executive right to lease is defined by courts and treatises "as the exclusive power to execute oil and gas leases."[3] In 2011, the Texas Supreme Court released its opinion for *Lesley v. Veterans Land Board of the State of Texas*[4] (hereafter, *Lesley*), a case that changed whether and how components (1) and (2) are related to one another—and even made the inadvertent fusion of the two a possibility.[5]

Of all the rights contained within the fee mineral estate, the extent, purpose, and limitations of the executive right to lease are possibly the least clearly defined by statute or case law. A glacial unfolding of opinions has gradually brought into focus the outlines of the executive right, but several questions and sources of confusion remain. What actions entail exercise of the executive right? Can inaction by an executive right owner

1. Altman v. Blake, 712 S.W.2d 117, 118 (Tex. 1986); *see also* RICHARD W. HEMINGWAY, THE LAW OF OIL AND GAS §§ 2.1–2.6 (3d ed. 1991) (providing an overview of the attributes of a mineral estate).

2. *See* Pinebrook Props., Ltd. v. Brookhaven Lake Prop. Owners Ass'n, 77 S.W.3d 487, 502 (Tex. App.—Texarkana 2002, pet. ref'd) (stating possession of the entire bundle of sticks is not necessary to maintain certain powers over the property); *see also* Concord Oil Co. v. Pennzoil Exploration & Prod. Co., 966 S.W.2d 451, 459 (Tex. 1998) (noting a royalty interest "does not include the right to receive delay rentals," which "is another attribute of the 'bundle of rights' associated with a severed mineral estate").

3. 2 HOWARD R. WILLIAMS & CHARLES J. MEYERS, OIL AND GAS LAW § 338 (Patrick H. Martin & Bruce M. Kramer eds., 2012); *see also* RICHARD W. HEMINGWAY, THE LAW OF OIL AND GAS § 2.2 (3d ed. 1991) (defining the right to lease, or executive right, as "the right to transfer the development rights of the mineral estate to another"); *Altman*, 712 S.W.2d at 118 (outlining the five attributes of a mineral estate and referring to the right to lease as the executive right).

4. Lesley v. Veterans Land Bd. of State, 352 S.W.3d 479 (Tex. 2011).

5. *See id.* at 492 (implying an interrelationship exists between the right of ingress and egress and the right to lease).

that does not want mineral development on the property be used to thwart development of the non-executives' mineral estate? Why should a non-executive be forbidden from self-developing the minerals by drilling a well without leasing? What is the scale and extent of the duty of the executive to non-participating royalty interest (NPRI) owners?

This Article begins with an analysis of the history of the executive right focused on how various Texas courts have analyzed the conveyance or retention of the right relative to conveyance and retention of related oil and gas real property, such as the right to royalty, to self-develop, or to receive rentals and bonus payments. This analysis is followed by a brief examination of the alienability, duration, and revocability of the executive right before tackling perhaps the largest current issue regarding the executive right and the linchpin of the *Lesley* case: the case law landmarks that define the nature and activation of the duty the executive right owner owes to the non-executive mineral interest owners.

At this point, the Article discusses the latest executive right landmark case, *Lesley*. This begins with the factual and procedural background of the case and continues with an analysis of the Texas Supreme Court opinion with regard to the duty owed by the executive right owner, the timing of its activation, self-development by the non-executive, and passage of the executive right.

Next, the Article scrutinizes a battery of questions through the prism of *Lesley*, such as the general duty the executive owes to the non-executives, the practical application of that duty, the commencement of this duty, non-leasing by the executive right owner of its own interest or that of the non-executive(s), self-development by the non-executive(s), and the relationship between the executive right and payment of bonus. Finally, the Article concludes with pontification on questions remaining after *Lesley*, such as whether the executive should have to lease its own minerals or self-develop and what should be the duty executives owe to non-participating royalty owners.

B. *History*

There is little evidence to definitively explain from what fountainhead the executive right originally sprang. It seems likely that the executive right was derived in response to the fractionalization of mineral fee interests in order to ease the leasing of oil and gas interests. Many oil and gas practitioners and commentators believe this is why the executive right

was originally crafted and later recognized.[6] Persons acquiring interests in co-tenancy may recognize that each division of ownership makes oil and gas development more difficult, not only because of the potential for disagreement regarding questions of exploration and development among the cotenants, but also because of the likelihood that minors or other persons under a legal disability may become owners of some of the interests.[7] Hence, leasing is greatly facilitated if one of the cotenants has the exclusive authority to execute leases. Similarly, co-owners—especially family members—may decide it is in their best interests to rely upon the special skill, contacts, or expertise that one of them acquired through previous experience or work in the oil industry. Among many practitioners, the purpose of the power is viewed as a tool to facilitate leasing—mineral cotenants and potential lessors can put the leasing negotiations in the hands of the most sophisticated party among them.[8] This provides potential lessees the benefit of only having to negotiate one lease instead of many.

On the other hand, it is hypothetically possible that the severance of the executive right has nothing to do with a desire to facilitate mineral development. Purchasers primarily interested in surface use may insist upon acquiring the exclusive executive right to protect their surface investment.[9] Because such purchasers hold the exclusive right to execute oil and gas leases, they can impose limitations upon surface use in any

6. *See, e.g.*, 1 EUGENE KUNTZ, THE LAW OF OIL AND GAS § 15.7 ("When the full mineral interest has been divided into many undivided interests . . . exploitation of the minerals may be frustrated by the practical difficulty of locating and securing oil and gas leases from each owner . . . . To avoid such difficulties, and for other reasons which would make it desirable to maintain control over leasing, the owner of the full mineral interests may wish to sever . . . the exclusive power to lease."); *see also* Pan Am. Petroleum Corp. v. Cain, 163 Tex. 323, 355 S.W.2d 508 (1962) ("Although he owned no estate in the subject matter on which the executive right was to operate, the power was reserved to facilitate the leasing of his interest in the minerals. It was for the protection and security of such interest that he stipulated for the power.") *overruled by* Day & Co. v. Texland Petroleum, Inc., 786 S.W.2d 667 (Tex. 1990).

7. *See* Bruce M. Kramer, *Conveying Mineral Interests—Mastering the Problem Areas*, 26 TULSA L.J. 175, 178 (1990) (asserting that problems frequently arise in the division of mineral interest).

8. *Cf.* J. Robert Beatty, *Duties of the Executive*, Presentation at the University of Texas at Austin School of Law 33rd Annual Ernest E. Smith Oil, Gas & Mineral Law Institute, at 2 (Mar. 30, 2007), *available at* http://www.utcle.org/eLibrary/preview.php?asset_file_id=10628 ("Potential lessees are far more interested in engaging in leases with one person (and executive), rather than pursuing individual leases of fractionated interests and multiple owners.").

9. *See* JOHN S. LOWE, ET AL., CASES AND MATERIALS ON OIL AND GAS LAW 473 (6th ed. 2008) (stating a "purchaser who is primarily interested in surface use may insist upon acquiring the exclusive executive right to protect his surface investment").

lease they subsequently execute.[10] This could lead to problems for both the owner of the executive rights and the owner of the nonparticipating mineral fee, particularly if their interests in mineral development diverge.

Eventually, disputes involving the executive right reached Texas courts. Here, the executive right began as a portion of the mineral estate, rather than a completely separate interest that could be conveyed or retained independently of the other four rights incident to the mineral estate.[11] As such, the estate becomes entangled with the right to bonus and delay rentals whose retention or passage depended on a myriad of factors such as the intention of the parties. This intention was often determined by either what other sticks were retained or passed, or through the introduction of outside evidence of intent. In cases settling disputes over whether a deed retained or conveyed a royalty or mineral interest, Texas courts first established a rule that a full mineral estate without the executive right, right to bonus, and the right to delay rentals was a royalty interest only.

This somewhat arcane regime began its evolution with *Klein v. Humble Oil & Refining Co.*,[12] wherein the disputed conveyance contained the following language: "Grantors ... reserve ... one-eighth (1/8) of all mineral rights ... [but] grantors herein are not to participate in any oil lease or rental bonuses that may be paid on any lease ...."[13] Using parol evidence to ascertain the intention of the grantor,[14] the court opined "it was the intention of the parties ... that the *mineral estate reserved* was to become a royalty interest under any lease thereafter executed, and that [grantee] had the authority to subject that interest to the terms of a lease,"[15] before holding that the executive power had been passed to the grantee. This left the grantors with the right of ingress and egress to develop and the right to royalty.[16] Although the grant was admittedly

10. *See* 2 HOWARD R. WILLIAMS & CHARLES J. MEYERS, OIL AND GAS LAW § 338 (Patrick H. Martin & Bruce M. Kramer eds., 2012) (explaining the impact of *Day & Co. v. Texland Petroleum, Inc.*, 786 S.W.2d 667 (Tex. 1990), which demonstrates the right of the executive right holder to execute oil and gas leases and limit surface usage of the land covered by the lease).

11. *See id.* (espousing the view that the executive right is a portion of the mineral interest, not a separate interest that can be retained or conveyed by itself).

12. Klein v. Humble Oil & Ref. Co., 126 Tex. 450, 86 S.W.2d 1077 (1935).

13. *Id.* at 1078.

14. In *Klein*, the grantor subsequently executed and recorded an instrument that stated: "[M]y interest is entirely a royalty interest and it is plainly recited in the deed from myself to [grantee] .... I waive all of my rights in any oil or gas lease and shall only retain a royalty." *Id.* at 1079. The court looked to this instrument as outside evidence of intent. *Id.*

15. *Id.* at 1080 (emphasis added).

16. *See id.* (determining the amount of royalty that was reserved by the grantors).

ambiguous,[17] the court's decision to have the executive power pass was certainly a reasonable interpretation. The decision to have a royalty interest reserved, however—entitling the grantor to a one-eighth (1/8) share of production—is less clear. As one astute commentator noted, the court's conclusion that a royalty interest was reserved is not consistent with the court's quote that a mineral interest was reserved and that it converted to a royalty interest upon leasing.[18] *Klein* represents the first link in a chain that, for a period of time, seemed to needlessly entangle the executive right with other mineral rights, namely the right to bonus and rentals.

The second link appeared two years later in *Schlittler v. Smith*[19] regarding a second dispute over whether a royalty or a mineral interest had been reserved.[20] In *Schlittler*, a fee grantor conveyed the surface and mineral estate, but reserved to himself "an undivided one-half interest in and to the royalty rights on all of oil and gas . . . in, on and under or that may be produced" for a ten year term.[21] The trial court held the grantor's reserved interest was a non-participating royalty interest (NPRI).[22] The appellate court reversed and held that the grantor's reservation also included the executive right as well as a one-half interest in any bonuses and rentals paid by a lessee.[23]

On appeal again, the Texas Commission of Appeals reversed the appellate court and reformed the trial court's decision to comprise a one-half royalty interest reservation, noting "it is well settled that a grantor may reserve minerals or mineral rights and he may also reserve royalties, bonuses, and rentals, either one, more[,] or all."[24] *Schlittler* differed from *Klein* in that the reservation of a royalty was expressed and recognized in the conveyance and was not the result of weighing which mineral property sticks were conveyed and which were reserved. The two also differed on

17. *See id.* at 1079 (noting that it was difficult to ascertain the intent of the parties without resorting to outside evidence).

18. *See* Bruce M. Kramer, *Conveyance Mineral Interests—Mastering the Problem Areas*, 26 TULSA L.J. 175, 179 (1990) (pointing out that the court in Klein reached a conclusion contradictory to its underlying propositions).

19. Schlittler v. Smith, 128 Tex. 628, 101 S.W.2d 543 (1937).

20. *Id.* at 544.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* The court also held the royalty in any later oil and gas lease could not be less than a one-eighth royalty and that the grantor could receive no less than one-half of a one-eight royalty, or no less than one-sixteenth of the total royalty, to be satisfied before the mineral owner could receive any royalty. *Id.* at 545.

whether the remaining sticks—in *Klein*'s instance, the executive right and the rights to bonus and delay rentals—equated to a mineral or royalty interest. However, *Schlittler* perhaps ends with a clue to the methodology at work in *Klein* mysteriously equating conveyed executive rights and rights to bonus and rentals with reservation of a royalty interest when the court opined, "[A] reservation of 'royalty' on all oil, gas and minerals which may be produced necessarily implies that the grantor contemplated the leasing of the land for production [and because] [h]e reserved no right of leasing to himself . . . the grantee possesses such right."[25] In *Schlittler*, the Commission of Appeals of Texas approached the question from the opposite direction of the court in *Klein*, determining that by reserving a royalty interest only, the grantor necessarily passed the executive right (along with the right to bonus and delay rentals—none of which were mentioned in the conveyance), instead of ruling that by passing those things, the grantor reserved the right to royalty.[26]

Schlittler also ricochets through case law history because it contains one of the first mentions of the duty owed by the executive right owner to the non-executives. In explaining this duty, the Commission stated, "[S]elf-interest on the part of the grantee may be trusted to protect the grantor as to the amount of royalty reserved [but] there should be *the utmost fair dealing* on the part of the grantee in this regard."[27] The Commission displayed a measure of naiveté when it assumed "that self-interest on the part of the grantee may be trusted to protect the grantor as to the amount of royalty reserved."[28]

The third link appeared several years later when the Texas Supreme Court handed down its opinion in *Watkins v. Slaughter*.[29] *Watkins* dealt with a reserved one-sixteenth interest in the mineral estate in an instrument with a granting clause, similar to the granting clause in *Klein*, which provided:

> [T]he grantor retains title to a 1/16 interest in and to all of the oil, gas and other minerals *in and under* and that *may be produced from said land*; but it is . . . understood that the grantor . . . shall not receive any part of the money rental paid on any future lease; and the grantee . . . shall have authority to lease said land and receive the cash bonus and rental; and the grantor . . .

25. *Id.* at 544.
26. *Id.*
27. *Id.* at 545 (emphasis added).
28. *Id.*
29. Watkins v. Slaughter, 144 Tex. 179, 189 S.W.2d 699 (1945).

> *shall receive the royalty retained herein only from actual production* of oil, gas or other minerals on said land.[30]

However, the grantor thereafter let pass the executive right and the right to receive bonus and delay rentals. In answering the question of whether the grantor was a non-executive entitled to either a one-sixteenth of one-eighth of production (if judged a mineral interest) or the owner of a full one-sixteenth of production (if judged a royalty interest), the court found that such a conveyance indicated that the grantor intended to reserve only a royalty interest.[31] The interpretative methodology used in *Watkins* differed from that of *Klein* in that the former disregarded the use of the "in and under" language—a classic indicator of a mineral interest[32]—and dispensed with any superfluous consideration of mineral interests that convert to a royalty interest upon leasing. The *Watkins* court instead focused on the language "that may be produced" and "shall receive the royalty retained herein only from actual production" as emphatically declaring the reserved interest a royalty.[33] Therefore, similar to the holding in *Klein*, the *Watkins* court seemed to establish a rule that a grant (or a reservation) of the executive right along with the rights to receive bonus (and perhaps delay rentals) left the party bereft of these components of the mineral interest with a royalty interest.[34]

This rule was unchallenged until the Amarillo Court of Appeals handed down their opinion in *Grissom v. Guertersloh*,[35] settling yet another "royalty interest vs. mineral interest" dispute.[36] In *Grissom*, the deed reserved for the grantor "an undivided one-sixteenth [1/16th] of all the oil, gas and other minerals in and under the tract of land hereby conveyed; [b]ut the grantors waive all interest in and to all rentals or other consideration which

30. *Id.* at 699 (emphasis added).

31. *Id.* at 700.

32. *See* 1 HOWARD R. WILLIAMS & CHARLES J. MEYERS, OIL AND GAS LAW § 304.5 (Patrick H. Martin & Bruce M. Kramer eds., 2012) (discussing language in a conveyance or reservation that commonly conveys or reserves a mineral interest).

33. *See Watkins*, 189 S.W.2d at 701 ("Certainly the reservation should not be given a different meaning merely because the description of the reserved interest as a royalty interest appears in the last clause of the sentence rather than in the first clause.").

34. *See id.* at 700 ("Had the foregoing clause been the whole of what the deed contained as to the mineral interest conveyed and the mineral interest reserved, Slaughter would have reserved . . . mineral fee interest. But the deed proceeds to describe the nature and quality of the two undivided mineral interests and to state what incidents and rights shall attach or belong to them.").

35. Grissom v. Guetersloh, 391 S.W.2d 167 (Tex. Civ. App.—Amarillo 1965, writ ref'd n.r.e.).

36. *See id.* at 171 (settling a dispute over whether a royalty interest or a mineral interest was reserved by the deed in question).

may be paid to grantees for any oil and gas lease."[37] The court noted the grant was comprised of two clauses. The first clause clearly reserved a one-sixteenth interest "in the minerals in and under" the described lands, while the second clause striped away the executive right and the rights to receive bonus and delay rentals from the reserved mineral interest, but did not otherwise change the reserved interest into a royalty interest.[38] The court further explained the granting clause made no reference to either royalties to be paid under subsequent leases or any "royalty interest-creating" language, such as interests "from actual production" or royalties to be paid from minerals "produced, saved[,] and made available for market."[39] The court examined the components of the mineral estate and apparently doled them out to the grantor or grantee based on the plain language of the conveyance.[40] As one commentator noted, the results in *Grissom* are difficult to reconcile with *Schlittler* and *Watkins*; however, *Grissom* and *Schlittler* at least parse the executive right and the other rights as components of the mineral estate that can be separated free of the other sticks.[41]

Thus, at the end of this initial phase, in three of the four cases described, the retained interest was determined to be a royalty interest with various opinions focusing on the following: (1) parol evidence to determine the intent of the parties (as in *Klein*);[42] (2) conveyance language such as "that may be produced" which has traditionally indicated a royalty interest (as in *Watkins*);[43] and (3) the assumption that retention of a royalty interest somehow implies the retainer intended for leasing to occur and

37. *Id.* at 167.

38. *See id.* at 170–71 (describing the granting clause as consisting of two components: one reserving a partial interest in the land's mineral rights and the other divesting this mineral interest of various appurtenant rights); *see also id.* at 171 ("The second clause of the reservation simply waived the grantor's interest in 'rentals and other consideration which may be paid to grantees for any oil and gas lease on the land or any part thereof hereby conveyed.' In our opinion the waiving of these bonuses and delay rentals by a grantor in a mineral reservation does not constitute a reservation of a royalty interest.").

39. *Id.* at 170–71.

40. *See id.* (examining the plain language of the mineral conveyance deed to determine which appurtenant interest the grantor retained and which were conveyed to the grantee).

41. *See* Bruce M. Kramer, *Conveying Mineral Interests—Mastering the Problem Areas*, 26 TULSA L.J. 175, 183 (1990) (noting both the *Grissom* and *Schlittler* opinions agree that a "mineral estate can be broken down into its component elements without losing its basic character").

42. *See* Klein v. Humble Oil & Ref. Co., 126 Tex. 450, 86 S.W.2d 1077, 1080 (1935) (using evidence outside of the conveyance to ascertain the intent of the parties).

43. *See* Watkins v. Slaughter, 144 Tex. 179, 189 S.W.2d 699, 700 (1945) (relying upon language within the deed naming all minerals "that may be produced" and concluding a royalty interest was reserved by the grantor).

thus the executive rights had passed (as in *Schlittler*).[44] *Klein* and *Watkins* suggest that a full fee mineral estate minus the executive right, the right to bonus, and the right to rentals is a royalty interest.[45] Only with *Grissom* does one find the mineral estate sticks—including the executive right—treated more like specific real property components of the mineral estate, instead of entangled features passed or retained based on terms of art, assumptions, and outside evidence.[46]

While these cases dealt with passage of the executive right, other cases struggled with the related question of how to define the executive right itself.[47] Early Texas courts considered the executive to be "a power coupled with an interest."[48] One Texas appellate court described a "naked" executive right—one held without any of the other mineral right sticks—as being "a power coupled with an interest which could not be revoked at the will of the [conveyors]."[49] The court also prohibited the non-executive from seeking a partition of the undivided mineral estate.[50] A "power coupled with an interest" is defined as "an interest [that] is not held for the benefit of the principal, and it is irrevocable due to the agent's interest in the subject property."[51] This definition of a "power coupled with an interest," where the agent (the executive) has no apparent duty to the principal (the non-executive), is difficult to reconcile with the executive right where, as described below, the executive owes the non-executives a

44. *See* Schlittler v. Smith, 128 Tex. 628, 101 S.W.2d 543, 544 (1937) (opining that when a grantor reserves a royalty, the executive right will automatically pass to the grantee unless expressly retained).

45. *Compare Watkins*, 189 S.W.2d at 700 (explaining an interest that receives no rights to "payments of the bonus or rentals" and is "paid only from production" is considered a royalty interest), *with Klein*, 86 S.W.2d at 1079–80 (concluding a reservation shorn of the right to bonus payments and leasing is a royalty interest).

46. *See* Grissom v. Guetersloh, 391 S.W.2d 167, 170–71 (Tex. Civ. App.—Amarillo 1965, writ ref'd n.r.e.) (explaining a mineral interest shorn of the executive right and the right to delay rentals is not thereby converted into a royalty interest).

47. *See, e.g.*, Bruce M. Kramer, *Conveying Mineral Interests—Mastering the Problem Areas*, 26 TULSA L.J. 175, 184–85 (1990) (discussing several early cases that created problems of interpretation with regard to the executive right).

48. *Id.* at 185–86 (citing Superior Oil Co. v. Stanolind Oil & Gas Co., 150 Tex. 317, 240 S.W.2d 281 (1951)); *see* Allison v. Smith, 278 S.W.2d 940 (Tex. Civ. App.—Eastland 1955, writ ref'd n.r.e.) (asserting that prior to 1962, most courts in Texas "treated the executive power as a power coupled with an interest").

49. Odstrcil v. McGlaun, 230 S.W.2d 353, 354 (Tex. Civ. App.—Eastland 1950, no writ).

50. *See id.* (disallowing partition of a mineral interest because the party contractually waived his right to such an action).

51. BLACK'S LAW DICTIONARY 1288 (9th ed. 2009).

sort of fiduciary duty.[52] Thus, the whole premise of the executive right being a "power coupled with an interest" rested upon unstable judicial granite.

Given this uncertainty, changes occurred. In *Pan American Petroleum Corp. v. Cain*,[53] the Texas Supreme Court considered the circumstance of a grantor who conveyed one-fourth of the entire mineral estate while reserving the stripped executive right.[54] After the grantor died, the question arose as to whether the reserved stripped executive right terminated by action of law, as the deed did not describe the intended fate of that executive power.[55] The court, believing the executive right must be a possessory estate for it to be properly classified as a power coupled with an interest, and because the grantor had no such possessory interest due to the non-possessory nature of the executive right, held the executive right could not be a power coupled with an interest and was not inheritable.[56] In its opinion, the court framed what rights were included and which rights were not encompassed by their conception of the executive right:

> [T]he executive right . . . is not a power coupled with an interest, and it is equally clear that the power to lease is not in itself an interest in land. It does not entitle the holder, either presently or at any time in the future, to possession or use of, or any benefit arising from, the land or any part thereof . . . . It is not an estate in the property, and its scope and extent is governed by the instrument creating it.[57]

Thus, the Texas Supreme Court in *Pan American* defined the executive right as a power and not as a property right.[58] Furthermore, this power

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52. *See generally* 2 HOWARD R. WILLIAMS & CHARLES J. MEYERS, OIL AND GAS LAW § 339 (Patrick H. Martin & Bruce M. Kramer eds., 2012) (reviewing the duties of the executive and the potential conflicts that may arise between executives and non-executives).

53. Pan Am. Petroleum Corp. v. Cain, 163 Tex. 323, 355 S.W.2d 506 (1962), *overruled by* Day & Co. v. Texland Petroleum, Inc., 786 S.W.2d 667 (Tex. 1990).

54. *See id.* at 507 (examining an instrument of conveyance that reserved executive rights to the grantor).

55. *See id.* (determining the rights inherited by the heirs of a holder of an executive right). The court opined that the parties could have avoided this problem by describing the executive power as inheritable. *See id.* at 509–11 (stating that the language of the reservation of the executive right needed to purport its inheritability in order to pass to the heirs of the grantor).

56. *Id.* at 508–09.

57. *Id.* at 510 (quoting Hupp v. Union Coal & Coke Co., 131 A. 364, 365 (Pa. 1925)).

58. *See id.* (concluding the executive right is a power that is not considered a real property interest in land); J. Robert Beatty & Monika Ehrman, *The Nature of the Severed Executive Right*, 32 ST. B. TEX. OIL, GAS & ENERGY RESOURCES SEC. REP. 21, 22 (2007) ("In [*Pan American*] the Supreme Court of Texas classified the executive right as an agency power given as security. The *Pan American*

was revocable upon the death of the principal.[59]

Given the parallel developments in *Klein*, described above, where the courts seemed to be moving towards treating the executive right as a real property interest, *Pan American*'s holding that the executive right is a contractual right began to grind harshly against the unfolding Texas case law.[60] Not surprisingly, this categorization eventually changed in the late 1980s when Texas courts considered a trio of cases all seeking to determine who held what mineral interest after execution of an instrument that was later contested.

Chronologically, the first of these cases was *Diamond Shamrock Corp. v. Cone*,[61] where the court faced the challenge of determining who between the grantor and grantee had what mineral right(s) after execution of a conveyance of the surface estate of a captioned tract containing the following reservation:

> There is reserved . . . all oil, gas and other minerals in, under and that may be produced . . . . However, grantors herein shall receive no part of any lease or bonus money . . . or from any delay rental paid to keep said lease in force. The grantors herein shall receive money from such lease only in case of actual production of oil, gas or other minerals . . . .[62]

Despite the similarities of the last clause of the reservation to the language at issue in *Klein*, which in that case ultimately resulted in the reservation of a royalty interest, the court in *Diamond Shamrock* simply ignored the last sentence. The court held that while the grantee received the right to receive bonus payments and the right to delay rentals, the clear intent of the parties—requiring no application of any canons of interpretations such as the "greatest estate" canon[63]—was that the grantor

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court defined the executive right as a power and not as a property right; this power was revocable on death of the principal." (citing *Pan Am. Petroleum Corp.*, 355 S.W.2d at 509)).

59. *See Pan Am. Petroleum Corp.*, 355 S.W.2d at 509 (stating an executive right reserved by a grantor may be revoked by the grantee upon the death of the grantor absent a showing of intention that the executive right was to pass to the grantor's heirs).

60. *Compare* Klein v. Humble Oil & Ref. Co., 126 Tex. 450, 86 S.W.2d 1077, 1079–80 (1935) (describing rights retained by a reservation as a separate interest in property), *with Pan Am. Petroleum Corp.*, 355 S.W.2d at 509 (failing to identify the executive right as an individually owned interest in property).

61. Diamond Shamrock Corp. v. Cone, 673 S.W.2d 310 (Tex. App.—Amarillo 1984, writ ref'd n.r.e.).

62. *Id.* at 312.

63. *See, e.g.*, Waters v. Ellis, 158 Tex. 342, 312 S.W.2d 231, 234 (1958) ("A deed will be construed to confer upon the grantee the greatest estate that the terms of the instrument will permit.").

retained a mineral interest instead of a royalty interest.[64] The right of self-development, which is correlative to the executive right, as discussed below, also presumably passed.

The second case emerged a year later. In *Elick v. Champlin Petroleum Co.*[65] the Texas Court of Appeals in Houston for the 14th District ruled a party with no other interest in the mineral estate could hold the executive right. The court ruled:

> The fact that [the non-mineral interest owning] appellants are required to join in the execution of a valid oil, gas and mineral lease covering . . . the tract does not interfere with the power to lease the mineral estate any more than if [non-mineral interest owning] appellants[] reserved exclusive executive rights to lease the mineral interest.[66]

Finally, in the 1990 opinion of *Day & Co. v. Texland Petroleum*,[67] the Texas Supreme Court not only endorsed the appellate court's position in *Elick*,[68] but also categorized the executive right to lease as a distinct property right whose transfer is governed by the laws of real property.[69] *Day & Co.* involved the question of whether the executive right passed through a conveyance of minerals in which the grantor reserved an undivided one-fourth mineral interest.[70] The court ruled the executive right had so passed because it was not expressly reserved in the grant, stating, "When an undivided mineral interest is conveyed, reserved, or excepted, it is presumed that all attributes remain with the mineral interest unless a contrary intention is expressed."[71] Therefore, being a real

64. *See Diamond Shamrock Corp.*, 673 S.W.2d at 313–14 (contending the conveyance of rights to delay rentals and bonus payments "does not operate to convert the mineral interest otherwise reserved into a reservation of a royalty interest").

65. Elick v. Champlin Petroleum, Inc., 697 S.W.2d 1 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.).

66. *Id.* at 5.

67. Day & Co. v. Texland Petroleum, Inc., 786 S.W.2d 667 (Tex. 1990).

68. Like the decision of the court of appeals in *Elick*, the Texas Supreme Court in *Day & Co.* held the executive right may be severed from the mineral estate and thus considered the executive right as an independent interest capable of further conveyance. *Compare id.* at 669 (treating the executive right as an independent interest that may be separated from the mineral estate), *with Elick*, 697 S.W.2d at 3–4 (explaining that the right to execute an oil and gas lease is an interest that may be independently severed from the mineral estate).

69. *See Day & Co.*, 786 S.W.2d at 669 (deciding the executive right to lease land for the purpose of mineral exploration and production is a "property interest subject to the principles of property law" even when separated from the other attributes of a mineral interest).

70. *See id.* at 668 (describing the issue in the case as whether a reservation of a partial mineral interest in land by an instrument of conveyance also reserves to the grantor the executive right to lease when the executive right is not explicitly mentioned as retained in the language of the deed).

71. *Id.* at 669 n.1.

property interest, like a non-participating royalty interest, the executive right does not terminate upon the death of the holder as a contractual right would terminate under the same circumstances.[72]

II. THE MODERN EXECUTIVE RIGHT TO LEASE OIL AND GAS INTERESTS

A. *Definition and Nature of the Right*

Eventually, the executive right came of age and, in the face of more analytical scrutiny by modern courts in more recent cases, it stood out more distinctly from the other rights comprising the mineral estate.[73] The case of *Altman v. Blake*,[74] cited by many sources[75] as the definitive Texas case for the proposition that the mineral estate consists of five distinct sticks, seemed to help usher in the modern view of the five-faceted separable mineral estate.[76] In *Altman*, the Texas Supreme Court held the grantee of the entire fee mineral estate received a mineral fee interest despite the grantor's reservation of the right to collect delay rentals and the executive right.[77] The court noted it had "before recognized that a mineral interest shorn of the executive right and the right to received delay rentals remains an interest in the mineral fee."[78]

Definitions of the modern executive right can be read very broadly: "The right to take or authorize all actions that affect the exploration and development of the mineral estate . . . [including] the right to engage in or

72. *Cf. id.* at 669 (articulating that the executive right is governed by the principles of real property law rather than the principles of contract law).

73. *See, e.g.*, Altman v. Blake, 712 S.W.2d 117, 118 (Tex. 1986) (referring to the executive right as a distinct and independent entity from the four other right appurtenant to ownership of the mineral estate).

74. Altman v. Blake, 712 S.W.2d 117 (Tex. 1986).

75. *See* JOHN S. LOWE ET AL., CASES AND MATERIALS ON OIL AND GAS LAW 557 (5th ed. 2008) (indicating that *Altman* "has been influential in determining the judicial approach" to interpreting deeds that sever rights from a mineral interest); PATRICK H. MARTIN & BRUCE M. KRAMER, THE LAW OF OIL AND GAS 546 (9th ed. 2011) (citing *Altman* in describing a mineral interest that has been conveyed with some attributes stripped away from the interest); 1 HOWARD R. WILLIAMS & CHARLES J. MEYERS, OIL AND GAS LAW § 304.10 (Patrick H. Martin & Bruce M. Kramer eds., 2012) (citing *Altman* and referring to the list of the five rights attributed to ownership of a mineral interest as defined in the case).

76. *See Altman*, 712 S.W.2d at 118 (describing the mineral estate as having five essential attributes: "(1) the right to develop . . . , (2) the right to lease . . . , (3) the right to receive bonus payments . . . , (4) the right to receive delay rentals . . . , [and] (5) the right to receive royalty payments").

77. *See id.* at 118–19 (recognizing a mineral interest as an "interest in the mineral fee" even when separated from the right to lease or the right to receive delay rental payments).

78. *Id.* (citing Delta Drilling Co. v. Simmons , 161 Tex. 122, 338 S.W.2d 143, 145 (1960)).

authorize geophysical exploration, drilling or mining, and producing oil, gas and other minerals."[79] However, courts rarely use the term in this broad sense. More commonly, courts equate the executive right with the right to execute oil and gas leases.[80]

Ultimately, the executive right must be analyzed as a separate interest in land because it is frequently severed from other incidents of mineral ownership.[81] Non-executive mineral interest owners have no power to lease their minerals.[82] Rather, that power resides in the hands of the owner of the executive right.[83] Because the owner of a royalty interest normally has no right to participate in the leasing process, the owner of a royalty is dependent upon the action of the mineral estate owner in realizing income from their interest.[84] Thus, all royalty rights such as NPRIs are, by definition, non-executive rights.[85] The executive right may also be severed from an interest in the mineral estate itself.[86] As such, the owner of Blackacre may convey away an undivided one-half interest in the minerals, retaining the other one-half interest plus the exclusive executive right. The grantee in such a transaction has received an interest commonly referred to as a nonparticipating mineral fee.[87] This type of interest differs from a royalty interest in that its owner is entitled to one-half of all benefits allocable to the mineral estate under an oil and gas lease, including

79. 1 ERNEST P. SMITH & JACQUELINE LANG WEAVER, TEXAS LAW OF OIL AND GAS § 2.6 (2d ed. 2012).

80. *Accord* Patrick H. Martin, *Unbundling the Executive Right: A Guide to Interpretation of the Power to Lease and Develop Oil and Gas Interests*, 37 NAT. RESOURCES J. 311, 315–16 (1997) (commenting that most courts view the executive right as the power to lease property for the purpose of exploration and production).

81. *See, e.g.*, Day & Co. v. Texland Petroleum, Inc., 786 S.W.2d 667, 669 (Tex. 1990) (recognizing the executive right as a separate interest when severed from other interests appurtenant to the mineral estate).

82. *See* JOSEPH SHADE, PRIMER ON THE TEXAS LAW OF OIL AND GAS 15–16 (4th ed. 2008) (discussing how an interest shorn of the executive right to lease possesses a "non-executive" interest in the mineral estate).

83. *See id.* (articulating the right to lease land for the purposes of mineral exploration and production as the "executive right").

84. *See id.* (pointing out non-executives do not hold the executive right to lease and therefore are reliant upon those with executive power in order to realize the monetary benefits of mineral ownership).

85. *See id.* (describing royalty interests, including non-participating royalty interests, as non-executive in nature).

86. *See, e.g.*, *Day & Co.*, 786 S.W.2d at 669 (deciding the executive right is an interest that may be severed from the mineral estate).

87. *See* Charles J. Meyers & Pamela A. Ray, *Perpetual Royalty and Other Non-Executive Interests in Minerals*, 29 ROCKY MTN. MIN. L. INST. 651, 651 (1983) (defining a "non-executive mineral interest owner as one entitled to participate in mineral/oil and gas lease benefits, with no right to execute leases").

the bonus and delay rentals.[88] However, the grantor holds the right to execute the lease itself.[89]

B. *The Alienability, Duration, and Revocability of the Executive Right*

Most courts have held the power to lease is freely assignable.[90] This power to lease another party's minerals is also irrevocable.[91] This durability resulted despite the different labels attached to the executive right in the past, such as a power coupled with an interest in the land,[92] a purely contractual right,[93] a power of appointment,[94] or simply a portion of the fee mineral estate severed from the other portions of the mineral estate—which is the modern Texas view.[95]

As a real property interest, the executive right is not only irrevocable in Texas but is also perpetual. Richard Hemingway noted the "executive right granted or reserved to the holder, his heirs, successors[,] and assigns is presumptively perpetual and hence purports to allow the creation of interests in real property that will vest at some indefinite time in the future."[96] This characterization as a real property interest under Texas law also saves the executive right from challenge via the rule against perpetuities. Although the executive right is an inchoate interest that may not be activated by usage for decades, if ever—and hence may not "vest" within twenty-one years of a life in being—it is unlikely the executive right

88. *See id.* (detailing how a mineral interest stripped of the executive right retains the full benefits of an oil and gas lease, subject to the proportion of mineral interest owned).

89. *See id.* (noting the owner of the executive power has "the exclusive right to lease" the land for mineral, oil, and gas exploration).

90. *See* RICHARD W. HEMINGWAY, THE LAW OF OIL AND GAS § 2.2(A) (3d ed. 1991) (acknowledging the power to lease property has been classified as an assignable personal right).

91. *See* Allison v. Smith, 278 S.W.2d 940, 941 (Tex.Civ.App.—Eastland 1955, writ ref'd n.r.e.) (asserting the power to lease property for mineral exploration and production could not be revoked on the basis that it would deprive the holder of a non-executive interest of a substantial right); Odstrcil v. McGlaun, 230 S.W.2d 353, 354–55 (Tex.Civ.App.—Eastland 1950, no writ) (determining an agreement to apportion part of the interest in the mineral estate and appoint one interest owner of the right to lease is irrevocable).

92. *See* RICHARD W. HEMINGWAY, THE LAW OF OIL AND GAS § 2.2 (3d ed. 1991) (listing the variety of terms previously used to classify the right to lease, including "a power coupled with an interest").

93. *See id.* (relaying that the Texas Supreme Court noted its own decision in *Pan Am. Petroleum Corp. v. Cain* treated the executive right as "a right based in contract").

94. *See id.* ("At one time or another the [executive] power has been classified as a . . . power of appointment.").

95. *See* Day & Co. v. Texland Petroleum, Inc., 786 S.W.2d 667, 669 (Tex. 1990) (treating the executive right as an interest that may be severed from the rest of the mineral estate, retaining the attributes of an interest governed by the principles of property law).

96. RICHARD W. HEMINGWAY, OIL AND GAS LAW AND TAXATION § 2.2(C) (4th ed. 2004).

violates the rule against perpetuities because Texas classifies the right as a separable and alienable portion of the mineral estate, as opposed to a mere contractual right.[97] Further, under Texas law, this result occurs even when the executive right holder has no other component of the mineral estate—sometimes called a "bare" or "stripped" executive right—because Texas treats "the exclusive power to lease as a separate . . . incident of mineral ownership."[98]

Generally, a conveyance of the mineral estate containing specifically expressed reservations of some right appurtenant to the mineral estate will effect a presumption that the other unmentioned rights are conveyed; this represents the "greatest estate" canon of interpretation in action. The counterpoint to this rule holds that conveyance of only specific appurtenant rights will effect a presumption that the unexpressed rights remain with the grantor.[99] For example, in *Burns v. Audas*,[100] the grantor expressly conveyed an executive right over a reserved mineral interest.[101] The appellate court determined that while a conveyance of all the oil, gas, and other minerals passes the entirety of the mineral estate to the grantee, when only one or more portions of the mineral estate is expressly conveyed, the rest of the unmentioned components of the mineral estate remain with the grantor.[102] In *Burns*, this meant the only portion of the mineral estate that passed was the executive right—the non-executive grantor retained all the other rights appurtenant to the mineral estate and the grantee/executive owned a portion of the minerals comprised only of the executive right.[103] Here, not only was the executive right able to exist as a completely stripped and separate mineral property right

97. *Id.*

98. *Id.* This result is in contrast to other states where the law treats the executive right as a mere contractual right as opposed to a right incident to the ownership of a mineral interest. *See id.* (describing California precedent for the notion that a stripped executive right is only a contractual right and is subject to the rule against perpetuities (citing Dallapi v. Campbell, 114 P.2d 646 (Cal.App.1941))).

99. *See* Burns v. Audas, 312 S.W.2d 417, 419–20 (Tex. Civ. App.—Eastland 1958, no writ) (holding the grantor of a mineral estate conveyance retained a portion of the rights appurtenant to the mineral estate, even though the retained rights were not explicitly mentioned in the grant).

100. Burns v. Audas, 312 S.W.2d 417 (Tex. Civ. App.—Eastland 1958, no writ).

101. *Id.* at 419–20.

102. *See id.* at 420 ("The fact that [grantee] was given the right to execute leases without the joinder of the other mineral owners does not deprive such other mineral owners of the other incidents of ownership, that is, the right to participate proportionately in any bonuses, rentals[,] and royalties.").

103. *See id.* at 419–20 (recounting deed language stating "[grantee] shall have . . . full power and authority to execute all oil, gas[,] and mineral leases on said lands").

recognized,[104] but the result also aligned with the view of *Grissom* that the retained mineral rights—self-development, bonus, rentals, and royalty—did not transform themselves into a mere royalty right with no self-development ingress allowed.[105]

C. *The Duty of the Executive to the Non-Executives*

For decades, Texas courts have struggled to describe the standard of duty owed by the executive to the non-executives. A bevy of cases parse out the exact duty owed by the executive to the non-executives word by word.[106] Like the collection of definitions used to determine the necessary threshold of certainty a jury needs to decide a case or convict or acquit a defendant, such as "clear and convincing evidence" and "evidence beyond a reasonable doubt," the spectrum of the scope of the executive duty is embodied by phrases. These include a rainbow of locutions starting with the lowest measure of care as "a duty of ordinary good faith," to a duty of "utmost good faith without a fiduciary obligation," to a duty of "utmost good faith with a fiduciary obligation," up to the "standard" fiduciary obligation as it is widely understood outside of the realm of oil and gas law.[107] An executive's duty in the realm of oil and gas law currently sits at the third tier mentioned above—the utmost good faith with a fiduciary obligation—just below a standard fiduciary duty.[108]

In its landmark *Manges v. Guerra*[109] opinion, the Texas Supreme Court compared and contrasted the duty of utmost fair dealing against the spectrum of possible fiduciary obligations.[110] Such fiduciary standards traditionally require putting the beneficiary party's interest above the

104. *See id.* at 420.

105. *See* Grissom v. Guetersloh, 391 S.W.2d 167, 170–71 (Tex. Civ. App.—Amarillo 1965, writ ref'd n.r.e.) ("The question is whether the second part of the reservation clause has the effect of reserving to the grantor a royalty interest. In our opinion it does not.").

106. *See, e.g.*, Lesley v. Veterans Land Bd. of State, 352 S.W.3d 479, 490–92 (Tex. 2011) (reviewing recent legal precedent in Texas and discussing and defining the duties of the executive to non-executives); Manges v. Guerra, 673 S.W.2d 180, 183 (Tex. 1984) (discussing the nature of the duty held by the executive to a mineral interest).

107. *See generally* Christopher Kulander, *Big Money vs. Grand Designs: Revisiting the Executive Right to Lease Oil & Gas Interests*, 42 TEX. TECH. L. REV. 33, 42–59 (2009) (discussing the executive right and the parameters of the executive's duty in detail).

108. *Lesley*, 352 S.W.3d at 481; *see also* Dearing, Inc. v. Spiller, 824 S.W.2d 728, 732 (Tex. App.—Fort Worth 1992, writ denied) ("[U]tmost good faith . . . is a more stringent standard than simple good faith but has generally been considered one step below a true fiduciary obligation.").

109. Manges v. Guerra, 673 S.W.2d 180 (Tex. 1984).

110. *See id.* at 183–84 (reviewing application of the fiduciary standard to oil and gas executive right holders).

agent's interest.[111] However, the most appropriate application of the general fiduciary duty to the specific confines of the executive right to lease oil and gas real property interest has proven elusive. *Manges* did not apply the highest fiduciary duty—where the executive rights owner must subordinate its own interest to those of the non-executive right interest holders—but instead held the executive should get every benefit for the non-executive mineral interest owner that it exacts for itself[112]—a sort of "fiduciary duty lite." In addition, any leases executed by the executive covering its own mineral interest that were not identical to those covering the mineral interest of the non-executive(s) did not automatically violate this utmost good faith standard, so long as the portions of the lease that were dissimilar were immaterial to the development of the mineral estate and the proceeds derived therefrom.[113]

Manges hinged upon a case of blatant self-dealing by the executive.[114] Manges owned the executive rights covering minerals owned in fee by non-executive cotenants, the Guerras.[115] Manges entered into an "Option Contract" covering the Guerras' mineral estate, as well as other acreage in thirteen other counties where Manges owned an interest.[116] The agreement authorized the other party to the contract, GPE, to develop the minerals covered by the agreement but with no obligation to pay the Guerra bonuses or delay rentals and stated there was no "obligation to drill or develop the minerals on the Guerras Lands."[117] Additionally, Manges borrowed money from GPE and entered into a "Repayment Agreement, Collateral Assignment, and Security

111. *See Lesley*, 352 S.W.3d at 490 ("A fiduciary duty often, as it would for agent and principle, 'requires a party to place the interest of the other party before his own' . . . ." (citing Crim. Truck & Tractor Co. v. Navistar Int'l Transp. Corp., 823 S.W.2d 591, 593 (Tex. 1992), *superseded by statute on other grounds* as noted in Subaru of Am., Inc. v. David McDavid Nissan, Inc., 84 S.W.3d 212, 225–26 (Tex. 2002))).

112. *See Manges*, 673 S.W.2d at 183 ("While the contract or deed may create the relationship, the duty of the executive arises from the relationship and not from express or implied terms of the contract or deed. That duty requires the holder of the executive right . . . to acquire for the non-executive every benefit that he exacts for himself.").

113. *See Marrs & Smith P'ship v. D. K. Boyd Oil & Gas Co., Inc.*, 223 S.W.3d 1, 15 (Tex. App.—El Paso 2005, pet. denied) (affirming that the executive and non-executive oil and gas leases do not need to be identical; however, the material terms of the oil and gas leases must be identical or the executive may face a claim for breach of the duty of utmost good faith).

114. *Manges*, 673 S.W.2d at 181–82.

115. *Id.* at 181.

116. Manges v. Guerra, 621 S.W.2d 652, 654 (Tex. Civ. App.—Waco 1981), *aff'd in part, rev'd in part*, 673 S.W.2d 180 (Tex. 1984).

117. *Id.*

Agreement."[118] The appellate court noted "[f]or seven years, the GPE contracts tied up the Guerra lands with no bonuses or delay rentals for the Guerras."[119] Manges also executed a deed of trust to secure a personal note held by the Bank of the Southwest National Association that covered "all of the oil, gas and other mineral interests . . . including . . . executive rights and powers" owned by Manges.[120] Accordingly, Guerra alleged these agreements "withdrew the Guerra minerals from the market for leases to third parties,"[121] and thus violated the duty owed to the non-executives by the executive.[122]

All three courts that eventually considered the case hinged their decision on the naked self-dealing.[123] The Texas Supreme Court affirmed the lower courts' holdings that unwound the lease and deed of trust, assessed punitive damages, and confirmed that Manges breached his fiduciary duty.[124] The court reasoned "[t]he fiduciary duty arises from the relationship of the parties" and then introduced the "fiduciary duty lite" level of care, still observed over thirty years later in Texas, with a quote known to most Texas oil and gas practitioners: "The [fiduciary] duty requires the holder of the executive right, Manges in this case, to acquire for the non-executive every benefit that he exacts for himself."[125]

Subsequent to *Manges*, Texas courts continue to apply this fiduciary duty lite approach to executive rights cases by not requiring the executive to always subordinate its interest to that of the non-executive(s), as might be applicable in the case of a trustee, agent, or more traditional fiduciary.[126] Richard Hemingway noted in his treatise *Oil and Gas Law and Taxation* that Texas courts typically examine the factual specifics each executive duty case and considered: (1) whether the executive leasing power was exercised

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 654–55.

122. *See Manges*, 673 S.W.2d at 184 ("In our opinion Manges' conduct amounted to a breach of his fiduciary duty found by the jury in making the lease to himself . . . .").

123. *See, e.g., id.* at 183 (holding Manges in breach of his duty of utmost fair dealing).

124. *Id.* at 184.

125. *Id.* at 183.

126. *See, e.g., In re* Bass, 113 S.W.3d 735, 745 (Tex. 2003) (holding the executive should acquire the same benefits for the non-executive that he would acquire for himself); Hlavinka v. Hancock, 116 S.W.3d 412, 419 (Tex. App.—Corpus Christi 2003, pet. denied) ("Where a party having executive leasing privileges enters into a transaction in which he and the non-executive mineral holders are both interested and the executive is authorized to act for both parties, he must exact for the non-executive every benefit that he exacts for himself."); *see also* RICHARD W. HEMINGWAY, OIL AND GAS LAW AND TAXATION § 2.2(C) (4th ed. 2004) (maintaining that the Texas Supreme Court continues to follow the *Manges* standard of "duty of utmost fair dealing with fiduciary obligations").

in a way that a similarly-situated fee mineral owner exercising the executive right to lease over its own interest would have acted, and (2) whether the executive had sought any advantages that the non-executive(s) would not receive.[127]

Application of this fiduciary duty lite proved challenging for the courts. While the subsequent case of *In re Bass*[128] reaffirmed that Texas executives owe the non-executives "a fiduciary duty,"[129] the Texas Supreme Court applied the duty in a different manner. In *Bass*, the fee mineral owner owned approximately 22,000 acres encumbered by a one-eighth NPRI.[130] In 1995, the mineral interest owner hired Exxon to conduct a seismic reflection survey on the tract, but did not subsequently lease.[131] The owners of an undivided portion of an outstanding NPRI then sued, arguing the mineral owner had violated its executive duty to them by failing to lease.[132] The NPRI owner also sought disclosure of the confidential seismic data as proof that the tract would be profitable to lease.[133]

The Texas Supreme Court reversed a lower court ruling compelling disclosure of the seismic data and scrutinized the nature of the fiduciary duty owed the NPRI owner, specifically focusing on the alleged duty to develop the tract.[134] The court rejected the argument that the executive's duty to develop the mineral estate springs from a special fiduciary relationship between the executive and the non-executives.[135] Instead, the court found that a duty to develop arises from "the implied covenant doctrine of contracts law in which courts read a duty to develop into an oil

127. *See, e.g.*, *Hlavinka*, 116 S.W.3d at 419 (opining that cases where the executive receives a disproportionate amount of benefits in comparison to those received by the non-executive trend towards a finding of breach of duty); Hawkins v. Twin Montana, Inc., 810 S.W.2d 441, 446 (Tex. App.—Fort Worth 1991, no writ) (holding an executive in breach of the duty owed to non-executives by acting to only obtain minimum benefits for the non-executive); Kimsey v. Fore, 593 S.W.2d 107, 113 (Tex. Civ. App.—Beaumont 1979, writ denied) (finding a breach of duty by an executive through failure to protect the rights of the non-executive); Portwood v. Buckalew, 521 S.W.2d 904, 911 (Tex. Civ. App.—Tyler 1975, writ ref'd n.r.e.) (holding it is the duty of the executive to "exact [for the non-executive] every benefit that he exacts for himself" in order to avoid breaching the duty of good faith).

128. *In re* Bass, 113 S.W.3d 735 (Tex. 2003).

129. *Id.* at 745.

130. *Id.* at 738.

131. *Id.*

132. *Id.* at 737.

133. *Id.* at 738.

134. *Id.* at 745.

135. *Id.* at 743 (citing Danciger Oil & Ref. Co. v. Powell, 154 S.W.2d 632, 635 (Tex. 1941)).

and gas lease when necessary to effectuate the parties' intent."[136] After distinguishing these two duties, the court noted the executive was only required to obtain for the non-executive what it obtained for itself.[137] Because the executive in *Bass* did not exercise its executive power by leasing and received no benefits therefrom, the executive did not violate its duty; neither party had received any benefit from leasing or otherwise.[138]

Bass is clearly distinguishable from *Manges* in that the executive in *Bass* engaged in no self-dealing.[139] In *Bass*, the executive had not refused to lease when presented with the opportunity.[140] Additionally, there was no evidence that the executive entered into contracts that had the effect of making the minerals unmarketable for leasing.[141] Thus, in *Bass*, the executive did not "use[] the executive powers to benefit himself with no similar benefit to the non-executives" as was the case when Manges refused to lease, executed the options contracts with GPE, and encumbered the non-executive minerals to a deed of trust.[142]

After *Bass* and, as discussed below, before *Lesley*, the executive could refuse to lease if offered the opportunity for almost any reason, possibly even refusal motivated by self-dealing by the executive that could be unfavorable to the non-executives. In *Hlavinka v. Hancock*,[143] non-executive mineral fee owners brought an action for a breach of fiduciary duty against the executive—who also possessed the surface estate—after the executive declined offers to lease the non-executives' mineral interest. The Corpus Christi Court of Appeals held the executives did not breach their duty to the non-executives when the executives did not accept a lease with different bonus and royalty rates than neighboring leases.[144] The court couched its holding in language that distinguished *Hlavinka* from previous cases involving refusals to lease by an executive, opining that it was not "a case where the Hlavinkas were arbitrarily refusing to lease under any circumstances."[145] Furthermore, *Hlavinka* involved no self-

136. *Id.* (citing *Danciger Oil & Ref. Co.*, 154 S.W.2d at 635).

137. *Id.* at 745.

138. *Id.* at 744–45.

139. *See id.* at 745 ("What differentiates this case from *Manges*, however, is that no evidence of self-dealing exists here.").

140. *Id.*

141. *Id.*

142. *Manges*, 673 S.W.2d 180, 182 (Tex. 1984).

143. Hlavinka v. Hancock, 116 S.W.3d 412 (Tex. App.—Corpus Christi 2003, pet. denied).

144. *See id.* at 420 ("[B]ecause they have not acquired any benefits for themselves pursuant to any lease, we conclude the Hlavinkas did not breach their fiduciary duty to [the non-executives] by failing to enter into any lease.").

145. *Id.* at 419.

dealing by the executive and was not "a case where the [executive] entered into a transaction affecting the mineral estate where they exacted a benefit for themselves to the exclusion of the [non-executives]."[146]

In *Aurora Petroleum, Inc. v. Newton*,[147] *Bass* likewise served as the principal rationale for the court's acceptance of an executive's refusal to lease. In *Aurora*, the plaintiffs were owners of terminable non-executive mineral interests comprising three-fourths of the fee mineral estate.[148] The executive defendant owned the remaining one-fourth of the fee mineral estate and both the executive rights and reversionary interest covering the terminable interests of the non-executives.[149] The terminable interests would revert to the executive if they were not maintained by production.[150] The non-executives decided to enter into a lease with Aurora Petroleum; however, the executive refused to ratify the lease.[151] Aurora sought a judicial declaration—on behalf of itself and the non-executives—that the executive had breached its fiduciary duty by not ratifying the lease.[152] The plaintiffs asked the court to transfer the executive right to the owners of the non-executive terminable interest.[153] The Amarillo Court of Appeals rejected this argument and instead held that the plaintiffs were essentially arguing the executive had a duty to lease or self-develop, a supposition that cannot arise in Texas without an oil and gas lease.[154] Citing *Bass*, the court held the executive does not have a duty to execute an oil and gas lease; instead, its executive duty to non-executives springs forth only upon the execution of a lease.[155] Only when the lease is signed does the duty arise for the executive to acquire every benefit for the non-executive that the executive acquires for himself.[156]

Therefore, in both *Hlavinka* and *Aurora*, the courts cited *Bass* in holding the executive did not violate its fiduciary duty to the non-executives

146. *Id.*

147. Aurora Petroleum, Inc. v. Newton, 287 S.W.3d 373 (Tex. App.—Amarillo 2009, no pet.).

148. *Id.* at 375.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *See id.* at 377 (noting an executive's duty to develop can only be implied from the presence of an existing lease).

155. *See id.* ("In *Bass*, the Texas Supreme Court stated that, 'a duty to develop a mineral estate arises . . . from the implied covenant doctrine of contracts law in which courts read a duty to develop into an oil and gas lease when necessary to effectuate the parties['] intent.'" (quoting *In re Bass*, 113 S.W.3d 735, 743 (Tex. 2003))).

156. *Id.*

because no lease was signed.[157] Thus was the legal landscape in Texas with regards to the executive's duty to lease at the time of the *Lesley* decision.

D. *The Different Duties Owed to Non-Executive Mineral Fee Owners and NPRI Owners*

Is an NPRI owner entitled to the same fiduciary duty from an executive as a non-executive mineral owner? The answer may lie in the difference between an NPRI and a non-executive mineral fee. An NPRI is a type of royalty that is conveyed or reserved by fee mineral or another royalty interest, meaning that they are ultimately carved out of the fee mineral estate and not out of the leasehold estate like an overriding royalty interest (ORI).[158] Some NPRIs last only for a certain interval of time while others are perpetual.[159] Texas courts have consistently characterized NPRIs as an incorporeal interest in land.[160] Because this interest is incorporeal, the NPRI owner cannot explore for or develop minerals itself.[161] In addition, the NPRI owner is not a necessary party to a lease of the mineral estate[162] and is only entitled to an interest in "actual production" once the minerals

157. *See id.* ("Since[] Newton has not leased, and, therefore, has not acquired any benefit for themselves, they cannot have breached their duty to the non-executive mineral right holders." (citing *In re Bass*, 113 S.W.3d at 745)); Hlavinka v. Hancock, 116 S.W.3d 412, 421 (Tex. App.—Corpus Christi 2003, pet. denied) (relaying that the Texas Supreme Court concluded in *Bass* "the executive did not breach a fiduciary duty to the non-executives without having exercised his executive power" (citing *In re Bass*, 113 S.W.3d at 744–45)).

158. *See* JOSEPH SHADE, PRIMER ON THE TEXAS LAW OF OIL AND GAS 15 (4th ed. 2008) ("The NPRI, like the LRI, is carved out of the [l]essor's interest" and "ORIs are carved out the Lessee's interest.").

159. *Id.*

160. *See, e.g.*, Bagby v. Bredthauer, 627 S.W.2d 190, 194 (Tex. App.—Austin 1981, no writ) ("His interest is an interest in 'land,' but since he may not enter the premises for the purpose of exploration or development, his interest is viewed as an *incorporeal* interest in the land."); Martin v. Schneider, 622 S.W.2d 620, 622 (Tex. App.—Corpus Christi 1981, writ ref'd n.r.e.) ("[T]he owner of a mere royalty interest has no present or prospective possessory interest in the land . . . his interest is merely a present vested incorporeal interest." (quoting Lee Jones, Jr., *Non-Participating Royalty*, 26 TEX. L. REV. 569, 569–70 (1948))); *see also* JOSEPH SHADE, PRIMER ON THE TEXAS LAW OF OIL AND GAS 16 (4th ed. 2008) (describing the NPRI under Texas law as an incorporeal estate).

161. *See Bagby*, 627 S.W.2d at 194 (noting an NPRI holder "may not explore for minerals himself"); *Martin*, 622 S.W.2d at 622 ("A non-participating royalty owner is not entitled to produce the minerals himself."); *see also* JOSEPH SHADE, PRIMER ON THE TEXAS LAW OF OIL AND GAS 15 (4th ed. 2008) ("Royalty owners do not have any operating rights. They have no right to develop or to lease.").

162. *See Bagby*, 627 S.W.2d at 194 ("A 'royalty interest' . . . is not a necessary party to a lease of the mineral estate.").

are produced.[163] As a further limitation, NPRI owners generally have no right to receive any lease bonus or delay rentals and do not have any power to make a lease.[164] On the other hand, NPRIs usually are "free of the costs of drilling and production."[165] In sum, NPRIs have been defined as:

> [A]n interest in the gross production of oil, gas, and other minerals carved out of the mineral fee estate as a free royalty, which does not carry with it the right to participate in the execution of, the bonus payable for, or the delay rentals to accrue under oil, gas, and mineral leases executed by the owner of the mineral fee estate.[166]

Texas courts have differentiated the presence or absence of an implied covenant to protect or develop a non-executive mineral interest depending on whether the non-executive interest was a fee mineral interest or an NPRI. In *Danciger Oil & Refining Co. of Texas v. Powell*,[167] the Texas Supreme Court explained a covenant to protect or develop may be implied if it appears "that it is necessary to infer such a covenant in order to effectuate the full purpose of the contract as a whole as gathered from the written instrument."[168] In *Danciger*, the court considered a mineral deed that unconditionally granted the fee minerals "for an unlimited period of time."[169] The grantor retained a one-eighth NPRI. When considering a tussle over whether the executive grantee owed a duty to develop to the NPRI-retaining grantor, the court stated, "There is nothing in the

163. *See* Watkins v. Slaughter, 144 Tex. 179, 189 S.W.2d 699, 700 (1945) (determining an interest to be a royalty due to the language in the subject instrument expressly limiting the interest's right to "actual production"); Neel v. Alpar Res., Inc., 797 S.W.2d 361, 364 (Tex. App.—Amarillo 1990, no writ) (noting royalty interests are not created by specific terms of art, but are instead created by the intent of the parties entering into the agreement, reviewed as a whole, to require that the interest be paid from actual production); *Bagby*, 627 S.W.2d at 194 (stating a royalty interest only "possesses the right to his specified proportionate share of production once the minerals are produced"); *Martin*, 622 S.W.2d at 622 (holding that because a royalty has no claim to minerals in place but only to minerals actually produced, the only right derived from the royalty interest was the right to take the NPRI's share of actual production); Miller v. Speed, 245 S.W.2d 250, 252 (Tex. Civ. App.—Eastland 1952, no writ) (distinguishing between an interest in oil and gas in place and an interest in oil and gas actually produced—the latter termed a royalty interest).

164. *See, e.g.*, Magnolia Petroleum Co. v. Storm, 239 S.W.2d 437, 438 (Tex. Civ. App.—El Paso 1950, writ ref'd n.r.e.) (finding NPRI holders were not entitled "to receive any part of the bonus or rentals" that normally accompany mineral interest ownership upon the birth of the leasehold term).

165. Temple-Inland Forest Prod. Corp. v. Henderson Family P'ship, Ltd., 958 S.W.2d 183, 186 (Tex. 1998).

166. Lee Jones, Jr., *Non-Participating Royalty*, 26 TEX. L. REV. 569, 569–70 (1948) (footnote omitted).

167. Danciger Oil & Refining Co. of Tex. v. Powell, 154 S.W.2d 632 (Tex. 1941).

168. *Id.* at 635.

169. *Id.* at 636.

instrument to indicate that its dominant purpose was to obtain an exploitation or development of the property for oil and gas mining purposes."[170] In holding that no duty to develop existed, the court noted that even though the grantor retained a one-eighth NPRI, this was insufficient in itself to require "reading into the contract" a covenant to speedily develop the property in the event commercial hydrocarbons were found.[171] Likewise, in *Pickens v. Hope*,[172] the San Antonio Court of Appeals held a fee mineral executive cotenant owes fiduciary duties to its fellow non-executive cotenants, but that such duties did not necessarily extend to an owner of an NPRI.[173] This reticence strongly suggests there is no implied covenant in Texas for an executive to protect or to develop NPRI-burdened minerals.

The NPRI owner does not obtain any possessory interest in the land or any title to the minerals.[174] The NPRI owner is also not a cotenant with the mineral fee owner, but instead has an incorporeal hereditament analogous to the right to receive future rents of real property.[175] The NPRI owner does not have "that degree of control over the executive that usually characterizes a principal-agency relation" and, hence, has no power to lease because it does not own a property interest that can be leased.[176] Finally, the relationship between the NPRI owner and the executive is not like that of a trust relationship because the executive does not own anything that encumbers the NPRI interest nor anything over which it would owe equitable duties, such as the executive control over the non-executive fee mineral interest.[177] In a real sense, the NPRI owner is just along for the ride.

This difference resonates between the two towers of *Bass* and *Manges*,

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170. *Id.*

171. *Id.*

172. Pickens v. Hope, 764 S.W. 2d 256 (Tex. App.—San Antonio 1988, writ denied).

173. *Id.* at 266.

174. *Id.* at 267; *see* Lee Jones, Jr., *Non-Participating Royalty*, 26 TEX. L. REV. 569, 573 n.17 (1948) ("[A] royalty owner . . . does not own and never did or will own[] a property interest that is capable of being leased.").

175. *See* Martin v. Schneider, 622 S.W.2d 620, 622 (Tex. App.—Corpus Christi 1981, writ ref'd n.r.e.) ("[T]he owner of a mere royalty interest has no present or prospective possessory interest in the land; . . . his interest is merely a present vested incorporeal interest." (quoting Lee Jones, Jr., *Non-Participating Royalty*, 26 TEX. L. REV. 569, 569–70 (1948))); *see also* JOSEPH SHADE, PRIMER ON THE TEXAS LAW OF OIL AND GAS 16 (4th ed. 2008) (describing the NPRI under Texas law as an incorporeal estate); Lee Jones, Jr., *Non-Participating Royalty*, 26 TEX. L. REV. 569, 573 n.17 (1948) (describing the NPRI as a non-executive, incorporeal mineral interest).

176. Lee Jones, Jr., *Non-Participating Royalty*, 26 TEX. L. REV. 569, 573 n.17 (1948).

177. *Id.* ("The owner of the executive right does not have legal title to any property belonging to the royalty owner . . . .").

described above, in that the non-executive interest owned in *Bass* was an NPRI; in *Manges*, the non-executive interest was a mineral fee.[178] Unlike an interest in the mineral fee, an NPRI is "an interest in gross production of oil, gas, and other minerals *carved out of the mineral fee estate* as a free royalty"[179] and was not a leasable interest. The executive obviously does not owe the NPRI owner a duty to lease an interest that is not capable of being leased.

III. FACTUAL AND PROCEDURAL BACKGROUND TO *LESLEY V. VETERANS LAND BOARD*

A. *Introduction and Factual Background*

The power of the executive right owner and the level of consideration the executive must give the non-executives are still being litigated. Recently, the Texas Supreme Court handed down an opinion in which the executive right played a defining role. The court's ruling, although somewhat terse, helped to shed further light on this most mysterious stick in the bundle of mineral rights. This case, *Lesley*, marks a turning point in executive right jurisprudence resulting from the inevitable transference of an executive right into the hands of a party with no desire to lease for mineral development because of the party's interest in developing the surface estate for other purposes that could be adversely affected by drilling and production.

The Barnett Shale play is a recently discovered gas deposit lying west of the Dallas/Fort Worth Metroplex and underlies the property at issue. Within the past five years it became the largest gas play in the continental United States.[180] Leasing and exploration activity, such as seismic reflection data gathering, have occurred and continue around the "Mountain Lakes Development"—the name of the captioned tract.[181] Prior to the advent of economic hydraulic fracturing, horizontal drilling

178. *Compare In re* Bass, 113 S.W.3d 735, 745 (Tex. 2003) (determining an executive relationship existed because McGills had a non-participating royalty in mineral estate), *with* Manges v. Guerra, 673 S.W.2d 180, 183 (Tex. 1984) (establishing a limited share of one-eighth royalty also created an executive right between Manges and Guerra).

179. *In re Bass*, 113 S.W. 3d at 745 n.2 (quoting Plainsman Trading Co. v. Crews, 898 S.W.2d 786, 789–90 (Tex. 1995)).

180. *See Barnett Shale Information*, R.R. COMM'N OF TEX., http://www.rrc.state.tx.us/barnettshale/index.php (last visited April 5, 2013) (reporting the "Barnett Shale is the largest onshore natural gas field in the United States").

181. Veterans Land Bd. v. Lesley, 281 S.W.3d 602, 608 (Tex. App.—Eastland 2009) *aff'd in part, rev'd in part sub nom.* Lesley v. Veterans Land Bd. of State, 352 S.W.3d 479 (Tex. 2011).

technology, and higher gas prices, the Barnett Shale was considered a "trap rock" formation that held oil and gas within more traditional reservoirs below it.[182] However, by the year 2000 higher gas prices and better drilling technology led to a deluge of gas production in and around Denton, Tarrant, and Wise counties in Texas, "with over 10,000 wells drilled" by 2008.[183] Lease bonuses in the region topped $26,000 per mineral acre in the most prospective portions of the Barnett Shale.[184]

The Barnett Shale itself ranges in depth from 6,500 feet to 8,500 feet and is found below the Marble Falls Limestone formation and above the Chappel Limestone formation.[185] Wells in the Barnett Shale are typically horizontal with "well spacing ranging from 60 to 160 acres per well" draining a highly variable reservoir with a thickness of 100 to 600 feet.[186] Government sources place 327 trillion cubic feed [Tcf] of gas in the Barnett, with 44 Tcf being recoverable; each ton of shale produces a generous 300 to 350 standard cubic feet [Scf] of natural gas.[187]

In *Lesley*, the tract in question was a 3,923.58-acre swath of land located near the middle of the Barnett Shale formation in Erath County, Texas that was conveyed in 1998 by Betty Yvon Lesley (Lesley) to the predecessor of Bluegreen Southwest One, L.P. (Bluegreen), a Florida real estate developer.[188] Completed in two deeds, the conveyances contained a reservation of a portion of Lesley's fifty-percent undivided mineral estate but passed all of the executive rights to the grantee.[189] The grantee, as executive rights holder, therefore owned twenty-five percent of the

182. *See Barnett Shale Information*, R.R. COMM'N OF TEX., http://www.rrc.state.tx.us/barnettshale/index.php (last visited April 5, 2013) ("It was not until the 1980[]s with new advances in horizontal drilling and well fracturing technology used by Mitchell Energy, a small independent, that the potential of the Barnett Shale was realized. Significant drilling activity did not begin until gas prices increased in the late 1990[]s.").

183. U.S. DEPARTMENT OF ENERGY (DOE) OFFICE OF FOSSIL ENERGY, MODERN SHALE GAS DEVELOPMENT IN THE UNITED STATES—A PRIMER 18 (2009), *available at* http://www.netl.doe.gov/technologies/oil-gas/publications/EPreports/Shale_Gas_Primer_2009.pdf.

184. *See* Jack Z. Smith, *Barnett Shale Bonus Payments*, FT. WORTH STAR-TELEGRAM BLOG, http://blogs.star-telegram.com/barnett_shale/2009/09/lawyers-address-neighborhood-regarding-aborted-gas-leases-.html (last visited Mar. 24, 2013) (reporting various neighborhood alliances in Arlington and Fort Worth reached agreements for bonuses in excess of $26,000 per acre).

185. U.S. DEPARTMENT OF ENERGY (DOE) OFFICE OF FOSSIL ENERGY, MODERN SHALE GAS DEVELOPMENT IN THE UNITED STATES—A PRIMER 18 (2009), *available at* http://www.netl.doe.gov/technologies/oil-gas/publications/EPreports/Shale_Gas_Primer_2009.pdf.

186. *Id.*

187. *Id.*

188. Lesley v. Veterans Land Bd. of State, 352 S.W.3d 479, 481 (Tex. 2011).

189. *Id.* at 481–82.

minerals but all of the executive rights to lease.[190] Additionally, the developer owned all of the surface estate.[191] The housing developer intended to develop the surface into a series of "ranchettes"—individual housing sites each comprising about five acres of land. Intermixed into the individual lots would also be communally-held lands managed by a community organization.[192]

In preparation for marketing approximately 1,200 surface tracts, the developer printed sales materials advertising the fact that no drilling would ever take place on the subject land[193]—this promoted claim served as an enticement for those looking to avoid having to deal with the gas shale development then rampant throughout the region. In addition, each of the individual lot owners would take deeds subject to a covenant against drilling that required the purchasers to acquiesce to anti-drilling covenants and other limitations that effectively prevented the development of the mineral estate.[194] Specifically, the "Declaration of Covenants" signed by the surface tract purchasers provided: "No commercial oil drilling, oil development operations, oil refining, quarrying or mining operation of any kind shall be permitted. No derrick or other structures designed for the use of boring for oil or natural gas shall be erected, maintained or permitted upon any Tract."[195] Although this Declaration of Covenants was amended from time to time, it was never repealed or withdrawn. Each surface landowner and their successors, heirs, and assigns who purchased a lot took their respective assignment of interests subject to this covenant.[196] The deeds for the individual lots, however, each passed the associated fee minerals without mention of the executive right.[197]

These limitations on drilling were used by the executive to heighten its

190. *Id.* at 481.

191. *Id.*

192. ADVERTISEMENT AND PROPERTY REPORT FOR MOUNTAIN LAKES SUBDIVISION, BLUEGREEN SOUTHWEST ONE, L.P., at 26–27 (June 19, 2002) (on file with *St. Mary's Law Journal*) (describing properties such as parks, picnic areas, dams, and boat ramps that would be conveyed to the Mountain Lakes Homeowner's Association by warranty deed after conveyance of the majority of the lots in the development).

193. *Id.* at 2, 13 (advertising restrictive covenants that "generally prohibit mineral development").

194. *See* Veterans Land Bd. v. Lesley, 281 S.W.3d 602, 609 (Tex. App.—Eastland 2009) (reporting a typical deed from Bluegreen to a purchaser of a tract in the development was subject to "[a]ny and all restrictions, covenants, and easements, if any, relating the hereinabove described property, but only to the extent that they are still in effect") *aff'd in part, rev'd in part sub nom. Lesley*, 352 S.W.3d 479.

195. *Id.*

196. *Id.*

197. *See Lesley*, 352 S.W. at 482 ("The deeds did not mention the executive right.").

return from selling the 1,200 tracts, a benefit derived from blocking the development hopes of the non-executives.[198] Thus, the owner of the executive right was also the surface developer and had a self-interest in maximizing its profits from lot sales.[199] Wanting to take advantage of this favorable leasing climate but finding themselves under the thumb of an obdurate executive, the owners of the majority share non-executive, non-surface, mineral interest brought suit.

B. *The District Court*

The non-executives filed suit against Bluegreen and the individual lot owners, including the Veterans Land Board of the State of Texas, in Erath County, Texas in 2005, complaining about the restrictive covenants that limited mineral development.[200] The 266th District Court of Erath County issued its opinion on January 17, 2007, and held that Bluegreen, deemed the sole owner of the executive rights, owed the non-executives a duty to seek out or cooperate with a prospective lessee.[201] The court also found the executive had breached its fiduciary duty to the non-executives

198. Because of the potential windfall to the developer by selling its surface properties at a higher price with the promise of no drilling, an argument could be made that he reaped a benefit his cotenants did not and thus they are due an accounting of a portion of the profits. In *White v. Smyth*, Smyth and others sued mineral estate cotenant White and others, seeking partition and accounting for rock asphalt removed from the common property. White v. Smyth, 214 S.W.2d 967, 969 (Tex. 1948). The Texas Supreme Court found for Smyth, casting aside White's argument that he merely took his share of the rock asphalt. *Id.* at 979. Further, the court stated:

> The rock asphalt was owned in undivided interests by all the co-tenants. Their ownership extended to all of the rock asphalt and to all of the advantages *and peculiar conditions and stages of development of the property* at the time when petitioner terminated the lease. This ownership extended to the developed pit with its great wall of easily accessible rock asphalt *and to the valuable mining site.* It extended to the use value of the rock asphalt *and to its profit possibilities.*

Id. (emphasis added). Non-development of natural resources which reaped for the executive rights owner an actual monetary benefit could be said to be worthy of an accounting if "peculiar conditions" included not disturbing a "valuable drilling site." Tactically, this accounting—in lieu of clearance to lease and receive royalty from subsequent drilling—is almost certainly not what the potential plaintiffs want in this circumstance. However, *White* involved self-development by cotenants, and did not involve exercise of the executive duty. It remains to be seen if this theory of damages will be extended to a situation involving the executive duty and failure to lease.

199. *See Lesley*, 352 S.W.3d at 492 ("We recognize that Bluegreen as a land developer acquired the executive right for the specific purpose of protecting the subdivision for intrusive and potentially disruptive activities related to developing the minerals."). Additionally, the developer had printed sales brochures wherein the fact that no drilling would be permitted through the use of restrictive covenants on the lots was advertised as a positive sales point. *Cf. id.* at 481–82 (restrictive covenants were used to "enhance[] and protect[] the value, desirability[,] and attractiveness" of the property (alteration in original) (internal quotation marks omitted)).

200. *Veterans Land Bd.*, 281 S.W.3d at 608, 610.

201. *Id.* at 610–11.

by: (1) implementing restrictive covenants that barred mineral development; (2) entering into deeds of trust that encumbered the property as mortgagor; and most importantly (3) failing to lease the minerals when an opportunity presented itself.[202] The court also held the restrictive covenants were not binding on the non-executives and that the non-executives could develop the oil, gas, and minerals under the captioned tract themselves—they could, in other words, "self-develop."[203] With this setback, Bluegreen and some of the individual tract owners—including the Veterans Land Board—appealed the district court's order in support of Lesley's motions for summary judgment to the court of appeals in Eastland, Texas.[204]

C. *The Eleventh Court of Appeals*

The Eleventh Court of Appeals, in a decision written by Justice Terry McCall,[205] overruled the trial court, reversing the trial court's summary judgment in all respects as a matter of law and remanding to the trial court for hearings consistent with its opinion.[206] In reaching its disposition, the court made four findings that are particularly relevant to Texas executive rights jurisprudence.

First, the court found Bluegreen and the individual lot owners to whom the executive right passed did not breach their duty to the non-executives because the owner of the executive right does not have a duty to lease the non-executives' minerals.[207]

Second, the court ruled that because the developer in *Lesley* did not lease the land, the fiduciary duty was not activated, opining, "No breach of fiduciary duty can occur until the executive exercises the executive rights."[208] In reaching this conclusion, the court quoted from *Bass*:

> The Guerras sued Manges for self-dealing in leasing a portion of the estate

202. *Lesley*, 352 S.W. at 482.

203. *See Veterans Land Bd.*, 281 S.W.3d at 613 ("[T]he [d]eclarations of [c]ovenants [are not] enforceable, and cannot be used to prohibit or restrict in any way, the exploration for, development of, production of, and/or marketing of oil, gas[,] and/or other minerals which may be located in, on, or under the [s]ubject [land]" and further that the covenants "cannot be used, to prohibit or restrict in any way, the [non-executive's] rights as mineral co-tenants to self-exploration or self-development of [the non-executive's] mineral interests.").

204. *See id.* at 603 (describing the history of the case and the grounds upon which the case was appealed).

205. *Id.* at 608.

206. *Lesley*, 352 S.W. at 482–83.

207. *See Veterans Land Bd.*, 281 S.W.3d at 619 ("Bluegreen did not breach a duty by failing to lease [the non-executives'] minerals.").

208. *Id.* at 618.

> to himself at unfair terms. We stated that "[a] fiduciary duty arises from the relationship of the parties . . . [t]hat duty requires the holder of the executive right, Manges in this case, to acquire for the non-executive every benefit that he exacts for himself." Accordingly, we held that Manges breached his fiduciary duty to the Guerras by making a lease to himself under numerous unfair terms.
>
> . . . .
>
> *What differentiates* [Bass] *from* Manges, *however, is that no evidence of self-dealing exists here.* Bass has not leased his land to himself or anyone else. Bass has yet to exercise his rights as the executive. Because Bass has not acquired any benefits for himself, through executing a lease, no duty has been breached. Thus, the present facts are distinguishable from *Manges.*[209]

Relying upon the findings of *Bass*, the court then suggested the rule "that no breach of fiduciary duty can occur until the executive exercises the executive rights."[210] The court parsed out this rule into three components, finding that "[a] fiduciary duty only occurs if (1) the executive exercises the executive rights, (2) the executive acquires benefits from the minerals for himself by exercising the executive rights, and (3) the executive fails to acquire every benefit for the non-executive mineral owners that he acquired for himself."[211] Because the anti-drilling covenants, conditions, and restrictions were instituted by Bluegreen "for the purpose of maintaining the integrity of the subdivision" and were not an exercise of the executive right, the developer did not breach the fiduciary duty owed by the executive to the non-executives—and would not have breached such duty even if such restrictions did constitute an exercise of the executive duty.[212]

Third, the court found that the non-executives not only passed the right to lease when they severed the executive right, but also passed all rights to

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209. *Id.* (emphasis added) (quoting *In re* Bass, 113 S.W.3d 735, 744–45 (Tex. 2003)), *aff'd in part, rev'd in part sub nom.* Lesley v. Veterans Land Bd. of State, 352 S.W.3d 479 (Tex. 2011).

210. *Id.*; *see also* Kerlin v. Sauceda, 263 S.W.3d 920, 931–32 (Tex. 2008) (Brister, J., concurring) (noting an executive rights holder only owes a duty after a lease is executed and has no duty to lease); Manges v. Guerra, 673 S.W.2d 180, 183 (Tex. 1984) (discussing how the executive's fiduciary duty to not engage in self-dealing to the detriment of NPRI owners was triggered by activation of executive power through leasing); Montgomery v. Rittersbacher, 424 S.W.2d 210, 213 (Tex. 1968) ("Respondents, in exercising the executive rights, had a duty to protect the nonparticipating royalty owner.").

211. *Veterans Land Bd.*, 281 S.W.3d at 618.

212. *See id.* at 620 ("[E]ven if the declarations or the agreement to comply with them could be construed as an exercise of the executive rights, Bluegreen . . . did not breach a fiduciary duty to [the non-executive] appellees.").

self-development.[213] The court noted that, "Had the [non-executives] retained the executive rights and the *correlative* right to develop, the restriction against mineral development would not prohibit them from exercising the [leasing and self-development] rights."[214]

As a fourth and final tenant regarding Texas executive rights law, the court considered the validity of the covenants imposed by the developer upon lot holders in the development. The non-executives contended the covenants were invalid because the mineral rights had not effectively passed from the developer to the lot owners, arguing that the covenants made the grant void and that the anti-drilling covenants violated the dominance of the mineral estate.[215] The trial court agreed, stating the anti-drilling covenants were void.[216] However, the appellate court held the anti-drilling covenants—made after the mineral assignments from the non-executive to the executive—impliedly precluded self-development.[217] In essence, the appellate court ruled that the restrictive covenants defeated the right to self-development, seemingly creating a peculiar new category of non-possessory mineral owners whose property is not dominant over surface restrictions instituted at a later date.[218]

IV. THE OPINION OF THE TEXAS SUPREME COURT

Lesley filed their Petition for Review on May 18, 2009.[219] The Texas Supreme Court granted the petition on July 2, 2010.[220] The case drew widespread attention across the realm of oil and gas law, drawing amicus curiae briefs in support of Lesley by Professor Emeritus Bruce M. Kramer of Texas Tech University School of Law, the Texas General Law Office, and veteran oil and gas practitioner Maston C. Courtney of Amarillo,

213. *See id.* ("When the Lesley Appellees conveyed the executive rights to Bluff Dale, the right to develop passed with the executive rights to Bluff Dale. Therefore, appellees did not retain a right to develop their minerals.") (footnote omitted).

214. *Id.* at 620 n.12 (emphasis added).

215. *Id.* at 621.

216. *See id.* ("The trial court declared that the declarations of covenants were unenforceable . . . .").

217. *See id.* at 620 n.12 ("The mineral owner, having the dominant estate, cannot be limited by subdivision restrictions imposed by surface owners after the estate is severed." (quoting Prop. Owners of Leisure Land, Inc. v. Woolf & Magee, Inc., 786 S.W.2d 757, 760 (Tex. App.—Tyler 1990, no writ))).

218. *Cf. id.* at 621 ("The trial court erred in declaring that appellees had the right to self-develop the land.").

219. Petition for Review, Lesley v. Veterans Land Bd. of State, 352 S.W.3d 479 (Tex. 2011) (No. 09-0306), 2009 WL 1604404.

220. *Lesley*, 352 S.W.3d at 483 n.17 (citing 53 TEX. SUP. CT. J. 911 (July 2, 2010)).

Texas.[221] Bluegreen was represented by Laura H. Burney, professor of oil and gas law at St. Mary's University School of Law;[222] Chris Aycock and Susan Richardson of Cotton, Bledsoe, Tighe & Dawson, PC—a long-established Midland, Texas firm well known for oil and gas litigation and appellate work—represented the non-executives.[223] Oral argument took place in Austin on September 15, 2010.[224] On August 26, 2011, the court issued its opinion.[225]

A. *Passage of the Executive Right*

The non-executives argued, as they had before the appellate court, that because the executive surface owner placed restrictive anti-drilling covenants on lots purchased by residents that prevented them from leasing the mineral interest underlying their tracts, Bluegreen effectively reserved the executive right.[226] The court rejected this argument, noting amendments to the covenants covering the lots could be amended or even repealed entirely by a two-thirds vote of the lot owners, suggesting that the executive rights were transferred to the lot owners and were merely subject to the covenant limitations.[227] Perhaps less flippantly, the court also noted the factual similarities between *Day & Co.* and *Lesley* regarding passage of the largest possible estate before deducing that:

> When an undivided mineral interest is conveyed, reserved[,] or excepted, it is presumed that all attributes remain with the mineral interest unless a contrary intention is expressed. Therefore, when a mineral interest

221. *See* Brief for Respondents at 24, *Lesley*, 352 S.W.3d 479 (No. 09-0306), *available at* http://www.search.txcourts.gov/Case.aspx?cn=09-0306 (listing the three practitioners that authored *amicus curiae* briefs); *see also* Brief for Maston C. Courtney as Amicus Curiae Supporting Petitioner at 1, *Lesley*, 352 S.W.3d 479 (No. 09-0306), 2009 WL 1903910 at *1; Brief for Texas General Land Office as Amicus Curiae Supporting Petitioner at 1, *Lesley*, 352 S.W.3d 479 (No. 09-0306), 2009 WL 2134961 at *1; Brief for Bruce M. Kramer as Amicus Curiae Supporting Petitioner at 2, *Lesley*, 352 S.W.3d 479 (No. 09-0306), 2008 WL 6259823 at *2.

222. *Lesley*, 352 S.W.3d at 480.

223. *Id.*

224. A video of the oral argument is archived by St. Mary's School of Law. *See* Video: *09-0306, Lesley v. Veterans Land Board* (Supreme Court of Texas 2010) (on file with the St. Mary's School of Law Digital Repository), *available at* http://www.stmarylaw.org/items/show/1293 (last visited April 5, 2013).

225. *Lesley*, 352 S.W.3d at 479.

226. *See id.* at 486 ("The parties agree that Bluegreen owned the executive right . . . when it implemented the restrictive covenants for the subdivision, but they dispute whether the right was included in Bluegreen's deeds to the lot owners.").

227. *See id.* at 487 ("The [restrictive covenants] did not withdraw the executive right from the conveyances in the lot owners' deeds but merely subjected the exercise of the right to the covenant's limitations.") (footnote omitted).

> is reserved or excepted in a deed, the executive right covering that interest is also retained unless specifically conveyed. Likewise, when a mineral interest is conveyed, the executive right incident to that interest passes to the grantee unless specifically reserved.[228]

Drawing from *Day & Co.*, the court applied the same reasoning to the facts of *Lesley*, pronouncing that the Bluegreen deeds passed the executive right along with the fee surface and mineral interests to the individual lot owners because Bluegreen did not expressly except the executive right in the deed.[229] Therefore, the executive right passed to the lot owners, but was subject to the anti-drilling covenants.[230]

B. *Self-Development by the Non-Executives*

The Texas Supreme Court also quickly dispensed with Lesley's argument that the non-executive can self-develop the minerals.[231] Squelching the notion that the right to self-develop and the executive right to lease are separate and independent sticks in the bundle of mineral rights, the court cited its prior opinion in *French v. Chevron U.S.A., Inc.*[232] wherein it opined in dicta:

> We have stated that "the right to develop is a correlative right and passes with the executive rights." By this rule, petitioners have no right to develop. Having rejected the premise of their argument, and holding instead that they are owed a duty by the executive, we decline to reconsider the relation between the right to develop and the executive right.[233]

As detailed below, this quote from *French* cites to a footnote in dicta within *Day & Co.* that, in turn, cites to another footnote in dicta from an even earlier case.[234]

C. *Duty of the Executive Right*

Regarding the exact duty owed by the executive, both the executives

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228. *Id.* at 486 (footnote omitted) (quoting Day & Co., Inc. v. Texland Petroleum, Inc. 786 S.W.2d 667, 668 (Tex. 1990)).

229. *Id.* at 486–87.

230. *Id.* at 487.

231. *See id.* at 492 (rejecting the argument that the non-executives retained the right to self-develop the mineral estate because the right to develop is correlative with the right to execute leases and therefore passed to the executive).

232. French v. Chevron U.S.A, Inc., 896 S.W.2d 795 (Tex. 1995).

233. *Lesley*, 352 S.W.3d at 492 (quoting *French*, 896 S.W.2d at 797 n.1).

234. *See French*, 896 S.W.2d at 797 n.1 (citing Day & Co., Inc. v. Texland Petroleum, Inc., 786 S.W.2d 667, 669 n.1 (Tex. 1990)) (following a chain of precedent to conclude that "the right to develop is a correlative right and passes with the executive rights").

and the non-executives tried to align the situation in *Lesley* with the two main cases they saw as favorable to their cause. The executives leaned upon *Bass*, echoing the appellate court's holding that the executive's duty does not arise until leasing occurs; because they refused all possible lease offers, they argued no duty to the non-executives ever arose.[235] In contrast, the non-executives invoked *Manges* and the self-dealing involved in that case, arguing the executive's reading of *Bass* that allows for no breach of duty until leasing occurs—and hence, no leasing—cannot be reconciled with both *Manges* and the obvious executive self-dealing present in *Lesley*.[236]

Declining to follow the avenues offered by both parties, the court instead blazed a more nuanced and interpretive trail. After reiterating much of the above-described case law regarding the jurisprudential evolution of the duty of the executive right, the court first disagreed with the non-executives, rejecting their notion that the duty to lease found in *Manges*—as the non-executives contended was evidenced by the damages levied on *Manges* for failure to lease—could not be reconciled with *Bass* and *Lesley*, noting:

> The tension . . . [between] *Bass* and *Manges* is relieved by the fact that *Manges*' finding of breach was in the context of pervasive self-dealing. In other words, Manges breached his duty not merely because he failed to lease to third parties as opposed to no one at all, but because he failed to lease to third parties as opposed to himself. The tacit assumption in *Manges* was that "the minerals would be leased to someone." That was not the assumption in *Bass*, where the parties disputed whether the mineral should be leased at all.[237]

Thus, the breach of the fiduciary duty in *Manges* resulted from self-dealing and not from the lack of leasing.[238] The *Lesley* court noted that, in *Manges*, the "tacit assumption . . . was that the minerals would be leased to someone" eventually, contrasting the notion in *Bass* that "the parties [in *Bass*] disputed whether the minerals should be leased at all."[239]

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235. *See Lesley*, 352 S.W.3d at 491 ("Bluegreen and the lot owners argue that the executive cannot breach his duty to the non-executive until the executive power is actually exercised.").

236. *See id.* (reviewing the non-executive's argument that *Manges* demonstrated damages may be awarded for "non-exercise of the executive right").

237. *Id.*

238. *See* Manges v. Guerra, 673 S.W.2d 180, 184–85 (Tex. 1984) (declaring Manges "willfully, wantonly, maliciously[,] and unconscionably breached his fiduciary duty" by a "failure to negotiate for mineral leases with third persons" and by instead leasing the Guerra interest to himself).

239. *Lesley*, 352 S.W. 3d at 491. *See generally* Monika Ehrman, *Duties of the Executive After* Lesley v. Veterans Land Board, Presentation at the University of Texas at Austin School of Law 38th

The court then dispensed with Bluegreen's argument that *Bass* could be invoked for the proposition that, whether or not self-dealing is present, the existence of no lease precluded a finding that a fiduciary duty existed between the executive and the non-executive:

> Nevertheless, we do not agree with Bluegreen and the land owners that *Bass* can be read to shield the executive from liability for all inaction. It may be that an executive cannot be liable to the non-executive for failing to lease minerals when never requested to do so, but an executive's refusal to lease must be examined more carefully. If the refusal is arbitrary or motivated by self-interest to the non-executive's detriment, the executive may have breached his duty. While there was an allegation of self-interest in *Bass*, we concluded that it was not sufficiently supported by the record to warranty compelling discovery of privileged information.[240]

Even though the executive right holder in *Lesley* did not execute an oil and gas lease, the court held that Bluegreen "exercised the executive right to limit future leasing by imposing restrictive covenants on the subdivision" and that "[t]his was no less an exercise of the executive right than Manges' execution of a deed of trust covering the Guerra's mineral interest."[241]

Instead of establishing a specific rule regarding the fiduciary duty of the executive in relation to a refusal to lease, the court instead reasoned that "an executive's refusal to lease must be examined more carefully. If the refusal is arbitrary or motivated by self-interest to the non-executive's detriment, the executive may have breached [its] duty."[242] The court remanded the issue for the trial court to decide whether the executive breached its duty by not entering into an oil and gas lease.[243] Instead of expanding on the issue, the court briefly explained it would not give a "general rule" because of the varying circumstances from which an executive could be liable for breaching its fiduciary duty, stating "we need not decide here whether as a general rule an executive is liable to a non-executive for refusing to lease minerals, if indeed a general rule can be

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Annual Ernest E. Smith Oil, Gas & Mineral Law Institute, at 1–17 (Mar. 30, 2012), *available at* http://www.utcle.org/eLibrary/preview.php?asset_file_id=33600 (emphasizing the difference in the way the respective courts adjudicating the *Lesley* dispute viewed the parties' expectations in *Manges* and *Bass*.)

240. *Lesley*, 352 S.W. 3d at 491 (footnote omitted).

241. *Id.*

242. *Id.*

243. *See id.* at 492 ("The judgment of the court of appeals is affirmed in part and reversed in part, and the case is remanded to the trial court for further proceedings in accordance with our opinion.").

stated, given the widely differing circumstances in which the issue arises."[244]

Regarding the restrictive covenant, the court held Bluegreen violated its fiduciary duty by placing anti-drilling restrictions on the individual lots.[245] Although the court recognized Bluegreen wanted to protect the homeowners from disruptive activity related to drilling, the court stated that protection of the surface estate could be properly achieved through the accommodation doctrine.[246]

V. ANALYSIS OF THE EXECUTIVE RIGHT IN TEXAS AFTER *LESLEY*

Executive rights have long perplexed the courts, causing them to struggle to consistently classify this most mysterious of the mineral interest rights.[247] *Lesley* speaks little to questions regarding bonus payment negotiation and reception, treatment of non-executive fee mineral interests versus NPRIs concerning the fiduciary duty of the executive, or duties by the non-executive to lease or self-develop its own minerals. However, *Lesley* does change the timing and application of the duty owed by the executive to the non-executives, when and how this duty is activated, and squelches self-development by the non-executive.

A. *The Duty Owed by the Executive to the Non-Executives Generally*

From a public policy perspective, the executive right was most likely created and recognized to facilitate the leasing of hydrocarbon real property.[248] The appellate court's opinion was entirely divorced from this view.

If the executive rights holder has an interest in ensuring the minerals remain undeveloped, such as in *Lesley*, a temptation may arise to put self-interest ahead of the interest of the mineral cotenants—a situation

244. *Id.* at 491.

245. *Id.* at 492.

246. *Id. See generally* Douglas R. Hafer, et al., *A Practical Guide to Operators/Surface-Owner Disputes and the Current State of the Accommodations Doctrine*, 17 TEX. WESLEYAN L. REV. 47, 58–67 (2010) (providing a detailed discussion of application of the accommodation doctrine in Texas).

247. *See, e.g.*, *Lesley*, 352 S.W.3d at 487–88 ("[T]he variety of non-executive interests and the reasons for their creation, and the effects of changing circumstances, make it difficult to determine precisely what duty the executive owes the non-executive interest.").

248. *See* J. Robert Beatty, *Duties of the Executive*, Presentation at the University of Texas at Austin School of Law 33rd Annual Ernest E. Smith Oil, Gas & Mineral Law Institute, at 2 (Mar. 30, 2007), *available at* http://www.utcle.org/eLibrary/preview.php?asset_file_id=10628 (opining that the executive right's original purpose on an individual level was "to preserve surface property and its uses" and on a public policy level "to encourage oil and gas development and protect mineral owners").

incompatible with the duties of a fiduciary. In *Lesley*, the developer had an incentive to prevent oil and gas development in order to increase the value of the surface in the eyes of prospective lot purchasers.[249] In such a case, the interests of the supposed fiduciary pull the executive in two conflicting directions. The developer, as the executive right holder, has a fiduciary duty to its non-executive mineral cotenants while also possessing self-interest in maximizing profits from lot sales.

Bluegreen violated the fiduciary duty when the anti-drilling covenants were placed on the lots in an attempt to stop the lot owners from leasing their mineral interest for exploration and development of their respective portions of the mineral estate.[250] The fact that the appellate court did not reflect upon the self-dealing of Bluegreen[251] and the friction this created with the fiduciary duty of the executive is exceptional. The self-dealing of the executive in *Manges* powered the opinion of the Texas Supreme Court.[252] The lack of self-dealing is what the court in *Bass* noted when distinguishing that case from *Manges*.[253] The implications are clear: if no evidence of self-dealing by the owner of executive rights existed in *Lesley*, *Bass* may have been applicable.[254] What differentiates *Lesley* from *Bass*,

249. *See* Veterans Land Bd. v. Lesley, 281 S.W.3d 602, 609 (Tex. App.—Eastland 2009) (discussing the background of Bluegreen's purpose and use of the land), *aff'd in part, rev'd in part sub nom. Lesley*, 352 S.W.3d 479.

250. *See Lesley*, 352 S.W.3d at 481 (noting Bluegreen instituted restrictive covenants for the purpose of protecting "the value, desirability[,] and attractiveness" of the surface estate by "forbidding 'commercial oil drilling, oil development operations, oil refining, quarrying[,] or mining operation'").

251. The appellate court had held there had been no self-dealing:

> We note that the facts in this case are nothing like the facts in *Manges*. This case involves an arms-length transaction between the Lesley Appellees and Bluff Dale .... The Lesley Appellees certainly knew that a residential developer would not want drilling or other similar activities to take place on the surface area in the subdivision. With that knowledge, the Lesley Appellees sold the property to Bluff Dale for about $2,000,000.

Veterans Land Bd. v. Lesley, 281 S.W.3d 602, 619–20 (Tex. App.—Eastland 2009), *aff'd in part, rev'd in part sub nom.* Lesley v. Veterans Land Bd. of State, 352 S.W.3d 479 (Tex. 2011).

252. *See id.* at 489–91 (discussing *Manges* at length and comparing its situation to that of *Bass*).

253. *See id.* at 490 (recounting that "[b]ecause Bass has not acquired any benefits for himself[] through executing a lease," the facts of *Bass* were "distinguishable from *Manges*" (quoting *In re* Bass, 113 S.W.3d 735, 745 (Tex. 2003))).

254. *See id.* at 491 (pointing out the critical distinction between *Bass* and *Manges* regarding self-dealing).

> The tension they see in *Bass* and *Manges* is relieved by the fact that *Manges*' finding of breach was in the context of pervasive self-dealing .... The tacit assumption in *Manges* was that the minerals would be leased to someone. That was not the assumption in *Bass* ....
>
> Nevertheless, we do not agree with Bluegreen and the landowners that *Bass* can be read to shield the executive from liability for all inaction.

however, was the evidence of self-dealing by the executive.[255]

By creating the anti-drilling covenants, Bluegreen effectively condemned minerals owned by a non-executive.[256] The potential pitfall in this arrangement is that when the holder of the executive right's motive to avoid development combines with the rule in *Bass*—that the executive's duty does not begin until a lease is taken—the executive right can easily and temptingly become a means to prevent development.[257] Whatever the initial reason for the creation of the executive right, that it was not created to prevent leasing is manifest.[258]

However, the Texas Supreme Court squelched this by clarifying that a surface owner does not have any effective eminent domain power to condemn mineral development through such covenants.[259] The court's decision notably provides further definition of the duty owed by the executive to the non-executives.[260] Ultimately, self-dealing by the executive is the most significant variable in executive rights cases that attempt to construe the extent and timing of the fiduciary duty.[261] It

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Id.

255. *See id.* (explaining the allegation of self-interest in *Bass* was not supported by sufficient evidence, but holding that Bluegreen had breached its fiduciary duty through self-dealing); *In re* Bass, 113 S.W.3d 735, 745 (Tex. 2003) ("What differentiates this case from *Manges*, however, is that no evidence of self-dealing exists here.").

256. *See id.* (holding Bluegreen's filing of the restrictive covenants prevented the non-executives from seeking development of their respective mineral interests—thus concluding that the restrictive covenants should be voided).

257. *See* Christopher Kulander, *Big Money vs. Grand Designs: Revisiting the Executive Right to Lease Oil and Gas Interests*, 42 TEX. TECH L. REV. 33, 55 (2009) ("[W]hen ownership of the executive right to lease and a reason for that executive right holder to not want development of oil and gas converge . . . the executive right to lease becomes a tool to prevent development . . . .").

258. *See Lesley*, 352 S.W.3d at 491 (recognizing while there are many valid exercises of the executive's right, self-dealing and the imposition of restrictive covenants that prohibit leasing will amount to a breach of the executive duty to non-executive mineral interest owners).

259. *See id.* ("Following *Manges*, we hold that Bluegreen breached its duty to [the non-executives] by filing restrictive covenants.").

260. *See id.* (broadening the scope of the executive's breach of duty to include the filing of restrictive covenants that limit the non-executive's ability to lease the mineral interests and the encumbering of the mineral interest through a "deed of trust secur[ing] loans for [the executive's] personal benefit").

261. *See, e.g.*, Manges v. Guerra, 673 S.W.2d 180, 184 (Tex. 1984) ("In our opinion, Manges'[] conduct amounted to a breach of his fiduciary duty as found by the jury in making the lease to himself, in agreeing upon a $5 nominal bonus for 25,911.62 acres of land, and in dealing with the entire mineral interest so that he received benefits that the non-executives did not receive. His taking of one hundred percent of seven-eighths of the three producing wells, his taking of one-half of the working interest, free and clear of costs, by his farm-out to [another party], was also the receipt of special benefits that the non-executives did not receive."). *But see In re* Bass, 113 S.W.3d 735, 745 (Tex. 2003) ("Because Bass has not acquired any benefits for himself, though executing a lease, no duty has been breached. Thus, the present facts are distinguishable from *Manges*.").

seems one can place *Manges* and *Bass* on a spectrum, with the first representing what happens in a case of egregious self-dealing and the second demonstrating what happens when the executive has clean hands, while *Lesley* lies somewhere between the two.[262]

An alternate solution for the non-executive mineral interest owners to seek remedy might have been an action seeking a declaratory judgment holding that the executive covenants acted as a private taking of their use of real property.[263] Inverse condemnation is an action against a party which has not yet exercised its formal power of eminent domain, but which has provided no compensation for an act that constitutes an effective taking of a real property right.[264] However, for this cause of action to exist, denial of the development of the mineral estate must be effectively complete, leaving no reasonable alternative for development of the oil and gas.[265]

B. *Commencement of the Executive Duty and Inaction by the Executive*

Prior to *Lesley*, questions existed about exactly when the duty owed by the executive to the non-executives sprang into existence.[266] *Bass* suggested that the executive's duty was only triggered by leasing and until leasing actually took place, no duty existed.[267] *Lesley* established two

262. The *Lesley* court distinguished between *Bass* and *Manges* on the grounds of "pervasive self-dealing" in *Manges*, and the lack of executive culpability in *Bass*, and then found that Bluegreen's purpose for obtaining the executive right was "for the specific purpose of protecting the subdivision from intrusive and potentially disruptive activities related to developing the minerals." *Lesley*, 352 S.W.3d at 491. This suggests that while Bluegreen breached its duty, it was not done for purely selfish or egregious, self-serving reasons.

263. *See, e.g.*, Kelo v. City of New London, 545 U.S. 469, 485 (2005) (suggesting that an unconstitutional private taking occurs where no public purpose or benefit can be derived from government's exercise of eminent domain); Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 245 (1984) ("A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void."); Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Tex., LLC, 363 S.W.3d 192, 195 (Tex. 2012) ("Unadorned assertions of public use are constitutionally insufficient . . . [n]othing in Texas law leaves landowners so vulnerable to unconstitutional private takings.").

264. *See* First English Evangelical Lutheran Church v. Cnty. of Los Angeles, 482 U.S. 304, 316 (1987) ("While the typical taking occurs when the government acts to condemn property in the exercise of its power of eminent domain, the entire doctrine of inverse condemnation is predicated on the proposition that a taking may occur without such formal proceedings.").

265. *See* Tarrant Co. Water Improvement Dist. No. One v. Haupt, Inc., 854 S.W.2d 909, 912 (Tex. 1993) ("[S]o long as the mineral owners possess their common law right to *reasonable* use of the surface, there is no damage to the dominant mineral estate."), *on remand*, 870 S.W.2d 350.

266. *See Lesley*, 352 S.W.3d at 481, 483 (explaining the executive's duty to the non-executive, but stating that the court has "seldom had occasion to elaborate" on the specifics of such duty).

267. *See In re* Bass, 113 S.W.3d 735, 745 (Tex. 2003) (noting "a duty to develop land arises under an oil and gas lease either through an explicit provision in the lease or through an implied

alternate triggers of the exercise of the executive right power, both of which could exist prior to the execution of a valid oil and gas lease. The court opined:

> It may be that an executive cannot be liable to the non-executive for failing to lease minerals when never requested to do so, but an executive's refusal to lease must be examined more carefully. If the refusal is arbitrary or motivated by self-interest to the non-executive's detriment, the executive may have breached his duty.[268]

While the Texas Supreme Court refused to establish a general rule holding that the executive is liable for refusing to lease, it wisely established that a refusal to lease by the executive that was arbitrary in nature or motivated by self-dealing could be actionable.[269] While proving a self-dealing motive can be difficult, this change by the court represents an important step towards making the executive's duty responsive to the apparent purpose of the executive right: to facilitate leasing of a tract with multiple mineral owners.[270] In refusing to establish a general rule that the executive is liable for refusing to lease, the court explained that such a concrete and un-nuanced holding was unnecessary because of the multitude of differing circumstances found in each such squabble.[271]

The court's refusal to establish a general rule requiring leasing by a non-executive—who may not be engaged in self-dealing—and its decision to instead focus on both the timing and the presence or absence of arbitrary and capricious designs of the executive that are contrary to its duties to the non-executives demonstrates remarkable judicial foresight. Scenarios will arise where one or more non-executives desire to lease while the executive—who typically owns a portion of the minerals himself—and possibly one or more other non-executives will want to delay leasing in hope of obtaining better terms, higher prices, or both. In such trying circumstances, the absence of a general rule regarding the duty to lease gives the executive latitude to ascertain the best path forward for itself and

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covenant to develop," but since no lease existed in the case, the record "fails to demonstrate the existence of an oil and gas lease that would create an implied duty to develop"). Certainly, this was what many oil and gas law practitioners took away from *In re Bass*. An informal survey of over a dozen oil and gas practitioners (known to the author over the course of 2011) found all believed *In re Bass* established the trigger of the executive's duty to the non-executive was the act of leasing.

268. *Lesley*, 352 S.W.3d at 491.

269. *Id.*

270. *Id.*

271. *See id.* ("But we need not decide here whether as a general rule an executive is liable to a non-executive for refusing to lease minerals, if indeed a general rule can be stated, given the widely differing circumstances in which the issue arises.").

all of its non-executive charges. Further, a hard-and-fast rule that leases must be taken by the executive at the first opportunity would be clumsy and would likely lend itself to abuse by non-executives in league with potential lessees with ulterior motives.

C. *Self-Development by the Non-Executive*

Regarding self-development, the *Lesley* decision cites the court's prior language in *French*, reciting "the right to develop is a correlative right and passes with the executive rights."[272] Notwithstanding the position taken by the General Land Office of Texas,[273] the contrary opinion of longtime oil and gas law expert Professor Emeritus Bruce M. Kramer,[274] and this author's disagreement with the concept,[275] and despite the seemingly favorable facts in support of the non-executives in *Lesley*, the Texas Supreme Court's quick and unanimous rejection of reconsidering the relationship between the right to develop and the executive right provides every indication that the rule is here to stay.

Disappointingly, the court provided little reasoning for this portion of the *Lesley* opinion outside a mention of the executive's fiduciary duty seemingly serving as the protective mechanism for the interests of the non-executive.[276] Both the Texas Supreme Court and the Eleventh Court of Appeals pointed to a string of three cases they claim support the finding that a non-executive possesses no right to self-develop the mineral estate.

The first case cited is *Altman*, which primarily concerned the all too common question of whether a conveyed interest was intended to be a royalty interest or a mineral interest. The deed in question conveyed "an undivided one-sixteenth (1/16) interest in and to all of the oil, gas[,] and

272. *Id.* at 492 (quoting French v. Chevron U.S.A., Inc., 896 S.W.2d 795, 797 (Tex. 1995)).

273. *See* Brief for Texas General Land Office as Amicus Curiae Supporting Petitioner at 4, Lesley v. Veterans Land Bd. of State, 352 S.W.3d 479 (Tex. 2011) (No. 09-0306), 2009 WL 2134961 at *4 (arguing that in holding "the executive has no duty to lease," the court would effectively allow an executive to completely destroy the value of the non-executive mineral owner).

274. *See* Brief for Bruce M. Kramer as Amicus Curiae Supporting Petitioner at 7, Lesley v. Veterans Land Bd. of State, 352 S.W.3d 479 (Tex. 2011) (No. 09-0306), 2008 WL 6259823 at *7 (contending the court should "reaffirm its holding in *Manges* that the executive owes a fiduciary duty to the owners of non-executive interests," and find that the sale of the surface estate with restrictive covenants prohibiting oil and gas leasing was a violation of that fiduciary duty).

275. *See* Christopher Kulander, *Big Money vs. Grand Designs: Revisiting the Executive Right to Lease Oil & Gas Interests*, 42 TEX. TECH. L. REV. 33, 73–74 (2009) (suggesting reasons for, and benefits incurred by, separating the executive right from the right to self-develop).

276. *See Lesley*, 352 S.W.3d at 488–89 (explaining an executive owes a fiduciary duty to the non-executive because of the former's position of power and presumably superior knowledge in relation to the latter).

other minerals in and under and that may be produced . . . ."[277] The grant also included a provision that the grantee would "not participate in any rentals or leases"[278] and provided "the rights of ingress and egress at all times for the purpose of mining, drilling, exploring and developing said lands" would pass to the grantee.[279]

This language was held to be a conveyance of one-sixteenth of the mineral fee shorn of the right to lease and the right to receive delay rentals.[280] Relying upon the traditional mineral interest versus royalty interest cases discussed above, the grantor argued that the deed was only a grant of royalty interest because of the reservation of the executive right and the right to rentals.[281] Even without considering the express grant of ingress and egress rights, the court found that similarly constructed conveyances were held to convey mineral interests instead of royalty interests.[282] In disagreeing with Blake's argument that the conveyance consisted of only a right to royalty instead of a mineral interest—the right of ingress and egress in "stick" parlance—the court concluded:

> [The grantors contend] the grantee did not receive the right of ingress and egress because that right necessarily was reserved to the grantor as part of the power to lease. Whether this contention is correct or not, it cannot distinguish this deed from those construed by the courts in *Delta Drilling*, *Etter*, and *Grissom*. In all those cases, the exclusive right to lease was retained by the grantor. If the right to lease includes the exclusive right of ingress and egress, that right was retained by the grantors in *Delta Drilling*, *Etter*, and *Grissom*.[283]

The court then interpreted the conveyance as a grant of the mineral estate, which traditionally includes the right of self-development to the grantee and the retention of the executive right to lease by the grantor.[284]

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277. Altman v. Blake, 712 S.W.2d 117, 117 (Tex. 1986).

278. *Id.* (emphasis omitted).

279. *Id.* at 118.

280. *Id.* at 120.

281. *Id.* at 118.

282. *See id.* at 118–19 ("This court has before recognized that a mineral interest shorn of the executive right and the right to receive delay rentals remains an interest in mineral fee." (citing Delta Drilling Co. v. Simmons, 161 Tex. 122, 338 S.W.2d 143 (Tex. 1960))); Grissom v. Guetersloh, 391 S.W.2d 167, 171 (Tex. Civ. App.—Amarillo 1965, writ ref'd n.r.e.) ("In our opinion the waiving of these bonuses and delay rentals by a grantor in a mineral interest does not constitute a reservation of a royalty interest."); Etter v. Texaco, Inc., 371 S.W.2d 702, 706 (Tex. Civ. App.—Waco 1963, writ ref'd n.r.e.) (rejecting appellees' argument that "because grantor retained the '[lease interests]' future rentals[,] and mineral privileges, no mineral interest was created, but only a royalty interest").

283. *Altman*, 712 S.W.2d at 119.

284. *See id.* at 119–20 ("The common law in Texas has been that a conveyance such as the one

One commentator has pointed out that this "conditional statement concerning an issue that was not before the courts in any of the referenced cases, has repeatedly been cited for the proposition that the right of ingress and egress is unseverable from the executive rights."[285] Note, however, that no fusion or even connection between the right of development and the executive right is evident in the language of the *Altman* decision.[286] In addition, this dicta had no bearing on the outcome of the case—that the mineral estate is comprised of five separate components, the right of self-development passed and was recognized as a separate interest, and the right of self-development is not part of the executive right.[287]

Altman was later cited in a footnote in *Day & Co.* as standing for the proposition that the right to self-develop is somehow correlative with the executive right.[288] To very briefly review, *Day & Co.* involved the question of whether the executive right passed by a conveyance of minerals in which the grantor reserved a fractional mineral interest but made no other express reservations.[289] The court held the executive right was conveyed because it was not expressly reserved in the grant.[290] While *Day & Co.* is a key case regarding how Texas has "unbundled" the various mineral rights and allowed them to be reserved and conveyed,[291] how such a ruling links the executive right and right to self-development is not explained therein or addressed within *Lesley*.

Day & Co., in turn, was cited in a footnote in *French* five years later.[292] *French* was another important case in the pantheon of Texas decisions dealing with whether a conveyance passed a mineral interest or royalty interest.[293] In the first footnote to *French*, the Texas Supreme Court surmised that, while the conveyance at issue provided the grantor reserved the right of self-development, the rule established in *Day & Co.* provided

in this case is a conveyance of minerals and not of royalty.").

285. Brief for Texas General Land Office as Amicus Curiae Supporting Petitioner at 4, Lesley v. Veterans Land Bd. of State, 352 S.W.3d 479 (Tex. 2011) (No. 09-0306), 2009 WL 2134961, at *4.

286. *See Altman*, 712 S.W.2d at 117–20 (discussing the right of development and executive right distinctly and separately).

287. *Id.* at 118.

288. Day & Co. v. Texland Petroleum, Inc., 786 S.W.2d 667, 669 n.1 (Tex. 1990).

289. *See id.* at 668–669 (analyzing the conveyance of executive rights through common law property and oil and gas principles).

290. *Id.* at 669–70.

291. Harper Estes and Douglas Prieto, *Contracts As Fences: Representing the Agricultural Producer in an Oil and Gas Environment*, 73 TEX. B.J. 378, 385, (2010).

292. French v. Chevron U.S.A., Inc., 896 S.W.2d 795, 797, n.1 (Tex. 1995).

293. *See* Richard C. Maxwell, *Mineral or Royalty—the French Percentage*, 49 SMU L. REV. 543, 547–49 (1996) (outlining the ways that the *French* opinion helped to determine the types of interests created "when the mineral estate is severed from the surface estate").

the right to develop passes with the executive right when undifferentiated in the language of the conveyance instrument.[294]

Thus, based on *Altman*, a case that does not expressly hold the right to self-development and the executive right pass as one in a conveyance,[295] and a reliance upon footnotes in *French* and *Day & Co.*, cases that did not directly speak to any link between the executive right and the right of self-development, the Texas Supreme Court seemingly decided to combine the executive right and the self-development sticks of the mineral estate.

The right to self-develop is generally construed as broad in nature. In other states, court opinions have stated in dicta that a non-executive mineral owner may still enter the subject tract and self-develop the mineral estate.[296] One commentator reads the right to self-development as "the right to develop the minerals . . . includes the right to use so much of the surface as is reasonably necessary to develop the underlying minerals . . . . Mineral ownership also includes rights to ingress and egress."[297] Other commentators favor the notion of the executive right and the right of self-development as being correlative and—after a practical analysis of the roles of the executive, potential operator (lessee), and non-executives—have pronounced ominously:

> The right to lease and the right to develop are correlative.
>
> . . . .
>
> The mineral owner's right to develop and to lease cannot be exercised simultaneously, at least in practice, since leases always convey the exclusive right to operate on the land. Therefore, it is unlikely in the extreme that parties who create a nonleasing interest in land intend for the owner to be able to exploit the minerals.

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294. *See French*, 896 S.W.2d at 797 n.1 ("First, the right to develop is a correlative right and passes with the executive rights." (citing *Day & Co.*, 786 S.W.2d at 669 n.1)).

295. *See* Derrick Price, *Executive Rights: Keep 'em if You Got 'em*, TEX. OIL AND GAS L. J., Dec. 2011 at 7(noting *Altman* relied on three prior Texas cases—*Delta Drilling Co, v. Simmons*, 161 Tex. 122, 338 S.W.2d 143 (1960); *Etter v. Texaco* 371 S.W.2d 702 (Tex. Civ. App.—Waco 1963, writ ref'd n.r.e.); and *Grissom v. Guetersloh*, 391 S.W.2d 167 (Tex. Civ. App.—Amarillo 1965, writ ref'd n.r.e.)—to find that a "mineral interest shorn of the executive right . . . remains an interest in the mineral fee").

296. *See, e.g.*, Cormier v. Ferguson, 92 So.2d 507, 511 (La. Ct. App. 1957) ("[U]ndivided mineral interests are often purchased subject to a pre-existing lease when there is a prospect of development, the purchasers in effect becoming co-lessors by purchasing subject to the existing lease; and although the purchasers themselves may not intend to drill for oil themselves, they have the right to do so when such a lease granting the exclusive development privilege lapses."); Crews v. Burke, 309 P.2d 291, 295 (Okla. 1957) (indicating a grantee given the right of ingress and egress "merely meant that the grantees might go upon the land for the purpose of drilling themselves, but had no right to participate in bonuses and rentals paid by others for this privilege").

297. JOSEPH SHADE, PRIMER ON THE TEXAS LAW OF OIL AND GAS 12 (4th ed. 2008).

> The practical results of separating the development right from the executive right would be disastrous: if the nonexecutive could develop at any time, despite the execution of a lease covering the land, no lease is likely to be executed because operators could not afford the risk. The executive right would accordingly be rendered nugatory. On the other hand, if the development right was considered to exist only if no lease existed on the land, there would be the further problem of determining whether the exercise of such right gave the owner exclusive operating rights. If so, the executive right is rendered nugatory. If not[,] the development right is not worth much, since the owner would be risking his capital to explore for the benefit of a subsequent lessee who enters under the lease to drill development wells in a proven field.[298]

This author respectfully submits that some of these fears are misplaced. As to the first paragraph above, because the executive right most likely sprang into existence to facilitate leasing when several parties owned undivided interests in the mineral estate,[299] and because it is unlikely the owner of a small fraction of the mineral estate will self-develop for economic reasons (i.e., the need to account to the other undivided cotenants) and practical reasons (most parties do not have the money, time, and expertise to explore and develop mineral property),[300] it is unlikely that any of the parties privy to the creation of the non-leasing interest in land—executive or non-executive—even considered self-development by the non-executive, thus eliminating the need for any speculation on their intent.

As to the second paragraph above, because oil and gas leases contain the right of exclusive development by the lessee as operator,[301] and because an executive leasing *any part* of the mineral interest over which it owns the executive right will usually be leasing *all* of the mineral interest over which it owns the executive right,[302] once leasing begins, the right of

298. 1 HOWARD R. WILLIAMS & CHARLES J. MEYERS, OIL AND GAS LAW § 304.10 (Patrick H. Martin & Bruce M. Kramer eds., 2012).

299. *See* Christopher Kulander, *Big Money vs. Grand Designs: Revisiting the Executive Right to Lease Oil & Gas Interests*, 42 TEX. TECH L. REV. 33, 34 (2009) ("[T]he executive right was likely derived in response to the fractionalization of the mineral fee interests so as to ease the leasing of oil and gas.").

300. *See* ROBERT E. SULLIVAN, HANDBOOK OF OIL AND GAS LAW 520–21 (1956) ("The cost of drilling an oil and gas well is so great that it precludes operations by the individual landowner.").

301. *Cf.* W.T. Waggoner Estate v. Sigler Oil Co., 118 Tex. 509, 19 S.W.2d 27, 28 (1929) ("[A] writing as that here called a lease operated to invest the party called lessee and his assigns with title to oil and gas in place" and "[t]he estate acquired by the so-called lessee and his assigns was a determinable fee." (citing Tex. Co. v. Daugherty, 107 Tex. 226, 176 S.W. 717 (1915))).

302. This supposition applies unless the executive is engaged in self-dealing, such as the "poison pill" scenario discussed below.

self-development for the non-executive should disappear just like the right of self-development for the executive. Simply put, the executive will likely lease all interests covered by its executive right at the same time. Therefore, if operators are worried about a self-developing non-executive interest, they should procure a lease of that non-executive interest so that the threat of self-development by that particular non-executive mineral owner dissipates. As far as exclusive operating rights are concerned, leasing the non-executive interests from the executive will acquire for the lessee exclusive operating interests over that portion of the mineral estate without the involvement of the non-executive.

If operators subsequently find the title situation problematic, they will inform the mineral owners of their concerns and the mineral owners—guided necessarily by the duties owed by the executive—will likely provide the reassurance that the potential lessee desires without litigation between the mineral owners. Ultimately, self-development of only a portion of the mineral estate underlying a tract is uncommon in oil and gas development, particularly for smaller fractional interests, not only because of the necessary cotenant accounting, but also because many mineral owners simply do not have the expertise and equipment necessary to explore for oil and gas.[303]

However, modern self-development is not just a matter of drilling wells; it also involves assessing future borehole geometry and surveying pad sites.[304] Before this occurs, surficial geological mapping and seismic reflection surveys may be conducted, as well as logging data from existing wells and offsite research of logs, seismic data, surficial geologic maps, and drill core.[305] All of these activities are commonly thought to be included in the right of self-development, hence the inclusion of the rights to ingress and egress in the above definitions of development rights.[306]

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303. *See* Robert E. Sullivan, HANDBOOK OF OIL AND GAS LAW 520 (1956) ("The cost of drilling an oil and gas well is so great that it precludes operations by the individual landowner."); David L. Cruthirds, Comment, *Power to Execute Mineral Leases Over a Severed Mineral Interest is a Real Property Interest*, 32 S. TEX. L. REV. 337, 342 (1991) ("Because of the risk, expense, complexity and overall difficulty of exploration and production of oil and gas, mineral development is generally conducted by the mineral estate owner's lessee as opposed to the mineral estate owner himself.").

304. *See* Judith L. Maute, Peevyhouse v. Garland Coal & Mining Co. *Revisited: The Ballad of Willie & Lucille*, 89 NW. U. L. REV. 1341, 1442 (1995) (discussing the surveying and testing of boreholes in order to determine the economic feasibility of a project).

305. *See* Sonya D. Jones, Comment, *Time to Make Waves? A Discussion of the Outdated Application of Texas Law to Seismic Exploration*, 38 TEX. TECH L. REV. 429, 444 (2006) ("[E]xploration for minerals, including oil and gas, includes aerial and geophysical surveys, including seismic surveys.").

306. *See* JOSEPH SHADE, PRIMER ON THE TEXAS LAW OF OIL AND GAS 12 (4th ed. 2012) ("Mineral ownership includes the right of ingress and egress.").

Are these activities proscribed by the Texas Supreme Court's invocation of footnotes and dicta in prior cases that did not primarily focus on the issue of the nature and extent of executive rights? One doubts the court considered the implications of such a dogmatic and broad change to the property rights held by non-executive mineral interest owners. For example, by combining the right to self-develop with the executive right without first analyzing all of the activities that may be included under the category of "self-development," the court casted more doubt upon the rights of a non-executive to conduct geophysical surveys in order to assess what sort of mineral assets underlie the subject tract.[307] That the executive right was not created to prevent mineral self-development—as the court has stated—is probable; that the executive right was not created to prevent a non-executive mineral owner from simply taking stock of its property through logging, mapping, and seismic surveys is certain.[308]

In addition, the Texas Supreme Court does not mention whether the right to self-development and the executive right can be expressly passed on an individual basis or withheld separately in an instrument of conveyance. There is no evidence to suggest the right to self-develop cannot be expressly withheld in an instrument of conveyance while the executive right is allowed to pass,[309] although the emphatic way in which the court denied Lesley's argument that they should be allowed to self-develop raises doubts about the court's continuing interest in preserving the executive right and the right of self-development as individual sticks in

307. There was already a measure of doubt in any event. *See* Hlavinka v. Hancock, 116 S.W.3d 412, 418 (Tex. App.—Corpus Christi 2003, pet. denied) (stating the executive has the power to negotiate surface damage agreements relating to geophysical operations); Portwood v. Buckalew, 521 S.W.2d 904, 916 (Tex. Civ. App.—Tyler 1975, writ ref'd n.r.e.) (analyzing a letter allowing for a twenty-five percent overriding royalty paid for a release of surface damages).

308. *See generally* C.J. Meyers, *The Effect of the Rule Against Perpetuities on Perpetual Non-Participating Royalty and Kindred Interests* 32 TEX. L. REV. 369, 398 (1954) ("[T]he executive right can be considered a power coupled with an interest . . . the full utilization of mineral wealth occurs with the exploration and development of the subsurface."); David L. Cruthirds, Comment, *Power to Execute Mineral Leases Over a Severed Mineral Interest is a Real Property Interest*, 32 S. TEX. L. REV. 337, 340–45 (1991) (tracing the historical and common law development of the executive right); Sonya D. Jones, Comment, *Time to Make Waves? A Discussion of the Outdated Application of Texas Law to Seismic Exploration*, 38 TEX. TECH L. REV. 429, 432–41 (2006) (describing the use of seismic exploration on oil and gas leases).

309. *See generally* David L. Cruthirds, Comment, *Power to Execute Mineral Leases Over a Severed Mineral Interest is a Real Property Interest*, 32 S. TEX. L. REV. 337, 342 (1991) ("The executive right may be severed from the mineral estate in order to maintain or convey control of the right to authorize such exploration and production activities or to facilitate the leasing of multiple diverse undivided interests in the mineral estate. Maintaining the executive right over severed mineral interests which are held in diversity also prevents owners of small interests in the severed minerals from hindering development.").

the bundle which comprise the mineral estate.[310] After all, finding the two distinct rights correlative—without further explanation—is but a small step away from finding them completely indivisible under any circumstance.

When considering self-development by a non-executive, the Texas Supreme Court's decision in *Martin v. Snuggs*[311] warrants scrutiny. While *Altman* is renowned for helping establish the five sticks of mineral ownership in Texas,[312] the *Martin* court underscored the ability of the grantor to retain or convey individual components of the mineral estate, holding "[a]ll these rights are transferable and a grantor can transfer all of them, or only part of them, but in reserving the minerals, *all are retained that are not specifically granted.*"[313] In *Lesley*, the right to self-development (the right of ingress and egress in the parlance of *Altman*) was clearly retained by the non-executives, and yet the Texas Supreme Court harkened back to the days where highly technical—some might say arcane—readings of the deed language and perusal of parol evidence governed whether the various sticks, when retained or conveyed together, are transformed into another stick altogether.[314] Instead of transforming the right to bonus payments and delay rentals into a royalty interest when the executive right is passed, as was done in *Klein*[315] and *Watkins*,[316] the *Lesley* court subsumed the right to development into the executive right when only the executive right is conveyed, despite the clear lack of an expressed conveyance of the development right or the finding of intent by the non-executives to do so.[317]

The rule that the executive right and the right to self-development are correlative, restated by the Texas Supreme Court in *Lesley*, is most perplexing in a situation where the executive owns little or no other interest and the non-executive mineral owner owns most or all the rest of the mineral estate. Consider a scenario wherein one party owns only the

310. Lesley v. Veterans Land Bd. of State, 352 S.W.3d 479, 491 (Tex. 2011).

311. Martin v. Snuggs, 302 S.W.2d 676 (Tex. Civ. App.—Fort Worth 1957, writ ref'd n.r.e.).

312. *See* Altman v. Blake, 712 S.W.2d 117, 118 (Tex. 1986) (specifying the "five essential attributes of a severed mineral estate").

313. *Id.* at 678 (emphasis added).

314. *See generally* Bruce M. Kramer, *The Sisyphean Task of Interpreting Mineral Deeds and Leases: An Encyclopedia of Canons of Construction*, 24 TEX. TECH L. REV. 1, 6–129 (1993) (giving an exhaustive chronicle of Texas courts' application of canons of construction to interpret mineral and royalty deeds and arguing that some consideration of surrounding circumstances and extrinsic evidence should be allowed by the court to aid in interpretation).

315. Klein v. Humble Oil & Ref. Co., 126 Tex. 450, 86 S.W.2d 1077 (1935).

316. Watkins v. Slaughter, 144 Tex. 179, 189 S.W.2d 699 (Tex. 1945).

317. *Lesley*, 352 S.W.3d at 491–92.

executive right and a second party owns one hundred percent of the rest of the mineral estate and its appurtenant rights. From a public policy standpoint that favors oil and gas development,[318] does it make sense that the second party should not be allowed to self-develop in this situation? While the above is an extreme case, a more realistic scenario might involve one or more non-executive mineral interest owners with a strong majority of the mineral interest, the existence of high oil and gas prices, and an executive right holder with an associated minority or trivial mineral interest that has no motivation to lease. If the non-executive(s) are willing and able to self-develop, even if it may mean carrying the executive right holder's smaller interest, should the executive rights holder still be allowed to prevent production?

This author suggests that it should not be so. The public policy of Texas that favors regulated mineral development and the basic tenants of real property law both argue the severance of the executive right does not prevent the non-executive mineral cotenants from conducting self-development efforts, whether through oil and gas exploration or other related activities.[319] The right of development is one of five sticks that comprise the total package of mineral ownership; these are a separate and equal right to that of the executive right.[320] By claiming the owner of the executive right can also prevent the non-executive mineral cotenants from self-developing the mineral estate, the court impliedly combined the two sticks of self-development and executive rights, leaving the non-executive

318. *Cf.* Brown v. Humble Oil & Ref. Co., 126 Tex. 296, 83 S.W.2d 935, 940–41 (1935) ("The oil industry in this state had become stupendous. There are now many separate oil fields operated in this state, under varying conditions. Texas is now the leading state in the production of oil and in oil refineries. The handling of this giant industry and its complex problems calls for the services of trained and experienced persons. It is utterly impossible for the Legislature to meet the demands of every detail in the passage of laws relating to the production of oil and gas. The necessities of the situation require that this duty be placed upon some tribunal to carry out some just and reasonable public policy. This duty is placed on the Railroad Commission."); Christopher Kulander, *Big Money vs. Grand Designs: Revisiting the Executive Right to Lease Oil and Gas Interests,* 42 TEX. TECH L. REV. 33, 71 (2009) ("[T]he policy behind the recognition of executive rights was likely to place all the power to lease in the hands of one entity who could then negotiate mineral leasing more quickly and efficiently than the parties could individually."); Sonya D. Jones, Comment, *Time to Make Waves? A Discussion of the Outdated Application of Texas Law to Seismic Exploration*, 38 TEX. TECH L. REV. 429, 454 (2006) ("From the very beginning of Texas oil and gas law, landowners and mineral interest owners have been encouraged to engage in responsible, effective production of oil and gas.").

319. *Cf.* Altman v. Blake, 712 S.W.2d 117, 118 (Tex. 1986) (discussing the right to develop as one of the alienable attributes of a severed mineral estate).

320. *See id.* ("There are five essential attributes of a severed mineral estate: (1) the right to develop (the right of ingress and egress), (2) the right to lease (the executive right), (3) the right to receive bonus payments, (4) the right to receive delay rentals, (5) the right to receive royalty payments.").

with only the rights to the proceeds from leasing and possible production—the rights to collect bonus payments, delay rentals and royalty.

If the Texas Supreme Court is concerned about self-development circumventing the power of the executive, the court should remember that, in practical terms, self-development is a self-limiting phenomenon because development by a party that does not own the entire mineral estate is often unprofitable. If the other mineral cotenants do not lease, then the self-developing party is left accounting for their interest.[321]

In a scenario where a self-developing party owns ninety percent of the minerals and its cotenant owns only ten percent, the self-developing owner must pay ten percent of the net profits (i.e. less a pro-rata share of development and production costs) to the minority owner, with no possible recoupment to the self-developing party for dry hole costs. While taking on a ten percent "carried interest" may still be economic for the self-developer, consider what a twenty-five percent carried interest does to the economic considerations of a development project. A non-executive self-developer with a ninety percent mineral interest in a tract may decide, after conducting its economic forecast, that the ten percent unleased interest can be carried and that the prospect is still economic. On the other hand, the owner of a non-executive three-quarters share of the minerals is very likely not to self-develop if it cannot get the other mineral cotenant(s) to lease, because the unleased quarter interest significantly cuts into the net profits of any potential development.[322]

The unleased portion of the tract effectively becomes a "poison pill" that kills development across the entire mineral estate.[323] This aspect of

321. *See* Burnham v. Hardy Oil Co., 147 S.W. 330, 335 (Tex. Civ. App.—San Antonio 1912) ("Plaintiffs, if they owned an undivided interest in the land, had the right, as well as defendants, to go upon the land and extract the oil, and each would have been subject to accounting to the other for the net proceeds thereof, which means the value of the oil taken by each, less the necessary and reasonable cost of producing it."), *aff'd* 195 S.W. 1139 (Tex. 1917).

322. *See* 1 HOWARD R. WILLIAMS & CHARLES J. MEYERS, OIL AND GAS LAW § 504 (Patrick H. Martin & Bruce M. Kramer eds., 2012) ("The clear weight of authority in the states which permit one concurrent owner to develop minerals without the consent or joinder of his co-owners is that the non-joining concurrent owner is entitled to a proportionate share of the proceeds of development less a proportionate share of the reasonable and necessary costs of development and production. However, the developing concurrent owner may not recover from the nonjoining coowners any share of the costs of such drilling or development operations. If the operations are unsuccessful, the entire burden falls upon the developing concurrent owner; if the operations are successful, he recovers his costs from the nonjoining concurrent owner only out of the nonjoining concurrent owner's share of the proceeds of development.").

323. *See* Christopher Kulander, *Big Money vs. Grand Designs: Revisiting the Executive Right to Lease Oil and Gas Interests,* 42 TEX. TECH L. REV. 33, 63–64 (2009) (describing a scenario where the

profitability versus the mineral estate portion owned by the self-developer introduces an interesting governor on self-development by non-executives: in cases where the self-developer(s) owns a significant portion of the mineral estate, such as the example above with the executive owning ninety percent—arguably the scenario wherein allowing self-development by non-executives makes the most sense—self-development will be more likely to take place. When the potential self-developer(s) do not possess a large share of the minerals, self-development is less likely to be economically feasible.

On the theoretical side, the executive right was derived in response to the fractionalization of mineral fee interests in order to ease the leasing and logistics of oil and gas interests.[324] One commentator stated the purpose of the power is to facilitate leasing; by virtue of this power, mineral cotenants and potential lessors can put the leasing negotiations in the hands of the most sophisticated party among them.[325] This provides potential lessees the benefit of only having to negotiate one oil and gas lease instead of several. Such alienability of the executive right also alleviates the problem of mineral interests owned by minors or persons under a legal disability.[326] No one has ever suggested a valid practical reason for why the executive right should be used as a tool by a surface owner to prevent a majority-owning mineral non-executive from developing its own minerals.

When courts make decisions about the nature and extent of real property rights without considering the collateral effects of their decisions and the unintended consequences these decisions have on the nature of mineral rights, unrelated third parties often find that the nature of their property rights have changed—often in a way that they would not expect or prefer.[327] For example, consider a non-executive party who wants to determine if its mineral estate may be prospective for oil, and perhaps to substantiate whether the executive right holder really was behaving as a

executive "who owns a portion of the mineral estate that, if not leased, makes the parcel uneconomical to lease and develop," refuses to lease his portion as a "poison pill").

324. *See* Patrick H. Martin, *Unbundling the Executive Right: A Guide to Interpretation of the Power to Lease and Develop Oil and Gas Interests,* 37 NAT. RESOURCES J. 311, 311–15 (tracing the origin of oil and gas law and executive rights to the English common law).

325. JOHN S. LOWE ET AL., OIL AND GAS LAW 602 (5th ed. 2008).

326. *Id.*

327. The author thanks former Texas Court of Appeals Judge Rick Strange for providing this thought. *See, e.g.*, Moser v. United States Steel Corp., 676 S.W.2d 99, 103 (Tex. 1984) (ruling prospectively only when overruling "surface destruction test" in light of public reliance on previous law to respect parties' bargains and to ensure stability of land titles).

reasonably prudent mineral lessor in turning down oil and gas leases. If the non-executive mineral owner and the executive rights holder are at odds over whether development should take place,[328] the non-executive will stand in a relatively weaker position when attempting to determine whether valuable minerals may be on the estate, provided it cannot itself procure geophysical or even surficial mapping assessments of the property.[329] The Texas Supreme Court's affirmation of the joined nature of the executive right and the right to self-development in *Lesley*[330] opened the door to this problem, and potentially lowered the value of the non-executives' mineral property without compensation.

D. *Leasing the Non-Executive Minerals*

Before the arrival of the *Lesley* opinion, the consensus in Texas—invoking *Bass*—was that no duty existed for an executive to lease.[331] Further, it was generally accepted that the reason there was no duty to lease was because the fiduciary duty of the executive did not arise until leasing occurred.[332] *Lesley* opens the box to the concept that the executive might be liable to non-executives for refusing to lease, and lawsuits on the issue will certainly follow.

One of the most succinct explanations of why the *Bass* rule[333]—a rule that was displaced to some extent by the Texas Supreme Court in *Lesley*—does not adequately serve to protect non-executives is provided by Texas attorney Maston Courtney in his amicus curiae brief received by the Texas

328. Such a conflict may arise if the potential lessee is known by the non-executive to be in a position to favor the executive, such as with non-arm's-length leases that may contain terms, which disadvantage the non-executive.

329. *See* Sonya D. Jones, Comment, *Time to Make Waves? A Discussion of the Outdated Application of Texas Law to Seismic Exploration*, 38 TEX. TECH L. REV. 429, 431 n.17 (2006) ("Geophysical operations include the searching for subsurface structures that are favorable to the accumulation of oil and gas by means of geophysical devices.").

330. Lesley v. Veterans Land Bd. of State, 352 S.W.3d 479, 491–92 (Tex. 2011).

331. *See, e.g.*, Aurora Petroleum, Inc. v. Newton, 287 S.W.3d 373, 377 (Tex. App.—Amarillo 2009, no pet.) ("In applying the lessons of *Bass* to the case before this Court, we immediately recognize that, as in *Bass*, there is no existing oil and gas lease. Therefore, there can be no implied duty to develop from the executive right holder to the non-executive mineral right holder."); Hlavinka v. Hancock, 116 S.W.3d 412, 421 (Tex. App.—Corpus Christi 2003, pet. denied) (invoking the rule in *Bass* to determine there was no breach of fiduciary duty because the power to lease had not been used).

332. *See Hlavinka*, 116 S.W.3d at 421 ("Because they have not used their power to lease, we conclude the Hlavinkas have not breached a fiduciary duty to appellees.").

333. *See In re* Bass, 113 S.W.3d 735, 745 (Tex. 2003) (holding there is no duty for an executive to lease because the fiduciary duty of the executive did not arise until the leasing had occurred).

Supreme Court on June 10, 2009.[334] In his brief, Courtney noted the duty owed by the executive to the owner of a non-participating royalty interest (NPRI), as in *Bass*, arises from the *contractual* position of the parties.[335] The duty is not based upon the relationship of the parties as is found in the duty owed by an executive right holder to non-executive mineral owners.[336] After differentiating between the duties owed by an executive to NPRI owners and non-executive mineral owners, Courtney argued that because of this difference, Bluegreen's actions could be interpreted as a violation of the duty to non-executives by virtue of self-dealing:

> [N]o duty to the [NPRI owner] arises except in connection with the exercise of the leasing privilege by the executive . . . .
>
> By contrast, in [*Lesley*] the executive . . . destroyed the economic value of [the] non-executive mineral estate while securing for the executive, who also was the owner of the surface estate, a substantial increase in the value of his surface estate.[337]

After *Lesley*, with its negative treatment of the findings in *Hlavinka* and *Aurora*,[338] the court has slightly changed direction again, plotting a course further from *Bass* and indicating that Texas courts will consider the reasons why an executive rejected a proffered lease when determining whether the executive violated its duty.[339] No longer will *Bass* provide an impenetrable shield against self-serving executives refusing to lease. Now, courts in Texas will consider whether the denial of a leasing opportunity was motivated by self-dealing on the part of the executive.[340] Whether

334. Brief for Maston C. Courtney as Amicus Curiae Supporting Petitioners, *Lesley*, 352 S.W.3d 479 (No. 09-0306), 2009 WL 1903910.

335. *See id.* at 2 (reciting that the duty owed by the executive to the owner of an NPRI is viewed as arising from contract, entitling a NPRI only to a share of the mineral production if and when minerals are produced (citing Plainsman Trading Co. v. Crews, 898 S.W.2d 786, 789–90 (Tex. 1995))).

336. *See id.* (reiterating the duty owed by the executive to the non-executive arises from the relationship between the parties, as opposed to by a contractual provision (citing English v. Fisher, 660 S.W.2d 521, 524–25 (Tex. 1983))).

337. *Id.* at 2–3.

338. *See Lesley*, 352 S.W.3d at 491 n.78 (disapproving of *Hlavinka* and *Aurora* regarding their findings that there is never a breach of duty by the executive who refuses to lease).

339. *See id.* at 491 ("If the refusal to lease is arbitrary or motivated by self-interest to the non-executive's detriment, the executive may have breached his duty.").

340. *See, e.g., id.* ("[The executive] did not simply refuse to lease the minerals[,] . . . it exercised its executive right to limit future leasing by imposing restrictive covenants . . . . This was no less an exercise of the executive right than [an executive's] execution of a deed of trust covering [the non-executive's] mineral interest."); Friddle v. Fisher, 378 S.W.3d 475, 481 (Tex. App.—Texarkana 2012, pet. denied) (noting part of the fiduciary duty entails that executive right holders "must acquire for the holder of the nonexecutive right every benefit he exacts for himself—that is, he must execute the

this will lead to an increase in actions brought by non-executives against executive right holders remains to be seen.

Although *Lesley* does not provide a bright-line rule delineating the extent of the executive's duty to the non-executive, it does seem to indicate (1) deciding whether or not to lease may be subject to judicial scrutiny;[341] and (2) any benefit received to the executive that is not shared by the non-executive is suspect.[342] Though an executive that refuses to lease because of self-dealing motives may now be subject to litigation, an executive that refuses leasing opportunities because of simple arbitrariness, stubbornness, confusion, or sheer inertia may not be liable in a suit brought by a non-executive for breach of duty. If clear evidence of self-dealing is not proven by the non-executive, it would appear that clear evidence of leasing at the offered-and-denied terms in other leases common in the area and evidence that the executive is not behaving as a reasonably prudent lessor must be supplied by the non-executive to succeed in proving a violation of the executive's duty.[343]

Ultimately, the executive right should not be a tool to curtail development through schemes of the executive right holder that are contrary to the clear wishes of the non-executive. A duty to eventually lease lies within the executive right, a duty recognized by the appellate court in *Pickens* when it noted that "[t]he duty to develop known minerals by the executive depends upon economics."[344] "Economics" in this sense implies the question of whether a reasonably prudent mineral owner would lease the minerals independent of rewards that may be realized by the executive but not by the non-executive.[345]

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same type of oil and gas lease on the same terms as he would have done in the absence of an outstanding, nonparticipating interest").

341. *See Friddle*, 378 S.W.3d at 482 (discussing *Lesley*, and noting the fiduciary duty of an executive is implicated by the decision of whether or not to execute a lease).

342. *See id.* at 481 (stipulating it is settled law in Texas that the executive has a duty to "execute the same type of oil and gas lease on the same terms as he would have done in the absence of an outstanding, nonparticipating interest").

343. *Cf.* Christopher Kulander, *Big Money vs. Grand Designs: Revisiting the Executive Right to Lease Oil and Gas Interests*, 42 TEX. TECH L. REV. 33, 43 (2009) ("Perhaps the best way to deal with such a fiduciary quandary, . . . is to conclude that there is a duty to lease within a reasonable time. This duty would be implied to exist alongside ownership of the executive rights. Such a duty would mean the executive right holder shall be expected to exercise the rights and power as would the average landowner who, because of self-interest, is normally willing to take affirmative steps to seek out and cooperate with prospective lessees.").

344. Pickens v. Hope, 764 S.W.2d 256, 269 (Tex. App.—San Antonio 1988, writ denied).

345. *See id.* (finding evidence of the landowner's efforts to lease the minerals demonstrated he sufficiently complied with his duty as the executive); *see also Friddle*, 378 S.W.3d at 481 (asserting the executive "must acquire for the holder of the nonexecutive right every benefit he exacts for

E. *Leasing the Executive Minerals*

If the executive owns a percentage of the mineral estate, it can decimate the economic value of a non-executive's mineral interest through a more subversive technique by simply refusing to lease its own portion of the mineral estate. By leaving its undivided percentage of the mineral estate unleased, the executive can render the entire tract uneconomic to explore for minerals. This is a situation similar to the self-development scenario discussed above, wherein the executive owns a percentage of the undivided fee mineral estate and the executive right over the entire mineral estate; however, in this instance the executive agrees to lease the non-executives' minerals while refusing to lease its own. The executive's reason for not leasing may be sound—for example, an offered lease with uneconomic terms or plans to self-develop.[346] The reason for refusing to lease may also be rooted in self-interest only, such as trying to improve the value of the surface by preventing drilling.[347] Therefore, the executive is not refusing to lease the non-executive mineral holder's interest and thus can claim that its fiduciary duty to the non-executive is fulfilled—a duty that, after *Lesley*, might include accepting an offer to lease.[348] Interestingly, in such a case the executive technically appears to have met the strictest level of fiduciary duty that requires the agent—the executive—to place the interest of the principal—the non-executive—above its own self-interest.[349] The executive can argue that it met this highest duty by acquiring a benefit for the non-executive that it had denied itself.

However, as described in the "poison pill" scenario above, unleased undivided acreage in a tract can virtually eliminate leasing or self-

himself").

346. *Cf. Friddle*, 378 S.W.3d at 480 (reviewing the appellee's contention that one of the duties they owed to the non-executive NPRI owners, was of a reasonably prudent lessor "to execute the same type of oil and gas lease as they would have done in the absence of the [non-executive interest]"); *Pickens*, 764 S.W.2d at 264 (describing a jury charge's definition of utmost fair dealing instructing that an executive could act as a reasonably prudent lessor by either "leasing such lands for exploration" or "*developing such lands himself*") (emphasis added).

347. *See, e.g.*, Veterans Land Bd. v. Lesley, 281 S.W.3d 602, 619 (Tex. App.—Eastland 2009) (noting the non-executives knew that the executives purchased the property for the purpose of development and "would not want drilling or other similar activities to take place on the surface area in the subdivision"), *aff'd in part, rev'd in part sub nom.* Lesley v. Veterans Land Bd. of State, 352 S.W.3d 479 (Tex. 2011).

348. *See Lesley*, 352 S.W.3d at 491 (ruling the executive is not shielded from liability for inaction and that the unique facts surrounding the failure to lease should be examined more closely).

349. *See* Manges v. Guerra, 673 S.W.2d 180, 183 (Tex. 1984) (explaining the fiduciary duty owed by the executive is settled law in Texas and the executive must "acquire for the non-executive every benefit that he exacts for himself" (citing Schlitter v. Smith, 128 Tex. 628, 101 S.W.2d 543, 545 (1937))).

development altogether. For example, if the executive owned twenty-five percent of the undivided mineral estate as well as all of the executive rights covering the tract and refused to lease its quarter mineral interest, and then development occurred, a quarter of the proceeds would go directly to the executive instead of the more typical payout of a quarter interest multiplied by the royalty fraction that the executive would have received under the terms of a lease.[350] Above a certain threshold of unleased acreage, this effectively strangles leasing because the oil company cannot make a profit after accounting to the executive—now its cotenant.[351]

Essentially, leasing of the executive minerals, if necessary to get the non-executive minerals leased, should be a necessary part of the duty owed by the executive. As this author has argued before:

> In a way analogous to how the "clear and convincing" evidentiary standard necessarily includes the less stringent "preponderance of the evidence" standard, bundled within the fiduciary duty of the executive rights holder as defined by *Manges* is necessarily included the less stringent duty for the executive to act as a reasonably prudent operator. Certainly if the executive was approached by a potential lessee with a leasing offer that was favorable in the present regional leasing environment, and particularly if leasing and perhaps production was occurring near and around the leasehold in question, then a reasonably prudent executive would and should lease his own interests if the law would require him to lease the non-executive's interest. To not make such an assumption would be to cast away in some instances, such as that confronted in *Lesley*, any duty owed by the executive rights holder.[352]

The Texas Supreme Court broadened what constitutes exercising the executive right.[353] Leasing is no longer the only action which amounts to the exercising of the executive right, as the court noted in *Lesley* when it

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350. *See, e.g.*, Bruce M. Kramer, *Conveying Mineral Interests—Mastering the Problem Areas*, 26 TULSA L.J. 175, 178 (1990) (noting a mineral interest's share of production under a lease is multiplied by the fractional rate of royalty before payout).

351. *See* Cox v. Davison, 397 S.W.2d 200, 201 (Tex. 1965) ("The Texas rule is that a cotenant who produces minerals from common property without having secured the consent of his cotenants is accountable to them on the basis of the value of the minerals taken less the necessary and reasonable cost of producing and marketing the same." (citing Burnham v. Hardy Oil Co., 147 S.W. 330, 334 (Tex. Civ. App. 1912), *aff'd* 108 Tex. 555, 195 S.W. 1139 (1917))); *cf. Lesley*, 352 S.W.3d at 487 (noting arbitrary exercise of the executive right could be detrimental to the non-executive).

352. Christopher Kulander, *Big Money vs. Grand Designs: Revisiting the Executive Right to Lease Oil & Gas Interests*, 42 TEX. TECH L. REV. 33, 63–64 (2009) (footnote omitted).

353. *See e.g.*, *Lesley*, 352 S.W.3d at 491 (finding restrictive covenants that effectively prevented leasing violated the fiduciary duty of the executive, and "[t]his was . . . an exercise of the executive right").

held the executive "exercised the executive right to limit future leasing by imposing restrictive covenants on the subdivision."[354] This suggests that when the executive does anything to limit future leasing of the non-executive's minerals, it has exercised the executive rights. Therefore, one of the events that should activate the duty is the offering of a commercially-reasonable lease covering the non-executive's portion of the minerals; furthermore, if such a lease will only come to fruition if the executive's portion of the mineral estate is leased concurrently, then fulfillment of the executive's duty should also include the leasing of its own minerals.[355] In this manner, the executive cannot use the "poison pill" method of leasing the non-executives minerals without leasing its own interest in order to prevent development of the subject tract.

Would this duty to lease be present in a typical cotenant relationship where each cotenant holds the executive right for the minerals it owns? The short answer is certainly not; however, even among cotenants, the ownership of an executive right over another's minerals is laden with a high duty of care. Anyone acquiring that right, or possessing that right by virtue of co-tenancy, must be aware that any action—or inaction when a reasonably prudent mineral owner would act—could potentially expose that executive to liability for failure to act in the non-executive's best interest.[356] The appointment of a judicial receivership is a remedy that may be appropriate when a court finds that the executive compromised its duty to the non-executives through the procurement of unequal benefits, or if the executive finds itself in a tight spot and wants to avoid facing suit.[357] This remedy is discussed further in Appendix A.

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354. *Id.*

355. *See* Christopher Kulander, *Big Money vs. Grand Designs: Revisiting the Executive Right to Lease Oil & Gas Interests*, 42 TEX. TECH L. REV. 33, 58 (2009) ("In any case in which an executive rights owner with a portion of the mineral estate accepts leases on non-executive interests but refuses to lease his own interest, and by this refusal effectively makes leasing uneconomical from a producer's standpoint, the end result is effectively the same as refusing to seek and execute a lease on any portion of the mineral estate.").

356. *See* Zimmerman v. Texaco, Inc., 409 S.W.2d 607, 614 (Tex. Civ. App.—El Paso 1966, writ ref'd n.r.e.) (holding cotenants did not owe each other a fiduciary duty and had no duty to produce minerals from the land for the benefit of another cotenant). *But see* Dearing Inc. v. Spiller, 824 S.W.2d 728, 733 (Tex. App.—Fort Worth 1992, writ denied) (holding cotenants are not automatically fiduciaries, but "the significant relationship which gives rise to the fiduciary duty is the *exercise* of the executive rights over the non-participating interest").

357. *Cf.* Hawkins v. Twin Montana, Inc., 810 S.W.2d 441, 444 (Tex. App.—Fort Worth 1991, no writ) (upholding the trial court's appointment of a receiver to prevent drainage and affirming such appointments are within the court's discretion).

F. *The Executive Right and Negotiation of Bonus*

If the executive leases and receives a bonus, should the non-executive receive any portion of that money? When the instrument severing the executive right either passes the executive right but retains the right to collect bonus for the non-executive portion[358] or retains the executive right but passes the right to collect bonus for the non-executive portion,[359] which party keeps the bonus paid from leasing? This would be an easier question if the document severing the executive right explicitly addresses which party is to receive the bonus.[360] In such a case, because the right to receive bonus payments and the executive right are recognized as separate component interests of the full mineral estate that are freely severable if so expressed in the conveyance,[361] the intention expressed by the grantor—unless deemed ambiguous—should control, assuming that the grantor also actually owns the right to receive bonus payments.[362]

This could be a more puzzling question in a situation where, (1) the right to receive bonus is not addressed in the instrument that severs the executive right from the other incidents, and (2) there is ambiguity as to whether the non-executive interest is a mineral interest or a royalty interest.[363] In their treatise on oil and gas law, Williams and Meyers

358. *See, e.g.*, Burns v. Audas, 312 S.W.2d 417, 420 (Tex. Civ. App.—Eastland 1958, no writ) (allowing the surface estate owner to convey the executive right while retaining the right to bonuses).

359. *See, e.g.*, Martin v. Snuggs, 302 S.W.2d 676, 278 (Tex. Civ. App.—Fort Worth 1957, writ ref'd n.r.e.) (finding the mineral estate owner could retain the executive right while conveying the right to receive bonuses).

360. *Cf.* Luckel v. White, 819 S.W.2d 459, 461 (Tex. 1991) (citing Altman v. Blake, 712 S.W.2d 117, 118 (Tex. 1986); Garrett v. Dils Co., 299 S.W.2d 904, 906 (Tex. 1957)) (determining unambiguous deeds were "a question of law for the court" and that "[t]he primary duty of a court when construing such a deed is to ascertain the intent of the parties from all the language in the deed by a fundamental rule of construction known as the 'four corners' rule"); Mull Drilling Co. v. Medallion Petroleum, Inc., 809 P.2d 1124, 1126 (Colo. Ct. App. 1991) (following the general rule in Texas that reservations and conveyances of the various components of one's property interest are analyzed by the court according to the language in the deed or instrument).

361. *Burns*, 312 S.W.2d at 420; *see Martin*, 302 S.W.2d at 678 (illustrating a mineral estate owner can successfully retain the executive right and transfer rights to bonus and delay rentals without creating a retained royalty, as seen in *Klein* and *Watkins*); *see also* Benge v. Scharbauer, 152 Tex. 447, 259 S.W.2d 166, 169 (1953) ("The parties owning the mineral interests may make [the right to receive bonuses, delay rentals, and royalties] different [in proportion] if they intend to do so, and plainly and in a formal way express that intention [within the deed].").

362. *See, e.g.*, *Burns*, 312 S.W.2d at 420 (rejecting the argument that a provision explicitly conveying the executive right but retaining the right to bonuses was ambiguous); *see also Benge*, 259 S.W.2d at 169 ("The fractional part of the bonuses, rentals[,] and royalties that one is to receive under a mineral lease usually or normally is the same as his fractional mineral interest, but we cannot say that it must always be the same.").

363. *See* Phillip E. Norvell, *Pitfalls in Developing Lands Burdened by Non-Participating Royalty: Calculating the Royalty Share and Coexisting with the Duty Owed to the Non-Participating Royalty Owner by the*

pontificated, "The participation in lease benefits by a nonexecutive mineral owner depend on the terms of his deed, but typically such owner shares in bonus, rental and royalty."[364] In the case of an NPRI where the executive right is severed, the executive is entitled to the bonus, even if it is attributable to the lands covered by the non-executive NPRI owner's royalty acreage.[365]

For example, assume Owen owns an undivided one-fourth mineral interest and conveys to Bruce one-half of his undivided one-fourth mineral interest but reserves the executive right. Assuming the instrument of conveyance was unambiguous and that Owen initially possessed the right to collect bonus, when subsequent leasing of Bruce's non-executive portion of the mineral estate takes place, which party is entitled to the bonus payments? In essence, if the instrument does not expressly decouple the right to receive bonus from the executive right, is the non-executive entitled to its proportionate share of the bonus consideration? In this example, the non-executive should get the bonus, because the non-executive holds a mineral interest, not an NPRI.[366]

Executive Interest, 48 ARK. L. REV. 933, 948 (1995) (describing the duty to seek the "potential for ambiguity and susceptibility to different interpretations" when construing mineral and royalty deeds); *see also* Harry R. Chadwick, Sr., *Mineral or Royalty—The French Percentage*, 49 SMU L. REV. 543, 555 (1996) ("For the most part, we have the freedom to draft in whatever form we wish documents that will have a permanent place in the land records and take the consequences. The consequences are frequently litigation, which often adds a complexity to our legal system that can undermine 'the ability of the profession to give a high level of professional service at a price that the public will be willing to pay.' In my opinion, *French* adds clarity to the law of oil and gas, but is clear that judges, lawyers and scholars can and do differ on the distinction between minerals and royalties." (footnote omitted)).

364. *See* 2 HOWARD R. WILLIAMS & CHARLES J. MEYERS, OIL AND GAS LAW § 339.1 (Patrick H. Martin & Bruce M. Kramer eds., 2012) (declaring that the terms of the severance deed should control); *see also* Patrick H. Martin, *Unbundling the Executive Right: A Guide to Interpretation of the Power to Lease and Develop Oil and Gas Interests*, 37 NAT. RESOURCES J. 311, 369 (1997) ("When the conveyance has provided for the executive right or power in one person but has made no provision for bonus and delay rental, the cases in Texas hold that the executive right holder must share the bonus and delay rental[s] with the mineral interest owner.").

365. *See* 2 HOWARD R. WILLIAMS & CHARLES J. MEYERS, OIL AND GAS LAW § 339.1 (Patrick H. Martin & Bruce M. Kramer eds., 2012) ("Upon exercise of the executive right delay rentals and bonus payable under the lease go to the executive and not to the royalty owner."). However, executives will not have the right to retain any royalty payments due to the NPRI owner because of their duty to NPRI owners as the executive. *See* Friddle v. Fisher, 378 S.W.3d 475, 481 (Tex. App.—Texarkana 2012, pet. denied) ("If the holder of the executive right receives royalties pursuant to the rights held by the NPRI holder, he is chargeable in equity as constructive trustee with the duty to hold the royalty attributable to the holder of the NPRI, whatever it may be, subject to the demand of the NPRI owner." (citing Andretta v. West, 415 S.W. 638, 641–42 (Tex. 1967))).

366. *See* Patrick H. Martin, *Unbundling the Executive Right: A Guide to Interpretation of the Power to Lease and Develop Oil and Gas Interests*, 37 NAT. RESOURCES J. 311, 361 ("A royalty does not share in bonus and delay rental because it is defined as a share of production, and bonus and delay rental[s]

While bonuses are now often calculated at thousands of dollars per acre, historically, bonus was not a primary vector of recompense for a lessor. Royalty has always been considered the biggest potential money-maker for lessors, with bonus, delay rentals, and shut-in royalty coming in a distant second, third, and fourth.[367] Therefore, in the past, bonus was not a primary point of negotiation, but rather a distant second to royalty in importance to the lessor.[368] Signing bonuses, typically a lump sum paid upfront per acre and multiplied by the percentage of undivided fee mineral ownership of the lessor, used to be somewhat comparable to delay rentals in terms of importance in lease negotiations.[369] The signing bonus was only an enticement to lease and royalty interest served as the prime vector of profit for lessors.[370]

Before the 1980s, bonuses were low, generally ranging between $100 to $400 per acre in speculative areas, and were often used as "grease payments" by landmen to facilitate leasing by enticing reluctant or unsophisticated parties with the promise of instant, guaranteed money in return for signing a form lease produced by the lessee.[371] With such nominal bonuses, a tendency to allow the executive to collect bonus actually owed to the non-executive mineral interest owner may have taken hold in certain corners. This tendency can be attributed to non-executive inattentiveness, ignorance of its right to a proportionate share of the bonus payment, a mistake concerning the nature of their non-executive interest (i.e., believing it was a royalty interest instead of a mineral interest), or a charitable belief that the executive ought to receive a small sum in return for its effort expended in the leasing process.[372]

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are not part of production. But a mineral interest owner . . . is entitled to bonus and delay rental[s] unless stripped of these [rights].").

367. Letter from John S. Lowe, Professor of Oil and Gas Law, S. Methodist Univ. Sch. of Law (July 13, 2012) (on file with author).

368. *Id.*

369. *Id.*

370. *Id.*

371. John S. Baen, *The "Standard Producers 88 Oil and Gas Lease in America"* at 6, Presented at the National Meeting of The American Real Estate Society (Apr. 18–21, 2012) (unpublished paper), *available at* http://www.cob.unt.edu/firel/baen/Baen-%20Standard% 2088% 20Oil% 20and% 20GasFinal.pdf (last visited April 5, 2013); *see also* Ronald D. Nickum, *Negotiating and Drafting a Modern Oil and Gas Lease on Behalf of Lessor*, 13 TEX. TECH L. REV. 1401, 1404 (1982) ("Normally, the lessee prefers to pay a higher bonus for a lower royalty; the lessor will generally accept a lower royalty for a higher bonus check lying on the table. However, a royalty may be far more valuable than a bonus in the long run.").

372. *See* John S. Baen, *The "Standard Producers 88 Oil and Gas Lease in America"* at 7, Presented at the National Meeting of The American Real Estate Society (Apr. 18–21, 2012) (unpublished paper), *available at* http://www.cob.unt.edu/firel/baen/Baen-%20Standard% 2088% 20Oil% 20and%

This changed dramatically in recent times, particularly with the advent of the Internet and the increasingly rapid dissemination of information about regional leasing trends.[373] With bonus levels in the Barnett Shale reported as high as $25,000 per acre in 2008,[374] leasing bonuses now rival production royalty as the main source of profit for lessors, and constitute a major negotiation point in any leasing transaction.[375] Modern bonuses can be an immense vector of recompense for lessors, amounting to many thousands of dollars per acre, and bonus payments are now an important point of negotiation between lessors and lessees.[376]

Consider a situation where the bonus attributable to the executive mineral interest is owed to the executive and the corresponding royalty is due the nonexecutive. Can an executive in that circumstance negotiate a higher bonus and a lower corresponding royalty? The obvious temptation for the bonus-owning executive is to negotiate a higher bonus—particularly if any portion of its executive right is stripped of other mineral ownership rights—and to potentially accept a lower royalty in return. Not only is this practice out of line with the executive's fiduciary duty, it also represents a potential source of liability for an executive—even if that executive is innocent of any alleged manipulation of lease negotiations.[377]

20GasFinal.pdf (discussing that a surface owner may not even realize a lease was executed unless they review their title documents).

373. *See, e.g.*, *Resources*, TEX. LAND AND MINERAL OWNERS ASS'N, http://www.tlma.org/resources.htm (last visited April 5, 2013) (providing numerous links for mineral owners on issues such as negotiating a lease, royalty payments, as well as offering a variety of useful Internet resources helpful to mineral owners).

374. Jim Fuquay, *Shhhhhhhhh! We've Got Big News*, STAR-TELEGRAM (Aug. 25, 2012, 3:02 PM), http://blogs.star-telegram.com/barnett_shale/2008/08/shhhhhhhhh-weve.html.

375. *See* Ronald D. Nickum, *Negotiating and Drafting a Modern Oil and Gas Lease on Behalf of Lessor*, 13 TEX. TECH L. REV. 1401, 1402 (1982) ("[L]essors now find they cannot only collect bonuses at premium rates, but that they are in the rather unique position of being able to dictate many of the terms of the oil and gas leases they execute."); *see also FAQ About Oil and Gas Mineral Rights*, LISTMINERALRIGHTS.COM, http://www.listmineralrights.com/faq.php (last visited March 5, 2013) ("Key items to negotiate are the lease bonus amount, the royalty reserved, pooling clauses and the primary term of the lease—to name a few.").

376. *See* Marcellus Drilling News, *Oil & Gas Lease Signing Bonus Payments Paid to Landowners 2011 v 2012*, SLIDESHARE (Oct. 12, 2012), http://www.slideshare.net/MarcellusDN/oil-gas-lease-signing-bonus-payments-paid-to-landowners-2011-v-2012 (comparing average leasing bonuses by state in 2011 and 2012, and showing in eight of the nine states surveyed, lease bonuses exceeded $2,000 in 2012). *But see Oil & Gas Investing FAQ*, BLACKBEARD DATA SERVICES, http://blackbearddata.com/oil-and-gas-royalties-what-they-are (last visited April 5, 2013) (stating that leasing bonuses typically range from $200 to $500 per acre).

377. *Cf.* Mack Keith McCollum, Note, Manges v. Guerra*: The Executive Right Holder Undergoes Close Scrutiny*, 38 BAYLOR L. REV.189, 204 (1986) ("A standard of duty imposed on the executive that requires him to subordinate his interest to that of the nonexecutive is almost certainly not what the parties had in mind when they initially bargained. The strict fiduciary standard of conduct essentially

Lesley does not resolve the issue of determining who should pay the non-executive mineral interest owner or what duty is owed to the non-executive in such royalty and bonus negotiations. However, with bonuses steadily increasing over time, these questions will grow in importance and parties potentially owed bonus and royalties will more carefully scrutinize the severance deed and case law for language divining whether the executive or non-executive should get the bonus.[378]

However, *Lesley* may provide some clues about where the law in Texas now stands. *Lesley* makes clear an executive cannot ignore the non-executive's interest in leasing.[379] Therefore, during negotiations in a scenario where the executive is entitled to the entire bonus, if the executive proposes a lease for a huge bonus and no royalty, it would seem clear that the executive would violate its fiduciary duty to the non-executive. While detecting self-dealing in such an extreme case is easy, consider a leasing scenario where the executive owns the bonus associated with a mineral interest, the non-executive owns the royalty interest associated with a mineral interest, and a lessee then offers the choice of an industry-wide and regionally-standard $500 per acre bonus and one-sixth royalty or the option of a $1000 per acre bonus and one-eighth royalty. In this case, does the executive have to choose the first offer? Would the executive's hands be likewise bound if data suggests that the acreage is not prospective and a reasonably prudent lessor who owned the whole mineral interest, royalty, and bonus would normally take the second option?

A related question exists as to who should pay the bonus to the non-executive mineral interest owner—the executive or the lessee? Even if the non-executive owns the bonus, the executive may desire to be a conduit for that money.[380] Money paid to middlemen sometimes disappears before it gets to its intended recipient, and the unpaid party may seek to

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ties the executive's hands in the lease bargaining process and prevents him from taking full advantage of the options which are available to him as holder of the exclusive leasing power."). *See generally* PYR Energy Corp. v. Samson Res. Co., 470 F. Supp. 2d 709, 721–22 (E.D. Tex. 2007) (describing the tenants of the executive duty doctrine).

378. *See* Mull Drilling Co. v. Medallion Petroleum, Inc., 809 P.2d 1124, 1126 (Colo. App. 1991) (ruling the non-executive owner was not entitled to a bonus payment because the severance deed "expressly provided that 'the reservation and exception being nonparticipating in any leases, participation being limited to *royalties only* payable under said leases'") (emphasis added).

379. *See* Lesley v. Veterans Land Bd. of State, 352 S.W.3d 479, 491 (Tex. 2011) ("It may be that an executive cannot be liable for failing to lease minerals when never requested to do so, but an executive's refusal to lease must be examined more carefully.").

380. *Cf.* John McFarland, *Lease Ratifications*, OIL AND GAS LAWYER BLOG (June 11, 2011), http://www.oilandgaslawyerblog.com/2012/06/lease-ratifications.html ("The entire bonus may have been paid to the owner of the executive interest.").

hold the original payor accountable.[381]

These questions become more difficult due to the fact that, while the Texas Supreme Court in *Manges* equated the executive right to a true fiduciary duty,[382] this strict standard receded in subsequent opinions so that the current standard is good faith at the level of "utmost fair dealing."[383] The executive owner has the right to lease, and leasing historically triggered a bonus payment.[384] When bonuses were nominal, there was little concern in the oil and gas industry over whether the bonus money made its way into the hands of the bonus-owning non-executives.[385] Now that bonuses have the potential to rival royalty in magnitude and can be a key negotiating point, more care is necessary.

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381. *See id.* (noting a non-executive may need to pursue a claim against the executive to receive the bonus owed to them).

382. *See* Manges v. Guerra, 673 S.W.2d 180, 183 (Tex. 1984) ("The fiduciary duty arises from the relationship of the parties."); Mack Keith McCollum, Note, Manges v. Guerra: *The Executive Right Holder Undergoes Close Scrutiny*, 38 BAYLOR L. REV.189, 193 (1986) (noting that the Texas Supreme Court adopted "the utmost good faith standard of duty" in *Manges*). McCollum commented further on the history of judicial descriptions of the executive duty before *Manges*:

> The standard of duty imposed on the executive ranges from the fiduciary responsibility of a trustee to that of ordinary care and good faith. The earliest Texas case dealing with the standard, *Schlitter v. Smith*, discussed the subject in dictum saying "We think that self-interest on the part of the [executive] may be trusted to protect the [nonexecutive] as to the amount of royalty reserved Of course, there should be the utmost fair dealing on the part of the [executive] in this regard." In *Wintermann v. McDonald*, a case decided in the same year as *Schlittler*, the supreme court imposed the less demanding duties of "prudence and good faith" and of "ordinary care and diligence" on the landowner .... At the other end of the continuum, the court ... held the executive ... to a strict standard of care, characterized by a "relation of trust." .... Additionally, recent cases couched this duty of utmost good faith in terms of an implied covenant arising from the deed or contract which created the executive right. Thus rested the status of the executive right when *Manges v. Guerra* arrived on the scene.

Id. at 192–93 (internal citations omitted).

383. *E.g.*, *Lesley*, 352 S.W.3d at 481 ("We held long ago that the executive owes other owners of the mineral interest a duty of 'utmost fair dealing.'" (citing Schlittler v. Smith, 128 Tex. 628, 101 S.W.2d 543, 545 (1937))).

384. *See* Patrick H. Martin, *Unbundling the Executive Right: A Guide to Interpretation of the Power to Lease and Develop Oil and Gas Interests*, 37 NAT. RESOURCES J. 311, 331 ("Most leases provide for a sum of money to be paid for execution of the lease ....").

385. One reason bonuses were historically nominal is that while royalty payments were calculated based upon the actual ownership of the lessor as determined after the often painstaking title work on a smaller tract that preceded actual drilling and production, bonuses were paid at the leasing stage where the percentages of ownership were—and still are—typically less certain. Therefore, bonus is different than the rest of the payments to lessors in that overpayments of bonus to owners that later are determined to not have the interest upon which the lessee thought they had when paying the bonus are often let go as the cost of doing business, absent fraud or other malicious acts by the lessors. Royalty, rentals, and shut-ins—generally paid after the lessee is certain of who owns what—are paid with a less cavalier attitude. Perhaps this cavalier attitude has carried over to the arena of bonus and executive rights.

Perhaps the most practical way to read the holding in *Lesley* and prior cases regarding the executive's duty is to recognize the cases show a willingness of the courts to protect non-executives against overreaching. This is easy to recognize in *Manges*.[386] Even if this is the correct interpretation, we still confront the issue of what exactly constitutes overreaching by the executive. One interpretation is that if an executive acts within the mainstream of industry practice, its actions will not constitute a breach.[387] Another possible interpretation is that the executive has an obligation to seek advantages for the non-executive along with advantages for himself.[388] For example, the executive could negotiate and accept both a higher bonus and royalty rate during lease negotiations, but could not prefer a higher bonus—where the executive is entitled to the bonus—over a higher royalty to which the non-executive is entitled. Additionally, *Lesley* suggests that in the above scenario, when the executive negotiates for a higher bonus over a higher royalty, this could activate the executive right in a manner similar to how the formulation of the anti-drilling covenants activated the executive right in *Lesley*.[389]

VI. UNANSWERED QUESTIONS AND OPINIONS THEREON

The limited scope of *Lesley*[390] and the light touch of the Texas Supreme Court in the case only managed to allay a few of the flotilla of questions remaining with regard to the executive right and the right to self-develop. The following questions remain.

A. *Does the Executive Have to Lease Its Own Minerals?*

Before *Bass*, Texas courts had not addressed whether the conveyance of the executive right created an implied covenant to enter into oil and gas

386. *See Manges*, 673 S.W.2d at 181–85 (awarding the non-executives exemplary damages because the executive "willfully, wantonly, maliciously[,] and unconscionably breached his fiduciary duty").

387. *Cf.* Mack Keith McCollum, Note, Manges v. Guerra: *The Executive Right Holder Undergoes Close Scrutiny*, 38 BAYLOR L. REV. 189, 206 (1986) (advocating for an "ordinary, prudent landowner standard" for executives).

388. *Cf. Schlitter*, 101 S.W.2d at 545 ("We think that self-interest on the part of the grantee may be trusted to protect the grantor as to the amount of royalty reserved. Of course, there should be the utmost fair dealing on the part of the grantee in this regard."); *see also* Mack Keith McCollum, Note, Manges v. Guerra: *The Executive Right Holder Undergoes Close Scrutiny*, 38 BAYLOR L. REV. 189, 206–07 (1986) (suggesting that *Schlitter* endorsed some level of self-interest on part of the executive).

389. *See* Lesley v. Veterans Land Bd. of State, 352 S.W.3d 479, 491 (Tex. 2011) (noting that the executive activated its executive right by imposing restrictive covenants).

390. *See id.* (declining to decide whether an executive who refuses to lease minerals is liable, as a general rule, to a non-executive for such refusal).

leases.[391] As *Lesley* illustrates, if courts do not recognize that the conveyance of the executive right creates some implied duty for the executive to trigger oil and gas operations through self-development or leasing, then the potential exists for non-executives to have their bargained-for property interest rendered valueless.[392]

Normally, cotenants do not have an obligation to lease when other cotenants lease.[393] For reasons explained above, such obstinacy can make it impossible to lease economically a tract. However, severance of the executive right introduces a complexity when the executive also owns some of the minerals and the executive right over minerals owned by another.[394] The question raised is this: If the executive agrees to lease the non-executive's minerals, but refuses to lease its own minerals, has the executive activated the executive right as to the unleased minerals? An argument could be made that such a refusal is an example of the inaction cited above regarding the drilling covenants.[395] By refusing to lease its own minerals, the executive could effectively strangle leasing opportunities that the fiduciary duty would normally require the executive to take.

Because oil and gas leases are conveyances of real property interests—a fee simple determinable[396]—it may initially appear unlikely that a court

391. *See In re* Bass, 113 S.W.3d 735, 743 (Tex. 2003) (refusing to read an implied covenant into the conveyance). In refusing to apply an implied covenant where no production existed, the Texas Supreme Court described the nature of the implied covenant in oil and gas law as follows:

> We have consistently stated that implied covenants are not favored by law and will not be read into contracts except as legally necessary to effectuate a plain, clear, unmistakable intent of the parties . . . . From these propositions, oil and gas jurisprudence recognizes an implied covenant to develop land in oil and gas leases after oil and gas are discovered in paying quantities. "The evident intent of the parties in the execution of [the mineral lease] being the production of minerals, possible only through operation and development, the obligation to operate with reasonable diligence and to reasonably develop the land, will be implied in order to effectuate that intent." No oil and gas lease exists here.

Id. (citations omitted).

392. *See Lesley*, 352 S.W.3d at 491 (concluding an executive who refuses to lease may be liable to the non-executive if such refusal "is arbitrary or motivated by self-interest to the non-executive's detriment").

393. *See* Glover v. Union Pac. R.R., 187 S.W.3d 201, 213 (Tex App.—Texarkana 2006, pet. denied) ("Absent an agreement to the contrary, a cotenant has the right to lease his or her interest without joinder of other cotenants.").

394. *See, e.g.*, Manges v. Guerra, 673 S.W.2d 180, 181 (Tex. 1984) (describing a complex relationship between the executive and non-executive).

395. *See Lesley*, 352 S.W.3d at 491 ("[W]e hold that Bluegreen breached its duty to [the non-executives] by filing restrictive covenants.").

396. *See* JOHN S. LOWE ET AL., OIL AND GAS LAW 309–10 (5th ed. 2008) ("In states that follow the ownership-in-place theory, the courts generally view the lessee's interest as a fee simple determinable estate in the oil and gas in place.").

would make an executive alienate its interest through leasing its portion of the mineral estate. However, a closer look at the nature of the executive's fiduciary duty suggests another direction. If a court casts the executive's fiduciary duty in the strictest light, the executive must put the non-executive's interest before its own.[397] It logically follows that if the only way for a non-executive's mineral interest to be developed requires leasing the mineral estates of both the executive and the non-executive, then an executive's rejection of a commercially-reasonable lease covering the executive's own minerals—particularly if the rejection is motivated by self-dealing—not only affects the non-executive's interest, and is thus an exercise of the executive right, but also results in the executive putting its own interest ahead of the non-executive in clear violation of its duty.[398] Just as an agent must put the interests of a principle ahead of its own,[399] the executive under the strictest version of the fiduciary duty would have to put the non-executive's interest ahead of its own. Therefore, even if the executive did not want to lease its own mineral interest, likely because of some other benefit it is receiving, as was the case in *Lesley*,[400] it would be forced to sacrifice that benefit and assure that the non-executive's wish of developing its mineral interest is seen through. The executive would be forced to lease its own minerals if that was the only method for the non-executive's minerals to be leased and developed.

On the other hand, if the executive's duty is interpreted as being one of "utmost good faith and fair dealing," then the issue is murkier. Here, the executive may not have to put the non-executive's interest above its own, and may therefore not have to lease its own interest even if such a lease

397. *See* Christopher Kulander, *Big Money vs. Grand Designs: Revisiting the Executive Right to Lease Oil & Gas Interests*, 42 TEX. TECH L. REV. 33, 43 (2009) ("Strict fiduciary standards require placing the beneficiary party's interest ahead of the agent's interest." (citing Bank One, Tex., N.A. v. Stewart, 967 S.W.2d 419, 442 (Tex. App.—Houston [14th Dist.] 1991, writ denied))); Patrick H. Martin, *Unbundling the Executive Right: A Guide to Interpretation of the Power to Lease and Develop Oil and Gas Interests*, 37 NAT. RESOURCES J. 311, 376 ("The strictest standard is a fiduciary standard. Although some recent cases have used this label, we will see that they do not use the 'fiduciary' standard in its strictest sense.").

398. *Cf. Lesley*, 352 S.W.3d at 491 (concluding an executive who refuses to lease may be liable to the non-executive if such refusal "is arbitrary or motivated by self-interest to the non-executive's detriment").

399. Crim Truck & Tractor Co. v. Navistar Int'l Transp. Corp., 823 S.W.2d 591, 594 (Tex. 1992), *superseded by statute on other grounds as noted in* Subaru of Am., Inc. v. David McDavid Nissan, Inc., 84 S.W.3d 212, 225–26 (Tex. 2002)); *see also* Nat'l Plan Adm'rs, Inc. v. Nat'l Health Ins. Co., 235 S.W.3d 695, 700 (Tex. 2007) (approving of the view that an agent must only act for the principal's benefit).

400. *See Lesley*, 352 S.W.3d at 481 (noting the executive imposed restrictive covenants for the purpose of making the subdivision more attractive and desirable).

would be necessary to ensure that the non-executive's minerals are leased.[401]

In the circumstance where a non-executive wants the executive to lease the executive's own minerals so that the non-executive may also procure a lease, another matter of concern is the underlying reason why the executive chooses not to lease its own minerals. If the reason involves self-dealing unconnected to the benefit of the non-executive, fiduciary duties were arguably activated and leasing may necessarily have to follow.[402] However, if the reason for not leasing is (1) the executive believes the lease terms are insufficient; or (2) the executive believes, in good faith, that current hydrocarbon prices are too low to warrant leasing and higher prices are on the horizon; or (3) the executive proffers a reasonable motivation for failing to lease, it follows that self-leasing by the executive should not be required.

Of course, the executive does not have to accept every lease offered. Such a condition could lead the non-executive(s) and a producer/lessee to collude so that the executive is forced to accept a lease with uneconomic or unreasonable terms.[403] An executive rights holder should never be obligated to sign a lease that no reasonably prudent mineral owner would sign independent of the executive duty.

B. *Is There Now an Implied Covenant for the Executive to Self-Develop?*

With the accepted and reaffirmed rule expressed in *Lesley* that the non-executive cannot self-develop its own minerals, the Texas Supreme Court has, in effect, combined the executive right and the right of self-development under the powers of the executive right holder.[404] The two primary ways an executive would exercise these rights, therefore, is either

401. *Cf.* Schlitter v. Smith, 128 Tex. 628, 101 S.W.2d 543, 545 (1937) (asserting that an executive can appropriately act with self-interest so long as it adheres to "the utmost fair dealing"). This standard is the currently applicable interpretation under Texas law. *See* Friddle v. Fisher, 378 S.W.3d 475, 480–81 (Tex. App.—Texarkana 2012, pet. denied) ("It is settled law in Texas that the owners of executive rights owe a fiduciary duty of 'utmost fair dealing' to the owners of other interests in the mineral estate . . . ." (citing *Lesley*, 352 S.W.3d at 480–81) (footnote omitted)).

402. *See Lesley*, 352 S.W.3d at 481, 491 (ruling that the executive exercised its executive right by restricting future leasing and therefore its fiduciary duties were activated—and simultaneously breached).

403. Christopher Kulander, *Big Money vs. Grand Designs: Revisiting the Executive Right to Lease Oil & Gas Interests*, 42 TEX. TECH. L. REV. 33, 64 (2009); *cf.* Mack Keith McCollum, Note, Manges v. Guerra: *The Executive Right Holder Undergoes Close Scrutiny*, 38 BAYLOR L. REV. 189, 206 (1986) (noting the inevitability of harsh results that flow from the fiduciary obligation imposed on executives).

404. *See Lesley*, 352 S.W.3d at 492 (reaffirming the rule that executives possess the exclusive right to develop the mineral estate).

to enter into oil and gas leases or to develop the mineral estate himself.[405] Related to the question of whether the executive has a duty to seek out, or at least sign commercially reasonable leases when approached, is whether there is a duty to self-develop the non-executive's minerals.[406] An implied covenant to develop a non-executive's minerals and an implied covenant to enter into oil and gas leases covering the interest of a non-executive are two different concepts.[407] However, because the Texas Supreme Court has effectively combined these two sticks, it opened the door to the question of whether the fiduciary duty owed to the non-executives now requires the executive to self-develop the minerals of the non-executive.

It is evident that self-development of a non-executive's minerals and leasing a non-executive's minerals are just as different as self-development or leasing of one's own minerals. A mere implied covenant to enter into oil and gas leases would mean that the executive must exercise its executive right to lease the non-executive's minerals—and maybe its own—at some point in time. It would follow that the executive cannot sit on this right to lease whatever the circumstances, but the executive is not required to self-develop.[408] In effect, *Lesley* seems to add to the executive's fiduciary duty an implied covenant for an executive to set aside self-dealing when considering whether to accept a commercially reasonable lease over a non-executive's minerals.[409] If such is the case, and because *Lesley* makes clear that the executive holds not only the right to lease the non-executive's minerals, but also the right to self-develop the non-executive's minerals,[410] does not the executive's fiduciary duty extend to the self-development component of the rights owned by the executive? This implies that once a party holds the now combined executive right and self-development right for a non-executive, then the executive would be

405. *See generally* Christopher Kulander, *Big Money vs. Grand Designs: Revisiting the Executive Right to Lease Oil & Gas Interests*, 42 TEX. TECH. L. REV. 33, 71–74 (2009) (discussing the executive's right to self-develop).

406. *E.g.*, *In re* Bass, 113 S.W.2d 735, 744 (Tex. 2003) (finding no implied duty to develop the non-executive's mineral estate existed under Texas law).

407. *See id.* at 743 ("The [non-executive's] argument confuses a fiduciary duty with a duty to develop; yet these two duties are distinct and have developed under different legal theories.").

408. *Cf. id.* at 745 ("Traditionally, a duty to develop land arises under an oil and gas lease either through an explicit provision in the lease or through an implied covenant to develop.").

409. *See Lesley*, 352 S.W.3d at 491 (asserting an executive may be liable to a non-executive if it refuses to lease minerals due to self-interest).

410. *See Lesley*, 352 S.W.3d at 492 ("We have stated that 'the right to develop is a correlative right and passes with the executive rights.'" (quoting French v. Chevron, U.S.A., Inc., 896 S.W.2d 795, 797 n.1 (Tex. 1995))); Day & Co. v. Texland Petroleum, Inc., 786 S.W.2d 667, 669 n.1 (Tex. 1990) (stating "the right to develop and produce minerals" is "correlative to the executive right" (citing Altman v. Blake, 712 S.W.2d 117, 118 (Tex. 1986))).

obligated to develop the non-executive's property—whether by leasing or self-development—if it could achieve commercial production or the executive could be compelled to allow the non-executive to self-develop.

C. *What Executive Duty Is Owed During Lease Negotiations?*

After *Lesley*, the practical question of how a bonus-owning executive negotiating a lease can bargain for the amount of bonus received while maintaining its fiduciary duty to the non-executive(s) remains unanswered.[411] Now that bonuses are a primary revenue generator for lessors, how do bonus-owning executive lessors balance the requested bonus with the requested royalty rate that is to be paid to the non-executive when negotiating lease terms? The trouble that arises in this situation stems from the fact that royalty and bonus are often inversely related: higher bonus often means lower royalty.[412]

Even with the high bonuses now being paid, if significant production is acquired, production royalty—commonly more than 20% in the current market[413]—will significantly outpace bonus over the duration of the lease. On the other hand, if little or no production is ultimately forthcoming, then signing bonuses represent the only substantial profit to the lessor from leasing.[414] When lease negotiations are underway, asking for a higher bonus typically means receiving a lower royalty, and vice versa.[415]

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411. *See* Marrs & Smith P'ship v. D.K. Boyd Oil & Gas Co., 223 S.W.3d 1, 16 (Tex. App—El Paso 2005, pet. denied) (suggesting that an executive who negotiates other benefits in exchange for a smaller bonus may be in breach of duty to a non-executive).

412. *See* Ronald D. Nickum, *Negotiating and Drafting a Modern Oil and Gas Lease on Behalf of Lessor*, 13 TEX. TECH L. REV. 1401, 1404 (1982) (describing the typical relationship between bonus and royalty payments as inverse).

413. *Oil & Natural Gas*, TEX. GENERAL LAND OFFICE, http://www.glo.texas.gov/what-we-do/energy-and-minerals/oil_gas/index.html (last visited April 5, 2013).

414. *Cf.* Ronald D. Nickum, *Negotiating and Drafting a Modern Oil and Gas Lease on Behalf of Lessor*, 13 TEX. TECH L. REV. 1401, 1404 (1982) ("If negotiation results in a higher royalty and a lower bonus than initially offered, the lessor is essentially gambling with the lessee on production.").

415. When negotiating an oil and gas lease, lessors are often faced with a variety of interrelated decisions regarding what benefits to pursue. Ronald Nickum noted:

> The negotiation of bonus and royalty is affected by numerous factors, such as the bonus and royalty being paid in the vicinity for similar acreage, whether or not this is a wildcat or proven acreage, new discoveries in the geographical area under consideration, and tax consequences. The negotiating parties should know or find out what is occurring in the oil patch and try to determine why the lessee wants this acreage .... Also, keep in mind the psychology of negotiation in this particular area. Normally, the lessee prefers to pay a higher bonus for a lower royalty; the lessor will generally accept a lower royalty for a higher bonus check lying on the table. However, a royalty may be far more valuable than a bonus in the long run.

Id. at 1403–04.

Hence, bonus and royalty are intertwined as potential profit sources, and either may serve the primary source of lessor revenue.

The bonus-owning executive may be innocent of any self-dealing when it asks for a higher bonus. Consider a bonus-owning executive who believes that the acreage under consideration for leasing is unlikely to yield production. In such a circumstance, and in the absence of executive right severance, a reasonably prudent lessor would typically request a higher bonus, believing that royalty payments are unlikely in the future. However, when an executive requests a higher bonus in return for a lower royalty in such circumstances—even circumstances as innocent as this—the executive could face a claim of self-dealing. If wells on the lease subsequently turn out to be producers, the non-bonus-receiving non-executives will have received a lower royalty because the bonus-owning executive requested a higher bonus during negotiations as a trade-off. Again, the executive right in such a situation creates a potential conflict of interest—casting a shadow over everything the executive does, however blameless.[416]

Additionally, royalty clauses determine more than just the level of royalty, and often include other provisions that affect the terms and operation of the lease. What if the executive agreed to a lease for a large bonus and also agreed to a royalty clause that an experienced lessor would never accept, instead of the more typical Texas landowner royalty provision[417] including the right to terminate the lease for breach? This would also appear to be a breach of the executive's duty.

Practically speaking, at the present time it would appear inadvisable for a bonus-owning executive/lessor to accept a higher bonus in return for a lower royalty for any reason, or even to negotiate a higher bonus regardless of the agreed-upon rate of royalty. In light of *Lesley*, a cautious counselor may advise an executive client against taking such a higher bonus or, especially, negotiating for a higher bonus. One solution might

416. *See* Lesley v. Veterans Land Bd. of State, 352 S.W.3d 479, 491 (Tex. 2010) (failing to create a general rule that would provide executive-owning lessors a definite set of guidelines, but offering limited guidance when making leasing decisions that affect nonexecutive-owners' rights); *see also* Matt Norwood, Lesley v. Veterans Land Board *and the Duties of the Executive Right Holder*, TEX. J. OF OIL, GAS, AND ENERGY L. BLOG (Nov. 20, 2011), http://tjogel.org/blog/?m=201111 ("So, the duties of the executive right owner in Texas remain uncertain after Lesley. Reading between the lines of the [s]upreme [c]ourt's opinion, Lesley may hint that the duty falls somewhere between what was described in *Manges* and *Bass*. If an affirmative duty to lease does exist, it only exists in limited circumstances that the court is not willing to describe at this time.").

417. *See Oil & Natural Gas*, TEX. GENERAL LAND OFFICE, http://www.glo.texas.gov/what-we-do/energy-and-minerals/oil_gas/index.html (last visited April 5, 2013) (suggesting a typical royalty provision is approximately twenty percent).

be for the executive to seek a "stipulation" with the non-executive(s) making clear that the non-executive mineral interest owners will not consider the bonus-owning executive's negotiations concerning bonus to be a breach of its duty.[418] However, such a stipulation may not be obtainable, and requesting a stipulation of this variety in already contentious situations could further strain relationships among the lessors.

D. *What Happens When the Separated Executive Right Is Sold to Multiple Undivided Grantees?*

Consider the following scenario: Joseph owns all of the minerals under Blackacre in fee. He reserves the executive right to lease when conveying an undivided one-half of his mineral interest to Mary (e.g., Joseph now owns one-half of all of the minerals along with the executive right for all of the minerals and Mary owns a one-half, non-executive mineral interest). Joseph's reservation occurs fairly early in the chain of title. As often happens in the chain of title, Joseph then conveys all of his interest in Blackacre to multiple parties—specifically, he conveys all his interest in equal, undivided shares to Matthew, Mark, Luke, and John. Each of them now owns one-fourth of the undivided executive right to lease Mary's minerals, along with one-fourth of one-half of Joseph's original fee minerals. Now suppose Luke desires to lease. What is the effect on Mary's minerals of a lease executed only by Luke? Are Mary's minerals leased as to only one-fourth of one-half? Are they leased in full, or perhaps not at all?

The answer appears to reside in *Day & Co.*, which represents the proposition that when an undivided mineral interest is received, the grantee is presumed to acquire all of the appurtenant attributes of the undivided mineral interest—including the executive right—"unless a contrary intention is expressed" in the grant.[419] Therefore, if multiple

418. *Cf.* A.W. Walker, Jr., *The Nature of Property Interests Created by an Oil and Gas Lease in Texas*, 8 TEX. L. REV. 483, 516 (1930) (demonstrating in general terms how an express stipulation can protect a party to an oil and gas lease from certain undesired outcomes).

419. Day & Co. v. Texland Petroleum, Inc., 786 S.W.2d 667, 669 n.1 (Tex. 1990). To review, the first footnote to *Day & Co.* explicitly stated:

> When an undivided mineral interest is conveyed, reserved[,] or excepted, it is presumed that all attributes remain with the mineral interest unless a contrary intention is expressed. Therefore, when a mineral interest is reserved or excepted in the deed, the executive right covering that interest is also retained unless specifically conveyed. Likewise, when a mineral interest is conveyed, the executive right incident to that interest passes to the grantee unless specifically reserved.

Id. (citations omitted).

grantees receive undivided shares of a mineral interest—including a "stand alone" executive right such as that portion of the executive right covering Mary's minerals—then the undivided portion received by any individual party would only cover that fractional portion of the entire undivided interest received by that individual party.[420] This would mean Luke's lease would cover only one-fourth of Mary's one-half mineral interest and would leave the other three-fourths of Mary's one-half mineral interest unleased. How a real court might actually divide the stand-alone one-half executive power is unclear, but this author advises that out of an abundance of care, a lessee should obtain the signature of Luke as well as Matthew, Mark, and John should the lessee seek to lease all of Mary's one-half non-executive mineral estate.

E. *When Does the Executive's Duty Become Effective?*

When the *Lesley* court held that the executive exercised its executive right upon the creation of the restrictive covenants, this seemed to move the activation of the executive's fiduciary duty back in time from leasing to a point where the executive acts in a manner that is detrimental to the interests of the non-executives.[421] While this sounds like bad news for an executive looking for a way to prevent leasing, what exactly does this mean for the non-executive?

First, the court has made it clear in a string of cases that self-dealing on the part of the executive is the prime mover of judicial action on behalf of non-executives.[422] Inaction by the executive, or simply leasing the portion owned by the non-executive while keeping the executive's portion unleased—thus using the "poison pill" ploy described above—can itself be self-dealing by the executive. However, this variety of self-dealing is of the sort that requires no affirmative action by the executive, and is therefore less likely to give rise to evidence highlighting self-dealing often revealed during discovery.[423]

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420. *See id.* (finding a grantee succeeds to all of the rights associated with grantor's conveyed interest unless a different intention is expressly made).

421. *See Lesley*, 352 S.W.3d at 491 (refuting the assumption that the executive party has no duty to the non-executive before leasing occurs). *But see In re* Bass, 113 S.W.3d 735, 745 (Tex. 2003) ("[The executive] has not leased his land to himself or anyone else. [Therefore, the executive] has yet to exercise his rights as an executive.").

422. *See Lesley*, 352 S.W.3d at 491 (noting self-dealing was a distinguishing and dispositive factor between *Manges* and *Bass*); Manges v. Guerra, 673 S.W.2d 180, 183–84 (Tex. 1984) (finding that the self-dealing by the executive-owner, which the court found to be a breach of the fiduciary duty owed to the non-executive, was the deciding issue in determining culpability).

423. *See, e.g.*, *Lesley*, 352 S.W.3d at 490 (recounting that, in *Bass*, the Texas Supreme Court found it an abuse of discretion to compel discovery of sensitive seismic data covering the subject minerals

Second, if self-dealing is proven by the non-executives, and considering that *Lesley* has seemingly knocked down the *Bass* shield for executive non-leasing, how can non-executives prove that the non-leasing is a violation of the executive's right in the first place? Is the non-executive now forced to resort to skullduggery, such as spying on the executive to see if it is approached for leasing purposes, or sending undercover lessees to the executive—possibly with terms that might favor what the non-executive wants—to see if they are turned down? How many courts will want to be the arbitrator of a dispute over what constitutes a "reasonable" offer that the executive should have accepted?

Third, the *Lesley* court ruled that Bluegreen exercised its executive right in making the anti-drilling covenants—the same covenants that the court disallowed upon remand.[424] Is the executive right now "activated" somehow? Does the executive right holder *now* have to seek a competitive lease or, at least accept one should it come along? If so, what if an offering lessee is motivated to offer the lease by virtue of the non-executive(s) making phone calls behind the scenes to potential lessees? Do the non-executives now have the right to conduct geophysical exploration?

Or, on the other hand, did the *Lesley* decision rule that the anti-drilling covenant crossed a line that violated the duty of the executive right holder, was therefore discarded, and now the situation has returned to exactly where it was before—where continued inactivity by the executive is still excused? If this is the case, less has changed than meets the eye.

Jurisprudence regarding hydrocarbon development is primarily concerned with facilitating development while protecting correlative rights.[425] This policy encouraging development should not only be pursued between owners of different tracts but also undivided owners within a single tract.[426] This author submits for consideration that the

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because the non-executives failed to first show that the executive breached his fiduciary duty to the non-executives).

424. *Id.* at 481.

425. *See* Elliff v. Texon Drilling Co., 210 S.W.2d 558, 562 (Tex. 1948) (reiterating mineral owners' right to capture as much oil and gas underneath their land as possible, so long as it is within the limits placed by conservation statutes, other regulations, and with regard for the correlative rights of contiguous property owners); Paul E. Daugherty, Note, *Oil and Gas—Implied Duty of the Lessee to Reasonably Develop and Protect the Premises*, 7 TEX. L. REV. 438, 439 (1929) ("When an oil and gas lease contains no provision with regard to the extent of development by the lessee after minerals have been found thereon in paying quantities[,] then the parties are presumed to have an implied duty on the part of the lessee [to] reasonably develop the leased area." (citing J.M. Guffey Petroleum Co. v. Oliver, 79 S.W. 884 (Galveston 1904, writ ref'd))).

426. *See* Prairie Oil and Gas Co., v. Allen, 2 F.2d 566, 571 (8th Cir. 1924) (holding that a cotenant generally may develop minerals without the authorization of the other cotenant).

executive's duty to the non-executives should be considered effective at the instant the executive right is separated.

F. *Who Gets Paid the Bonus?*

The Texas Supreme Court first considered the question of bonus distribution in the aforementioned case of *Burns*, wherein a deed expressly gave the grantee the executive rights over the reserved portion of the mineral estate.[427] The grantee executed a lease and received a bonus, which it kept instead of sharing on a pro rata basis with the non-executive.[428] The non-executive grantor filed suit, claiming that it had not passed the right to bonus payments along with the executive right in the deed of conveyance.[429] The court found that if the deed of conveyance expressly retains or grants a mineral estate, severing the executive right alone does not change the resultant non-executive mineral estate to a royalty; therefore, the non-executive grantor was entitled to the bonus money.[430]

Some doubt remains about exactly what standard of care is owed by the executive to the non-executive. Amongst the spectrum of potential duties, the executive's duty lies in either (1) putting the non-executive's interests before the executive (a traditional agent/principle-type arrangement that comes freighted with the strictest fiduciary standard);[431] or (2) obtaining for the non-executive everything that the executive gets (the practical threshold of conduct seemingly established by the "utmost good faith and fair dealing standard"—that being one step below strictest fiduciary).[432] There is nothing in either possibility that suggests the executive should keep a bonus attributable to the portion of a mineral estate owned by the other non-executive parties. Rather, both possible standards suggest that an executive, as lessor, should turn over to the non-executive that portion of the lease bonus attributable to the undivided mineral interest owned by the non-executive, unless the instrument severing the executive right

427. *See* Burns v Audas, 312 S.W.2d 417,420 (Tex. Civ. App.—Eastland 1958, no writ) (restating there are separate and distinct mineral property rights, one of which is the right to receive bonus payments).

428. *Id.* at 418.

429. *Id.*

430. *Id.* at 420.

431. *See* BLACK'S LAW DICTIONARY 581 (9th ed. 2009) (defining a fiduciary duty as "a duty to act with the highest degree of honesty and loyalty toward another person and in the best interests of the other person").

432. *See* Manges v. Guerra, 673 S.W.2d 180, 183–84 (Tex. 1984) (requiring the executive owner to deal on behalf of the non-executive owner, as if it were receiving the benefits owed to the non-executive).

stipulates otherwise. *Lesley* does nothing to disturb this ground.

A tougher question emerges about the actual payment logistics of bonus: Should it be paid by the lessee directly to the non-executive or pass through the hands of the executive first? *Bass* suggests the agency relationship between the executive and non-executive applies strictly to the negotiation and execution period of the lease; generally, this relationship cannot be construed to exist outside of this period—certainly not before and maybe not after leasing.[433] This would suggest that the executive is not an agent for the non-executive when handling bonus funds. However, *Lesley* generally extends this duty to any activity by the executive that affects the non-executives interest.[434] Still, this author recommends that a lessee pay the bonus directly to the bonus-owning non-executive, as well as any royalty or rental owed to the non-executive mineral owner. Following this policy will help shield the executive from potential liability, and should be followed unless the executive receives express written instructions to the contrary from the non-executive, because the real property right of the non-executive mineral owner entitles it to bonus originating from the lessee.[435]

G. *What About the Duty Owed to NPRI Owners?*

As noted previously, non-executive mineral owners and NPRI owners are in different positions with regards to the executive right holder, potentially giving rise to different duties owed by the executive to each.[436] After *Lesley*, has the Court dissolved this fiduciary duty distinction between a non-executive mineral interest owner and an NPRI owner?

It is important to keep in mind that, at the very least, the executive's general duty to obtain for the non-executives what it obtains for itself carries over to the executive's duty towards NPRI owners.[437] For

433. *See In re* Bass, 113 S.W.3d 735, 743 (Tex. 2003) (delineating that a duty to develop results from contract covenants, not the relationship of the parties).

434. Lesley v. Veterans Land Bd. of State, 352 S.W.3d 479, 491 (Tex. 2010) (denying the notion that the executive owner owes the non-executive owner no duty prior to leasing, but instead holding that circumstances might exist in which an executive owner could breach the duty owned to the non-executive owner outside of the leasing period).

435. The author thanks Texas oil and gas attorney Terry I. Cross for his assistance in formulating this analysis.

436. *Compare* HOWARD R. WILLIAMS & CHARLES J. MEYERS, MANUAL OF OIL AND GAS TERMS 664 (M. Bender ed., 6th ed. 1984) (describing a non-executive interest as the party who does not have the right to execute an oil and gas lease), *with id.* at 668 (defining a non-participating royalty as an expense-free interest that is taken from production).

437. *E.g.*, Manges v. Guerra, 673 S.W.2d 180, 183–84 (Tex. 1984) (holding an executive right holder must obtain for the non-executive any benefit that the executive bargains for and receives).

example, on August 17, 2012, in *Friddle v. Fisher*[438] the Texarkana Court of Appeals decided an appeal from the 62nd Judicial District Court in Hopkins County, Texas that dealt with an executive mineral interest owner, Fisher, acting as lessor, that executed an oil and gas lease, but did not inform a non-participating royalty interest owner, Friddle, of the existence of the lease covering a tract encumbered by Friddle's NPRI.[439] Additionally, the lessee—Valence Operating Co. (Valence)—also failed to inform Friddle of the lease covering his interest in the tract.[440] When a well began producing on pooled acreage bordering the subject tract, Valence paid the entire royalty attributable to the pooled leased acreage, including the portion of that royalty attributable to the Friddle NPRI (calculated at over $90,000), to Fisher.[441]

Friddle sued Fisher and Valance to recover his share of the total royalty.[442] The portion of the case against Valence was severed. The district court granted summary judgment to Fisher.[443] On appeal, Friddle argued that disputed issues of material fact existed, and that his claims for conversion, unjust enrichment, need for a constructive trust, and fraud were not addressed in Fisher's motion for summary judgment that the district court signed.[444]

In addition, Friddle claimed that Fisher owed him a fiduciary duty and, therefore, a duty to notify Friddle of the execution of the lease, activation of the pooling provision, and the beginning of production.[445] Finally, Friddle claimed that the district court misapplied Texas law concerning the discovery rule and that Friddle had neither actual nor constructive notice of his claim against Fisher at the time that the claim would have been barred by limitations.[446] Fisher countered that he owed no duty to notify Friddle, asserting Friddle had either actual or constructive notice of the lease and pooled unit.[447] Fisher also asserted that the statute of limitations barred recovery for any of Friddle's causes of action.[448]

The appellate court reversed and remanded, distinguishing *Friddle* from

438. Friddle v. Fisher, 378 S.W.3d 475 (Tex. App.—Texarkana 2012, pet. denied).
439. *Id.* at 479.
440. *Id.* at 478.
441. *Id.*
442. *Id.*
443. *Id.*
444. *Id.*
445. *Id.*
446. *Id.*
447. *Id.*
448. *Id.*

Montgomery v. Rittersbacher,[449] wherein the Texas Supreme Court—faced with a similar question, but one where the lessee had paid all of the money attributable to the leasehold into a court registry instead of to the lessor—held that by bringing suit to claim the royalty, the claimant had ratified the lease and was therefore only entitled to receive royalties accruing after the date the suit was filed.[450] Here, the appellate court distinguished *Montgomery* by holding that because Fisher—who owed Friddle a fiduciary duty, unlike the producer in *Montgomery*—had already collected the funds, the rule established in *Montgomery* did not apply.[451]

Regarding the measure of duty that Fisher owed to Friddle, the appellate court cited *Lesley* for the proposition that the executive rights holder owed Friddle a fiduciary duty of "utmost fair dealing."[452] The appellate court held that this duty not only required the executive to obtain for the non-executive every benefit that the executive obtains for itself, but that "[i]f the holder of the executive right receives royalties pursuant to the rights held by an NPRI holder, he is chargeable in equity as constructive trustee with the duty to hold the royalty attributable to the holder of the NPRI."[453] Thus, when Fisher elected to receive the entire royalty attributable to the lease, he had a "duty to hold that portion of the funds payable to Friddle as a constructive trustee."[454] In addition, the appellate court found that a fact question existed as to whether Fisher had a duty to inform Friddle of the lease or other agreement that affected the rights of Friddle.[455]

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449. Montgomery v. Rittersbacher, 424 S.W.2d 210 (Tex. 1968).

450. *See id.* at 215 ("Montgomery, in bringing this suit, seeks two things under the lease—royalties that have already accrued and royalties that are to accrue in the future. We have held that Montgomery has ratified the lease in question by filing suit; consequently, he is only entitled to receive royalties accruing from and after . . . the date this suit was filed. In this connection, we point out that Montgomery, having thus ratified the lease, is as much bound thereby as if he had joined in the original execution thereof.").

451. *See Friddle*, 378 S.W.3d at 480 (explaining the distinguishing factor between *Friddle* and *Montgomery*—that in *Friddle* "the disputed funds . . . have already been paid to the Fishers (who owe Friddle a fiduciary duty) whereas, in *Montgomery* the disputed funds hand never been paid out to anyone by the holder of the leasehold estate but, instead, were held by the producer, a third party who was not in a fiduciary relationship with the NPRI holder" (citing HECI Exploration Co. v. Neel, 982 S.W.2d 881, 888 (Tex. 1998))).

452. *See id.* at 480–81 ("It is settled law in Texas that the owners of executive rights owe a fiduciary duty of 'utmost fair dealing' to the owners of other interests in the mineral estate, such as the holder of an NPRI." (quoting Lesley v. Veterans Land Bd. of State, 352 S.W.3d 479, 480–81 (Tex. 2011) (footnote omitted))).

453. *Id.* at 481 (citing Andretta v. West, 415 S.W.2d 638, 641–42 (Tex. 1967)).

454. *Id.* at 482.

455. *See id.* ("Here, we are unable to determine whether the Fishers had a duty to provide notification to the NPRI holders of the existence of a lease, pooling agreement, and/or unit

Finally, regarding the statute of limitations, the appellate court held that the discovery rule tolled the statute of limitations because even if the official public records contained notification of the lease, Friddle could not be charged with constructive notice of the lease "because it was executed and recorded after [Friddle] acquired [the NPRI]."[456] In addition, a fact question existed as to whether Friddle had actual notice of production because the well on the unit that included the leasehold at issue was both demarked by a sign and was in obvious view.[457] Therefore, a factual dispute existed that could only be resolved by further investigation by the district court. Finally, the appellate court ruled that the previously granted summary judgment failed to address all of Friddle's claims, further necessitating remand of the case.[458]

Technically speaking, when the Texas Supreme Court set out the fiduciary issue in *Lesley*, it did not distinguish between whether the duty is exclusively for a non-executive mineral interest owner or an NPRI owner, or both, instead merely stating, "We come now to the principal issue in the case: the nature of the duty that the owner of the executive right owes to the non-executive interest owner."[459] If the court desired to create an express distinction, it would seem the opinion would have at this point specifically articulated what type of non-executive interest required a fiduciary duty on the part of the executive; unfortunately, the court instead employed the generic term "non-executive interest owner."[460] The court defined the difference between a non-executive mineral fee interest and an NPRI but made no further explicit distinction in its opinion, including whether these two different types of interests are owed the same level of fiduciary duty by the executive.[461] Furthermore, the court opined that "[t]he law has never left non-executive interest owners wholly at the mercy of the executive."[462] The court did vaguely acknowledge the existence of a distinction in the application of the fiduciary duty when it mentioned the "variety of non-executive interests."[463] However, the court did not

declaration, because there are unresolved issues of material fact.").

456. *Id.* at 484 (citing *Andretta*, 415 S.W.2d at 642). *But see HECI Exploration Co.*, 982 S.W.2d at 886 (assigning to mineral estate interest owners "some obligation to exercise reasonable diligence in protecting their interests").

457. *Friddle*, 378 S.W.3d at 484.

458. *Id.* at 485.

459. Lesley v. Veterans Land Bd. of State, 352 S.W.3d 479, 487 (Tex. 2011).

460. *See id.* (ignoring any difference between mineral or royalty owners, and instead addressing only differences between executives and non-executives).

461. *Id.*

462. *Id.*

463. *Id.* at 487–88.

expressly state that different types of non-executive mineral interests are due a different measure of duty.[464] In the end, the best interpretation may be that the *Lesley* opinion purposefully dissolves any fiduciary duty distinction between a non-executive mineral interest owner and an NPRI owner, a view seemingly further cemented by *Friddle*.[465]

However, such analysis may ascribe more thought to the use of the technical language in the opinion than the *Lesley* opinion actually considered.[466] If the court was unintentionally imprecise with its use of technical language, it would be unwise to ascribe too much credit to the court's use of the generic "non-executive interest owner" in the *Lesley* opinion.[467] This author submits it is clear that the duty should differ as between a non-executive fee mineral owner and an NPRI owner, given the fundamentally different nature of their interests, as described above.[468] This is especially true if the royalty owner owns a fraction *of* the royalty as opposed to a fractional royalty.[469] In the case of a fractional royalty

464. *See id.* at 487 (defining non-executive and executive interests); *see also* Friddle v. Fisher, 378 S.W.3d 475, 481 (Tex. App.—Texarkana 2012, pet. denied) (failing to distinguish between mineral interests and royalty interests, instead focusing on non-executive and executive differences).

465. *See Lesley*, 352 S.W.3d at 487–88 (positing the different circumstances and reasons for the creation of distinct mineral interests "make it difficult to determine precisely what duty the executive owes the non-executive interest"); *Friddle*, 378 S.W.3d at 481 (applying the fiduciary duty of the executive to NPRI holders); *see also* David L. Cruthirds, *Power to Execute Mineral Leases Over a Severed Mineral Interest is a Real Property Interest*, 32 S. TEX. L. REV. 337, 354–55 (1991) ("Regardless of the classification of the executive right, under Texas law the holder of such right owes a duty of utmost good faith and fair dealing to the mineral interest owner in exercising the right.").

466. *Cf.* Patrick H. Martin, *Unbundling the Executive Right: A Guide to Interpretation of the Power to Lease and Develop Oil and Gas Interests*, 37 NAT. RESOURCES J. 311, 315 (1997) (describing the act of defining the executive right as challenging to even the "most astute of oil and gas attorneys").

467. *Lesley*, 352 S.W.3d at 487.

468. *See* Judon Fambrough, *What Estate Planners Should Know About Oil and Gas Law*, Presentation at the University of Texas at Austin School of Law 11th Annual Estate Planning, Guardianship and Elder Law Conference, at 12, 17 (Aug. 13–14, 2009), *available at* recenter.tamu.edu/ speeches/pdf/JF081309S1114.pdf (explaining the difference between a mineral interest and a royalty interest).

469. *See* Coghill v. Griffith, 358 S.W.3d 834, 838 (Tex. App.—Tyler 2012, pet. denied) (distinguishing a fractional royalty from a fraction of royalty). A fraction of royalty is defined as an interest in the mineral fee estate, while a fractional royalty represents what is commonly known as an "NPRI." Interpretation of the difference between the two can be difficult when instruments of conveyance or reservation fail to sufficiently define what type of interest is being created. *See* Richard C. Maxwell, *Oil and Gas Conveyancing—Is There Truth in Labeling?*, 33 WASHBURN L.J. 569, 577 (1994) (noting an interest is defined as a mineral interest or royalty interest "because it has certain attributes" and that, while labeling of interests is common to denote what attributes are conveyed or reserved, "no attributes as such are spelled out but language of normative, or potentially normative, significance is used"). Bruce Kramer further describes the difficulties encountered when attributes are not fully named in an instrument of conveyance or reservation:

(NPRI), the real property interest is a perpetual and defined interest in royalty, whereas in the first case, the "fraction *of* royalty" is derived from whatever royalty interest arises from the terms of a lease—it is carved from the lease and derivative thereto.[470] It may be a stretch to think that the court actually intended to articulate a standard encompassing all non-executive interests.

This author submits that if the executive owes a non-executive mineral cotenant a duty to lease the non-executive's interest or even to lease its own interest, such a heightened measure of care should not carry over to a fixed, perpetual NPRI. With a fixed and perpetual NPRI there is little the executive can do to affect the NPRI holder other than sign a lease or not.[471] In such a circumstance, the executive cannot treat the non-executive better than itself, because the executive has no control over the amount of royalty that the NPRI holder receives and, since the NPRI holder is not entitled to bonus or delay rentals, the executive's decisions in that regard have no bearing on the non-executive.[472] The circumstances become very different when mineral cotenants are involved and the executive's decisions can influence all aspects of the non-executive's participation and compensation.

Ultimately, it is this author's opinion that *Lesley* simply ignored the various types of non-executive mineral interests and by default seemingly recognized a common duty for all executives to all types of non-executive

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Given the choices available to owners of the full mineral interest, it is not surprising that problems arise when the written instrument does not fully explain the division of the original bundle of sticks that make up the full mineral interest. When confronting these problems, courts consistently try to carry out the intent of the parties to the deed insofar as they expressly define the division of the sticks. More difficult issues arise when courts fill in the lacunae where the drafters or the parties themselves were not clear in specifying which of the elements are granted and which are reserved.

Bruce M. Kramer, *Conveying Mineral Interests—Mastering the Problem Areas*, 26 TULSA L.J. 175, 178 (1990).

470. Range Res. Corp. v. Bradshaw, 266 S.W.3d 490, 493 (Tex. App.—Fort Worth 2008, pet. denied); Phillip Norvell, *Pitfalls in Developing Lands Burdened by Non-Participating Royalty: Calculating the Royalty Share and Coexisting with the Duty Owed to the Non-Participating Royalty Owner by the Executive Interest*, 48 ARK. L. REV. 933, 935–36 (1995).

471. *See* Phillip Norvell, *Pitfalls in Developing Lands Burdened by Non-Participating Royalty: Calculating the Royalty Share and Coexisting with the Duty Owed to the Non-Participating Royalty Owner by the Executive Interest*, 48 ARK. L. REV. 933, 935 (1995) (emphasizing a fractional royalty entitles the owner to a particular share of production regardless of the landowner's royalty bargained in the lease).

472. *Id.* at 934; *see* Judon Fambrough, *What Estate Planners Should Know About Oil and Gas Law*, Presentation at the University of Texas at Austin School of Law 11th Annual Estate Planning, Guardianship and Elder Law Conference, at 15, 17 (Aug. 13–14, 2009), *available at* recenter.tamu.edu/speeches/pdf/JF081309S1114.pdf (outlining the five attributes of the mineral interest, and emphasizing that owning a royalty interest does not include the same benefits).

interests.[473] However, it is suspected that whether the duty is found to have been breached will be highly fact specific and depend upon the nature of the relationship between the parties.[474]

However, the executive could directly affect—potentially negatively — the amount received by an NPRI owner by negotiating a higher bonus in return for a lower royalty. Unlike the general leasing duty described above, such shenanigans by the executive possibly could get the executive something in return for a direct lessening of the proceeds due the NPRI owner. Such a situation was encountered in *Bradshaw v. Steadfast Financial, L.L.C.*,[475] an opinion released on February 14, 2013 wherein the Ft. Worth Court of Appeals reversed the summary judgment issued by the trial court in favor of the executive of a tract consisting of 1,800 acres in Hood County, Texas.[476]

Steadfast Financial, L.L.C. (Steadfast) owned the surface—which it later assigned to Range Resources Corp. (Range)—and mineral estate (which it retained) subject to Bradshaw's NPRI.[477] Steadfast executed a lease to Range for a one-eighth royalty and a bonus of $7,505 per acre.[478] Following the lease, Steadfast assigned royalties totaling one-sixteenth of oil and gas production to a multitude of assignees, including its managing member.[479] Bradshaw sued Steadfast, believing that the fiduciary duty owed to it by the executive had been violated. Bradshaw argued that the one-eighth royalty clause was out of line with the prevailing one-fourth lessor's royalty more common in the region at the time and was combined

473. Monika Ehrman, *Duties of the Executive After* Lesley v. Veterans Land Board, Presentation at the University of Texas at Austin School of Law 38th Annual Ernest E. Smith Oil, Gas & Mineral Law Institute, at 13 (Mar. 30, 2012), *available at* http://www.utcle.org/eLibrary/preview.php?asset_file_id=33600; *cf.* Matt Norwood, Lesley v. Veterans Land Board *and the Duties of the Executive Right Holder*, TEX. J. OIL GAS & ENERGY L. BLOG (Nov. 20, 2011), http://tjogel.org/blog/?m=201111 (discussing the nature of a mineral interest and that a non-executive owner may sometimes be subject to the decision of an executive to lease or not).

474. *See* Lesley v. Veterans Land Bd. of State, 352 S.W.3d 479, 491 (Tex. 2011) (tailoring the effect of the opinion to the specific fact situation and declining to extend general rules regarding the duties of an executive right holder to non-executive interest holders); *see also* Monika Ehrman, *Duties of the Executive After* Lesley v. Veterans Land Board, Presentation at the University of Texas at Austin School of Law 38th Annual Ernest E. Smith Oil, Gas & Mineral Law Institute, at 1 (Mar. 30, 2012), *available at* http://www.utcle.org/eLibrary/preview.php?asset_file_id=33600 (implying the disappointment of oil and gas practitioners who found that *Lesley* failed to create any clear rules regarding application of the fiduciary duty in relationships between executives and non-executives).

475. Bradshaw v. Steadfast Financial, L.L.C., No. 02-10-00369-CV, 2013 WL 530969 (Tex. App.—Fort Worth, Feb. 14, 2013, no pet. h.).

476. *Id.* at *12.

477. *Id.* at *1.

478. *Id.* at *3.

479. *Id.* at *4.

with a high bonus to the detriment of the NPRI owner.[480] Bradshaw also sued Range, arguing it had conspired with Steadfast to draft the lease to Bradshaw's disadvantage.[481] As a remedy, Bradshaw sought a constructive trust to be created upon the defendants interests.[482]

The court of appeals noted that the level of duty owed by the executive depends on the amount of control it had over the NPRI owner's property rights—basically, whether the royalty was a fraction *of* royalty or a definite fractional royalty.[483] If the NPRI owner's royalty was a fraction *of* royalty, with the amount received by the NPRI owner dependent on the lessor's royalty fraction in the oil and gas lease negotiated by the executive, then the executive will be held to a high standard of duty.[484] Finding some evidence that a one-eighth royalty was not the "going rate" of leases in the area at the time of the transaction with Range, the court of appeals remanded the case back to the trial court.[485]

Now that bonus is firmly ensconced as a prime vector of profit for lessees, this case may signal a coming wave of suits by NPRI owners who feel that the leases they are dependent on for revenue from their royalty interests are not reflective of the regional leasing trend and perhaps represent a violation of the duty owed to them by the executive. Executives would do well to ensure their royalty and bonus fractions and amounts in leases they execute are not noticeably out of line with regional leasing terms, particularly if the leasehold is burdened with NPRI interests and especially if those NPRI interests are fractions *of* whatever royalty the executive negotiates.

APPENDIX A—RECEIVERSHIP AS A REMEDY

Courts will be increasingly challenged to find solutions to legal imbroglios involving non-executives wanting to develop the minerals and executives that do not. The appointment of a receiver could effectuate a

480. *See id.* at *5 (arguing that summary judgment was improper because there was an issue of material fact with regard to Steadfast breaching its fiduciary duty to the NPRI holder).

481. *See id* at *21 (recounting Bradshaw sued Range Resources and argued they conspired with Steadfast).

482. *Id.* at *2.

483. *See id.* at *20 (finding the level of control determines the applicable level of duty); *cf. id.* at *13 ("This fiduciary duty should apply when the executive controls only the amount of royalty interest just as it does when the executive controls both the amount of royalty interest and the bonus and delay rentals." (quoting Mims v. Beall, 810 S.W.2d 876, 879 (Tex. App.—Texarkana 1991, no writ))).

484. *Id.* at *20.

485. *See id.* (stating a fact question existed regarding whether the rate of royalty secured on the lease was the standard rate in the area).

process by which non-executive mineral estate owners can develop their estate while allowing surface owners to have their concerns addressed by a receiver experienced in oil and gas development before a plan is submitted for court approval.

The remedy of receivership is available in actions between mineral cotenants.[486] Section 64.001 of the Texas Civil Practices and Remedies Code delineates the circumstances under which the remedy of a statutory receivership can be appointed. Receivership is covered by Sections64.001(a)(3) and (b):

> (a) A court of competent jurisdiction may appoint a receiver
>
> . . . .
>
> (3) in an action between partners or others jointly owning or interested in any property or fund
>
> . . . .
>
> (b) The party (applying for a receiver) must have a probable interest in or right to the property or fund, and the property or fund must be in danger of being lost, removed, or materially injured.[487]

Courts have equated receiverships to other terms such as "overseer" or "escrow agent."[488] A receivership is an equitable remedy that is available at the discretion of the trial court.[489] Section 64.001(a)(6) of the Texas Civil Practices and Remedies Code governs equitable appointment of a receiver.[490] Appointment of a receiver can be sought through an independent hearing and does not have to be linked to another action, nor is it abuse of discretion for a court to grant a receivership in such a case.[491] An executive rights holder that owns the surface estate and mineral interest underlying the land and a non-executive mineral interest holder each hold interests in the same property; therefore, a court could

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486. TEX. CIV. PRAC. & REM. CODE ANN. § 64.001(a)(3) & (b) (West 2008).

487. *Id.*

488. *See, e.g.*, O & G Carriers, Inc. v. Smith Energy 1986–A P'ship, 826 S.W.2d 703, 707 (Tex. App.—Houston [1st Dist.] 1992, no writ) ("The fact that the name 'escrow agent' instead of 'receiver' was used to refer to the person proposed to act in that capacity is not of substantial significance.").

489. Hawkins v. Twin Montana, Inc., 810 S.W.2d 441, 444 (Tex. App.—Fort Worth 1991, no writ); Hunt v. State, 48 S.W.2d 466, 469 (Tex. Civ. App.—Austin 1932, no writ).

490. CIV. PRAC. & REM. § 64.001(a)(6) (West 2008).

491. *See Hawkins*, 810 S.W.2d at 444–45 (holding an independent declaratory judgment to determine the rights of executives and nonexecutives may properly result in the court's appointing a receiver).

appoint a receiver in an action between the parties.[492] Limiting this potential remedy of receivership status is the requirement that there be a risk of loss or actual damage to the property, and no receiver will be appointed if the only motive is an inability of a party to have the property developed.[493] Among cotenants, a court may appoint a receiver if it is necessary to prevent loss through drainage onto adjoining tracts,[494] particularly if the failure to prevent drainage is caused by a refusal to agree on development or operations related thereto.[495]

The finding of a strict fiduciary duty as employed in *Manges*[496] may not be necessary for a receivership. However, a receiver may only be appointed if it is for the benefit of all interested parties and not just the party seeking receivership.[497] Although courts have criticized the *Manges* decision, either level of duty owed by the executive, whether it is the highest fiduciary standard or the "utmost far dealing" standard, can probably warrant the appointment of a receiver.[498] In *Hawkins*, the court appointed a receiver when the executive rights owner accepted a lease with a one-eighth royalty and declined one with a one-fourth royalty.[499] The non-executive landowners were granted a receiver to execute a lease. In *Hawkins*, as in *Hunt*, the court seemed to downplay the relative difference between receiverships granted in law or in equity.[500]

492. *See generally id.* at 443–44 (discussing the relationships between the non-executive and executive interest holders and the appropriateness of appointing a receiver).

493. *See* Consolidated Petroleum Co. v. Austin, 283 S.W. 879, 879–80 (Tex. Civ. App.—Eastland 1926, no writ) (stressing a party seeking appointment of a receiver must demonstrate "that the property is in danger of being lost, removed, or materially injured"); United N. & S. Oil Co. v. Meredith, 272 S.W. 124, 126 (Tex. Comm'n App. 1925) (underscoring the need for potential damage to or loss of property in the appointment of a receiver).

494. *Hawkins*, 810 S.W.2d at 444.

495. Malone v. Barnett, 87 S.W.2d 523, 524 (Tex. Civ. App.—Texarkana 1935, no writ); Chancellor v. Guerra, 85 S.W.2d 663, 664 (Tex. Civ. App.—San Antonio 1935, no writ).

496. *See* Manges v. Guerra, 673 S.W.2d 180, 183 (Tex. 1984) ("That duty requires the holder of the executive right to acquire for the non-executive every benefit he exacts for himself.").

497. Whitson Co. v. Bluff Creek Oil Co., 256 S.W.2d 1012, 1014 (Tex. Civ. App.—Fort Worth 1953, no writ).

498. *See Hawkins*, 810 S.W.2d at 444 (declaring that granting a receivership "is within the discretion of the trial court").

499. *Id.* at 445.

500. *Id.* at 444; Hunt v. State, 48 S.W.2d 466, 469 (Tex. Civ. App.—Austin 1932, no writ).