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The Duties Owed by the Executive Rights Owner and the Operator to ORRI and NPRI Interests

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Section 1 - Nature of Overriding Royalty Interest

An overriding royalty interest has been described as a cost and expense-free share of production carved out of the working interest granted by either direct grant or reservation. It is a real property interest and as such is treated as other real property interests *Consolidated Gas & Equip. Co. of Am. v. Thompson,* 405 S.W.2d 333, 336 (Tex.1966); *EOG Res., Inc. v. Hanson Prod. Co.,* 94 S.W.3d 697, 701 (Tex. App.-San Antonio 2002, no pet.); *El Paso Production Co. v. Geomet, Inc.*, (228 S.W.3d 178, 181 (Tex. App.-Dallas, 2007, pet. denied); *Gruss v. Cummins,* 329 S.W.2d 496, 501(Tex. Civ. App.-El Paso 1959, writ ref'd n.r.e.). It is regarded as a covenant running with the land between the assignor and the assignee, and is enforceable by the assignor against the assignee. *Phillips Petroleum Co. v. Taylor,* 116 F.2d 994, 995 (5th Cir.1941*). EOG Resources, Inc. v. Hanson Production Co.,* 94 S.W.3d 697, *701 (Tex. App.-San Antonio, 2002, no pet.)

Absent contrary language in the instrument creating the override, when the lease from which it originates terminates, the override is extinguished. *Sunac Petroleum Corp. v. Parkes,* 416 S.W.2d 798, 804 (Tex.1967); *Sasser v. Dantex Oil & Gas, Inc.*, 906 S.W.2d 599, *603 (Tex. App.-San Antonio,1995); *Fain & McGaha v. Biesel,* 331 S.W.2d 346, 347-48 (Tex. Civ. App.-Fort Worth 1960, writ ref'd n.r.e.); *Keese v. Continental Pipe Line Co.,* 235 F.2d 386, 388 (5th Cir.1956).

While an overriding royalty, like any royalty, is an interest in land, "it is clearly non-possessory, and hence the owner is not entitled to possessory remedies, *e.g.,* trespass to try title in Texas ...." 2 Williams and Meyers, *Oil and Gas* Law § 418.1 at 342 (1981); *T-Vestco Litt-Vada v. Lu-Cal One Oil Co,.* 651 S.W.2d 284, *291 (Tex. App. - Austin 1983, writ ref'd n.r.e.); *Grasty v. Wood,* 230 S.W.2d 568, 571 (Tex. Civ. App.- Galveston 1950, writ ref'd n.r.e.); *Natural Gas Pipeline Co. v. Pool,* 124 S.W.3d 188, 192 (Tex.2003); *Glover v. Union Pacific R. Co.,* 187 S.W.3d 201, 210-211 (Tex. App.-Texarkana, 2006, pet. denied)

As partition operates upon possessory rights, an overriding royalty interest not an indispensable party or entitled to participate in a partition suit involving the mineral estate or working interest. *Lane v. Hughes,* 228 S.W.2d 986 (Tex. Civ. App – Amarillo 1950, no writ history); *Henderson v. Chesley*, 273 S.W. 299. (Tex. Civ. App.- 1925, writ denied); *Chaffin v. Hall,* 210 S.W.2d 191 (Tex. Civ. App.- Eastland 1948, writ ref'd n.r.e), *Newcomb v. Blankenship*, 256 S.W.2d 700 (Tex. Civ. App. – Texarkana 1953, no writ history); *Douglas v. Butcher* 272 S.W.2d 553, 555 (Tex. Civ. App.- San Antonio 1954, writ ref'd n.r.e.)

A suit involving the determination of title to an overriding royalty is a suit to determine title to real property under Section 15.011 of the Texas Civil Practice and Remedies Code and mandatory venue lies in the county where the override is located. *Yzaguirre v. KCS Resources, Inc.,* 53 S.W.3d 368, 371 (Tex. 2001); *Renwar Oil Corp. v. Lancaster,* 154 Tex. 311, 276 S.W.2d 774 (Tex. 1955). *Maranatha Temple, Inc. v. Enterprise Prods. Co.,* 833 S.W.2d 736, 738 (Tex. App.--Houston [1st Dist.] 1992, no

writ history); *Scarth v. First Bank & Trust Co.,* 711 S.W.2d 140, 141-42 (Tex. App.--Amarillo 1986, no writ history); *T-Vestco Litt-Vada v. Lu-Cal One Oil Co.,* 651 S.W.2d 284, 292 (Tex. App.--Austin 1982, writ ref'd n.r.e); *Parker v. Petro-Lewis Corp.* 663 S.W.2d 905, 906 -907 (Tex. App.- San Antonio 1983, no writ history)

A contract involving the acquisition or transfer of an overriding royalty interest involves real property and is subject to the Statute of Frauds *Swinehart v. Stubbeman, McRae, Sealy, Laughlin & Browder, Inc.*. 48 S.W.3d 865 (Tex. App.-Houston [14 Dist.],2001 pet. denied); *Quigley v. Bennett,* 227 S.W.3d 51 (Tex. 2007). In *Stubbeman* the issue was whether the action was one to enforce a contract whose primary purpose was for the sale of geological information or to secure interests in oil and gas leases. The San Antonio Court of Appeals noted that "the Statute of Frauds is not implicated merely because a real estate transaction may be incidentally involved…[C]onsidering all the terms of the third contract, it is clear that the primary purpose of the contract was to secure interests in oil and gas leases. The gathering of geological information was merely a means to an end, that is, to locate prospective leases and to ultimately obtain mineral interests in those leases. We conclude the primary purpose of the third contract was to acquire mineral interests and is subject to the statute of frauds." *Id*. at 877.

In *Quigley v. Bennett*, the Texas Supreme Court recently considered whether an oral agreement for the providing of geological services in exchange for an overriding royalty interest came within the Statue of Frauds. Bennett, a geologist, claimed that Quigley, an operator, had violated an oral agreement to provide him remuneration in the form of an override for geological services connected with developing a particular prospect. Bennett, apparently recognizing the difficulty he would have in overcoming the Statute of Frauds on a contract action, brought his claim as a fraud case. The Texas Supreme Court determined that Bennett's only evidence of damages was for the value of an override and noted:

> "Allowing recovery of the value of a royalty interest when the interest itself could not be recovered because the statute of frauds bars recovery would circumvent protections of the statute….*Haase,* 62 S.W.3d at 798-99 (noting that when the bargain violates the statute of frauds and is unenforceable, allowing recovery for benefit-of-the-bargain damages would deprive the statute of any effect). Thus evidence of the value of a royalty interest, which was what Bennett contended for as compensation, cannot be given any weight or effect and legally cannot be considered as evidence supporting the jury's finding. *See id.* at 799;*see also Merrell Dow Pharm., Inc. v. Havner,* 953 S.W.2d 706, 711 (Tex.1997) (noting, in part, that a no evidence assertion will be sustained if the court is barred by rules of law from giving weight to the only evidence offered to prove the matter at issue)." Id. at 54.

As a part, albeit separated from, the working interest, an overriding royalty interest created after the entry of a joint operating agreement is subject to such agreement. A recent case out of the Eastland Court of Civil Appeals, *Boldrick v. BTA Oil Producers*, 222 S.W. 3d 672 (Tex. App.- El Paso 2007, no pet.) addressed whether a

override created after the entry of a JOA was subject to it. BTA, a non-operating working interest owner, entered into a joint operating agreement with Texaco. Subsequent to that agreement, it assigned an override to Boldrick's predecessor in title. BTA participated in the initial producing well, and Boldrick was paid on his override. Texaco proposed a second well for which BTA went non-consent. Boldrick sued BTA alleging that even though BTA's working interest was subject to the non-consent provisions of the JOA his override was cost-free, and that BTA had the obligation to pay him even though it was not then receiving revenue. The Eastland Court of Appeals first noted that the overriding royalty interest was a part of the working interest and was created after the execution of the joint operating agreement. As such, it was a subsequently created interest under language in the JOA and was subject to that agreement. Therefore, it was subject to the non-consent provisions and BTA had no obligation to pay the override until after the non-consent penalty was met and it began to receive revenue. The Court left open an interesting question as to whether Boldrick might have recourse for damages after BTA began sharing in the revenue stream. Such damages would presumably be based upon the amount lost to the overriding royalty interest as a result of the interruption in revenue because of the non-consent penalty.

An overriding royalty interest is also subject to a preferential right to purchase. *El Paso Production Co. v. Geomet,* (228 S.W.3d 178, 181 (Tex. App.-Dallas 2007, pet. denied); *Horizon Resources v. Putnam,* 976 S.W. 2d 268 (Tex. App. – Corpus Christi 1998, no pet.) and to a proportionate reduction clause. *EOG Resources, Inc. v. Jay Petroleum, L.L.C.,* 2005 WL 110376 (Tex. App – Houston [1st Dist.] 2005, pet. denied).

Further, it is not an indispensable party in a proceeding involving the determination of a Rule 37 spacing question. *H.G. Sledge v. Prospective Investment and Trading Company, Ltd.,* 36 S.W. 3d 597 (Tex. App. – Austin 2000, pet. denied).

A non-participating royalty interest does not derive from the working interest but from the mineral estate. It has been defined as "An 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 an oil, gas, and mineral lease executed by the owner of the mineral fee estate." *Plainsman Trading Co. v. Crews*, 898 S.W.2d 786, 789-90 (Tex. 1995). The NPRI owner does not have a possessory interest in the land or a right to enter the land for any reason or title to the oil or gas under the land. Jones, *Non-Participating Royalty*, 26 Texas Law Review 569 (1948).

This basic difference between an ORRI and an NPRI is the nature of the interest from which they are carved. An ORRI is carved from the working interest, and an NPRI from the mineral estate. This results in significant differences in the determination of the duties owed by the working interest to each.

Section 2 – Relationship of the Overriding Royalty Interest Owner With the Working Interest Owner – Implied Covenants

The owner of an overriding royal interest is not entitled to enforce any covenant or obligation which the lessee may owe to the lessor under the base lease from which the interest emanates. Williams and Myers, *The Law of Oil and Gas* §420, at 360 (1981). However, a number of courts have been willing to allow the owners of an overriding royalty interest to enforce implied covenants similar to those which might be implied in an oil and gas lease.

Implied covenants, typically refer to one of the following:

1. implied covenant to drill an exploratory well;
2. implied covenant to drill additional wells;
3. implied covenant for diligent and proper operation of the wells and for marketing the product if oil and gas are discovered in paying quantities; and
4. implied covenant to protect the lease premises against drainage by wells on adjoining land. Kuntz, *The Law of Oil and Gas*, §55.3 (1978).

Generally, when parties express their agreement through a written document, no additional provisions will be implied unless absolutely necessary to effectuate the expressed intention of the parties.

> "An implied covenant must rest entirely on the presumed intention of the parties as gathered from the terms as actually expressed in the written instrument itself, and it must appear that it was so clearly within the contemplation of the parties that they deemed it unnecessary to express it, and therefore omitted to do so, or it must appear 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. It is not enough to say that an implied covenant is necessary in order to make the contract fair, or that without such a covenant it would be improvident or unwise, or that the contract would operate unjustly. It must arise from the presumed intention of the parties as gathered from the instrument as a whole. 21 C.J.S., Covenants, s 9, p. 888; 13 C.J. 558; 17 C.J.S., Contracts s 328; 15 C.J. 1214; 21 C.J.S., Covenants, s 14; 14 Amer.Jur. 490;Freeport Sulphur Co. v. American Sulphur Royalty Co., 117 Tex. 439, 6 S.W.2d 1039, 60 A.L.R. 890;Grass v. Big Creek Development Co., 75 W.Va. 719, 84 S.E. 750, L.R.A. 1915E, 1057. However, covenants will be implied in fact when necessary to give effect to the actual intention of the parties as reflected by the contract or conveyance as construed in its entirety in the light of the circumstances under which it was made and the purposes sought to be accomplished thereby. See Property Interest Created by Lease, by A. W. Walker, Jr., Professor of Law, University of Texas, 11 Texas Law Review 402." *Danciger Oil & Refining Co. in Texas v. Powell* 137 Tex. 484, 490-491, 154 S.W.2d. 632, 635 (Tex. 1941).

In *Danciger* the Texas Supreme Court drew a policy distinction between a lease and the grant or reservation of an overriding royalty interest with regard to the intention of the parties and their contemplation of the duties which are necessary to effectuate such intention. The purpose of a lease is exploration within a defined period of time. That may not be so with conveyances of mineral interests. Even so the court stated "that there

can be such an implied covenant to develop the property even though the instrument be a conveyance of the minerals and not a lease. Id. at 490-491.

Some commentators have observed that the grant of an overriding royalty interest bears no resemblance to a leasing transaction and should not form the basis for the implication of any duty to develop. Kuntz, *Oil and Gas* §55.3, at 34. However, a reservation of an overriding royalty interest bears more resemblance to a lease transaction and, in some circumstances, justifies the implication of certain obligation to protect against drainage. *Id.* at page 35; *Bolton v. Coats* 533 S.W.2d. 914, 916 (Tex. 1975).

Prior to *Bolton*, Texas law did not clearly imply covenants running between assignors and assignees of oil and gas leases. As pointed out by one commentator, the analysis included a determination of:

1. Whether the expressed provisions in the assignment preclude implication of obligations. *Simms Oil Co. v. Colquitt*, 296 S.W. 491 (Tex. Civ. App. Texas Comm'n of App., judgment adopted);
2. In the event that expressed terms are not controlling and covenants may be implied, the intent of the parties, restricted to the reasonable inference from the language of the assignment the contract, governs. *Ebberts v. Carpenter Production Company*, 256 S.W.2d. 601 (Tex. Civ. App. – Beaumont, 1953, writ ref'd. n.r.e.).
3. Where the lessor has not sought to enforce implied covenants such are not enforceable by the original lessess against his assignee. *Ebberts v. Carpenter Production Co.* at 613-14. Salim, *Implied Covenants Between Assignors And Assignees Of Oil And Gas Leases: Policy and Precedent* , 31 Sw. L. J. 905 (1977).

Texas cases before to *Bolton* as reflected by *Greenwood & Tyrrell v. Helm,* 264 S.W. 221 (Tex. Civ. App. – San Antonio 1924, writ ref'd.); *Simms Oil Co. v. Colquitt,* 293 S.W. 491 (Tex. Comm. App. judgment adopted); *Cole Petroleum Co. v. United States Gas & Oil Co*. 121 Tex. 59, 41 S.W.2d. 414 (Tex. 1931) and *Ebberts v. Carpenter Production Co*. 256 S.W.2d. 601 (Tex. Civ. App. – Beaumont, 1953, writ ref'd. n.r.e.) determined the parties' intent as evidenced by the language in the instrument. This did not necessarily result in implying the same covenants as between the assignor and assignee of a lease and as between a lessor and lessee. This analysis was not undertaken in *Bolton* where the court sought the rationale for the implication of a covenant from other than document.

In *Bolton*, the owner of a reserved overriding royalty sued the working interest owner alleging, in part, that oil was being drained. The Texas Supreme Court held that the assignee of an oil and gas lease impliedly covenants to protect the premises against drainage when the assignor reserves an overriding royalty. Id. at 915. The Court noted the analogy between implied covenants in a mineral lease transaction and in a mineral lease assignment transaction and held that Bolton was entitled to the benefit of the implied covenant to protect against drainage.

Rather than support the implication of a convenant to protect against drainage in theory, the *Bolton* Court opted to base its decision on precedent.

> "Unless the assignment provides to the contrary, the assignee of an oil and gas lease impliedly covenants to protect the premises against drainage when the assignor reserves an overriding royalty. Phillips Petroleum Co. v. Taylor, 115 F.2d 726 (5th Cir. 1940). The analogy between implied covenants in mineral leases and those in mineral lease assignments is demonstrated in Cole Petroleum Co. v. United States Gas and Oil Co., 121 Tex. 59, 41 S.W.2d 414 (1931). See also Merrill, Covenants Implied In Oil and Gas Leases, (2nd Ed., 1940) 416-418, and 3 Summers, The Law of Oil and *917 Gas, (2nd Ed., 1958) 652-659. Bolton is entitled to the benefit of the implied covenant under his assignments if his allegations are found to be true concerning drainage and the protection therefrom which would have been afforded by a reasonably prudent operator under the same or similar circumstances. Coats and the other defendants did not negate these allegations in the manner required for summary judgment under Rule 166-A." Bolton v. Coats 533 S.W.2d 914, *916 -917 (TEX 1976).

The principle precedent upon which it relied was *Phillips Petroleum Co. v. Taylor*. In *Taylor*, the overriding royalty interest sued the assignee of an oil and gas lease for breach of the implied covenant to offset. The Fifth Circuit noted that Texas law imposed such a duty as between a lessor and lessee and that it was reasonable to impose a similar duty between an assignor and assignee. It also observed that the decision to apply an offset covenant no prejudice either party. Id. at 996.

The second decision upon which the Court in *Bolton* relied was *Cole Petroleum Co. v. United States Gas & Oil Company,* 121 Tex. 59, 41 S.W.2d. 414 (Tex. 1931). *Cole* was a trespass to try a title suit in which the plaintiff sought to enforce an express clause in the assignment itself that reasonable diligence be employed in marketing. The Texas Supreme Court held that the express marketing provision had been breached and that the assignment should be forfeited. By way of dictum, the Court concluded that "Even if the assignment terms had not expressly required the assignee to use reasonable diligence in marketing the gas produced from the wells, such a covenant would nonetheless have been implied." *Id.* at 64.

For a time cases after *Bolton* seemed to support the implication of covenants in an assignor/assignee relationship without examination of the policy for doing so. In *Wes-Tex Land Company v. Simmons*, 566 S.W.2d. 719 (Tex. 1978), the lessee assigned the lease to Wes-Tex retaining a 1/16 override. There was development on adjacent lands and the assignor contacted Wes-Tex about drilling on the lease. Wes-Tex did not drill and the assignor sued claiming a breach of the implied duty to protect the lease from drainage. The court stated, "Where there is no express agreement between the assignor and the assignee, there is an implied covenant of the part of the assignee to protect the premises against drainage where there is an overriding royalty for the assignor."

Other cases include *United States Steel Court v. Whitley,* 636 S.W.2d. 465 (Tex. App. – Corpus Christi 1982 writ ref'd n.r.e.)(implied covenant with regard to due diligence), *Exxon Co. v. Dalco Oil Co.,* 609 S.W.2d. 281 (Tex. Civ. App. - Corpus Christi

1980, writ granted and judgments of both courts below set aside and case dismissed as moot due to settlement) (implied development covenant); *Tana Oil and Gas Corp. v. Bates,* at 739 (implied covenant to market); *Condra v. Quinoco Petroleum, Inc.,* 954 S.W.2d 68, *72 (Tex. App.-San Antonio 1997, no writ) (implied covenant to market); *Cook v. El Paso Natural Gas Co.,* 560 F.2d 978 (10th Cir. 1977) (implied covenant against drainage).

In *HECI v. Neel,* 982 S.W. 2d 881 (Tex. 1998) a decision cited more for its holding regarding the discovery rule, royalty owners claimed the defendant lessee had an implied duty to notify them of a claim against the operator of an adjoining lease for damage to a common oil reservoir. The supreme court disagreed and, relying heavily upon *Danciger*, stated:

> "A covenant will not be implied unless it appears from the express terms of the contract that it was so clearly within the contemplation of the parties that they deemed it unnecessary to express it and therefore they omitted to do so, or it must appear 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." *Id*. at 888

See also *Union Pacific Resources Group, Inc. v. Neinast* 67 S.W.3d 275, 281 - 283 (Tex.App.-Houston [1 Dist.] 2001, no pet.) in which the court considered the "HECI-Danciger" rule in the implication of covenants in the context of considering whether to certify a class of royalty owners.

One treatise states that it has not been established in Texas that the owner of an overriding royalty interest is entitled to all of the covenants which might exist under an oil and gas lease. Williams & Myers, *The Law of Oil and Gas* §420.1 at 363 (1981).

Section 3 – Duty of Operator to ORRI

An operator or working interest owner owes an overriding royalty interest owner a duty to act as a reasonably prudent operator in the exercise of operations concerning the well. *Whitson Company v. Bluff Creek Oil Company,* 293 S.W.2d 488 (Tex. 1956). In Whitson, the owner of an ORRI sued the operator claiming that it was negligent in the use of torpedo jets to re-complete an abandoned oil well. Based upon jury findings of negligence and proximate cause, the Trial Court entered judgment for what the jury found to be the reasonable cash value of the overriding royalty interest.

Section 4 – Duty of the Working Interest to the Overriding Royalty Interest - Washout

As previously noted an overriding royalty interest derives from and is part of the working interest. Therefore, termination of the underlying lease also terminates the overriding royalty interest. Can a working interest owner terminate a lease with the intent to wash out the overriding royalty interest?

It is clear that the mere assignment or reservation of an overriding royalty interest does not create a special relationship or a duty of good faith as between the overriding royalty interest owner and the working interest. *Sasser v. Dantex Oil & Gas, Inc.,* 906 S.W.2d 599 (Tex. App. – San Antonio 1995, writ denied). Consequently, Texas courts have typically engaged in a two-step analysis in order to determine whether a duty was breached by an intentional termination of the lease to wash out an overriding royalty interest owner. First, the language of the instrument creating the overriding royalty interest is examined in order to determine whether the language itself creates any such duty. Next, the circumstances independent of the transaction are examined to determine if they give rise to a duty of good faith or fair dealing.

The language most often inserted in an assignment or reservation of an overriding royalty interest in order to protect against a possible washout is an extension and renewal clause. Texas courts have tended to narrowly construe such clauses and have often found them to be inapplicable because the first lease had terminated and the second lease was on different terms and conditions.

The San Antonio Court of Appeals in *Cain v. Neuman,* 316 S.W.2d 915 (Tex. Civ. App. – San Antonio 1958, no writ) addressed the issue in the context of an oil and gas lease held by the production of salt. Cain, the lessee under a 1918 oil and gas lease assigned his interest reserving a 1/32 overriding royalty interest. The assigned interest eventually became owned by Columbia Southern. The lease had a 25-year primary term, during which there was production of some sulfur and salt. The primary term expired on January 31, 1953. Prior to that, Columbia released the lease and re-executed a new lease with the mineral interest owner.

Cain sued contending that the original base lease had not terminated. The court agreed relying upon language in the habendum clause of the base lease providing that it would remain in effect "as much longer thereafter as oil, gas, or other minerals can be produced in paying quantities thereon." The Court reasoned that the event which would terminate the lease, i.e., the cessation of production, was not dependent upon who would own the product but whether there was production from the lease premises. Therefore, since production of minerals had continued unabated, the underlying lease did not terminate and the overriding royalty interest was not extinguished.

In *Sunac v. Parks*, 416 S.W.2d 798 (Tex. 1967), the Texas Supreme Court held that a second lease was not a renewal or extension and terminated a preexisting overriding royalty interest. In *Sunac*, the Lessee under a lease containing a 1/8 royalty and a primary term of 10 years assigned the lease reserving a 1/16 of 7/8 overriding royalty interest. The assignment contained a clause indicating that the override would apply to any renewals or extensions of the underlying lease. It further included a "no duty to develop" clause providing that the assignee had no obligation to keep the lease in effect by payment of delay rentals, drilling, or other operations. The assignment also contained a surrender clause indicating that the assignee had the ability to surrender the lease at any time. The lease eventually ended in the hands of Sunac. Production from the lease temporarily halted and the question arose as to whether the lease had terminated as

a result. Sunac negotiated with the mineral owner and obtained a new lease. The overriding royalty interest owner sued claiming that the override had not been extinguished because the lease had not terminated, and, even if it had, the taking of a new lease breached a duty of good faith that the assignee owed to the overriding royalty interest owner. The Court first addressed the issue of whether the first lease had terminated and found that it had. It next addressed the issue of whether the new lease was an extension or a renewal. The Court held that it was not as it contained different terms and was entered almost a year after the termination of the first lease.

The Court then addressed the issue of whether or not the relationship between the overriding royalty interest owner and the lessee was such as to allow the imposition of a constructive trust. The Court noted that the assignment itself did not create a duty to preserve the overriding royalty interest and there was no prior confidential relationship between the parties which would create a fiduciary. Therefore, the lessee had no duty to preserve the override and it was washed out.

In *Exploration Co. v. Vega,* 843 S.W.2d 123 (Tex. App. – Houston [14th Dist.] 1992, writ denied), the court held that new leases were not extensions or renewals and no prior relationship between the parties would support the imposition of a constructive trust to protect an overriding royalty interest from a washout transaction.

In *Vega* the court dealt with three leases each containing an extension and renewal clause. The leases were assigned with the reservation of an overriding royalty interest. At some point, a question arose as to whether the leases were maintained by production. The lessee took new leases and refused to pay the overriding royalty interest owner on the basis that the new leases extinguished the override. The overriding interest owner sought a declaratory judgment that the new leases were an extension and renewal of the original leases. The court held that the evidence supported a finding that production had ceased and the original leases had terminated thereby terminating the overriding royalty interest. It then principally relied upon *Sunac* in determining that the new leases were not extensions or renewals. The court noted some of the same factors as stated by the Texas Supreme Court in *Sunac*, including: a) that the old leases had expired; b) that new consideration was given for the new leases; c) that the new leases were executed under different circumstances; d) that the new leases contained different terms; and e) that they were between different parties.

The overriding royalty interest owner then argued that the reservation of the override itself created a fiduciary relationship which would justify the imposition of a constructive trust upon the new leases. The Court rejected that notion citing *Sunac* and *Grimes v. Walsh & Watts, Inc.,* 649 S.W.2d 724 (Tex. App. – El Paso 1983, writ ref'd n.r.e.). The Court noted that the Texas Supreme Court had declined to impose a fiduciary relationship based upon a renewal and extension clause coupled with a clause which negated the lessee's obligation to keep the lease in effect. Although the assignment in the case before it did not contain such a clause negating a duty to maintain the lease, the court held that such absence does not mean that a fiduciary relationship would be established by a renewal and extension clause alone. The Court further looked at

Consolidated Gas & Equipment Co. v. Thompson, 405 S.W.2d 333 (Tex. 1966) in noting that a constructive trust must arise from a relationship of the parties apart from the agreement made the basis of the case. Finding no evidence of such a relationship, the court affirmed the summary judgment of the trial court in favor of the lessee.

In *Sasser v. Dantex Oil & Gas, Inc.,* 906 S.W.2d 599 (Tex. App. – San Antonio 1995, writ denied), Sasser, the owner of an overriding royalty interest under a lease executed in 1974, sued Dantex, the lessee under both the 1974 lease and a subsequent lease, arguing that the release of the prior lease was ineffective because it failed to comply with the surrender clause and it breached a duty of good faith and fair dealing.

The facts indicate that Dantex feared the 1974 lease had expired as a result of cessation of production. It asked the original lessor to ratify the lease which it refused to do. However, a new lease was agreed upon.

The trial court found that the 1974 lease was released, which terminated the overriding royalty interest. Additionally, no special relationship existed which would justify the imposition of a constructive trust.

The San Antonio Court of Appeals confirmed the general proposition that the termination of the underlying lease terminates the override, citing *Sunac*. Sasser argued that "evolving principles of Texas law" mandate the imposition of a duty not to wash out an overriding royalty interest. Again, relying on *Sunac*, the court disagreed. It noted that the assignment in *Sunac* contained a renewal and extension clause and a clause specifically negating the lessee's obligation to maintain the lease in effect. The court found that Sasser was even in a less compelling position than Sunac as his assignment did not contain either of these provisions. The court noted that the mere assignment does not create a special relationship and there were no facts outside of the transaction supporting the imposition of such a relationship between the parties.

Sasser further argued that *Cain v. Neuman* supported the granting of relief to an overriding royalty interest owner who was harmed by the intentional acts of a leasehold owner. The court questioned *Cain's* survival after *Sunac* and noted that, even if it survived, it was distinguishable because the assignment involved in *Cain* did not contain a surrender clause nor a partial release clause. The court noted that, "This contractual right to unilaterally terminate the lease, coupled with the absence of any facts justifying the imposition of a confidential fiduciary relationship, that conclusively defeats Sasser's duty argument."

The most recent case addressing the washout issue is *Ridge Oil Company, Inc. v. Guinn Investments, Inc.,* 148 S.W.3d 143 (Tex. 2004). In that case, Guinn and Ridge were co-lessees under a single lease involving two tracts. Ridge's tract contained two producing wells. Ridge shut those wells in for a period longer than 90 days thereby terminating the lease. He executed new leases not including Guinn's tract. Guinn then attempted to permit a well on his tract, but before any development filed suit against Ridge contending that the original lease had not terminated because cessation of

production was temporary and he had begun operations on his tract before the lease expired and was prevented from continuing those operations by Ridge's conduct. Alternatively, he argued that if the original lease had terminated, Ridge had tortiously interfered with Guinn's contract rights and committed fraud and that the court should impost a constructive trust on the new lease. Ridge countered that the lease terminated due to a cessation of production or when the new lease was entered. The lease contained a surrender clause allowing any lessee to surrender the lease. The Court held that such allowed the termination of the originhal lease and production thereafter was under the new lease.

Guinn then asked the court to hold that a lessee cannot surrender or terminate a lease to destroy the rights of an overriding royalty interest owner. The court declined to adopt such a blanket rule of law stating that, "Even if such a rule of law might be appropriate in the context of overriding royalty interest when the underlying lease does not contain an express release provision, a question we do not address, there is a material distinction between an overriding royalty interest and that of a lessee. An overriding royalty interest is a non-participating interest. A royalty owner has no right and thus no ability to go onto the underlying property and drill or otherwise take action to perpetuate a lease. An overriding royalty interest owner is wholly dependent upon the lessee to keep the lease alive. That is not true of the lessee. A lessee in Guinn's position could continue a lease in effect by drilling a well and obtaining production, or continuing operations until production is obtained, under lease provisions like those in the 1937 lease." *Id.* at 155

Guinn further asked the court to apply the holding in *Cain v. Neuman*. The Texas Supreme Court did not find it necessary to resolve whether *Cain* was correctly decided but distinguished it based upon the habendum clause language indicating "the lease would remain in effect, as much longer as oil, gas, or other minerals can be produced in paying quantities thereon." The court indicated that production on the lease premises regardless of who owned the production maintained the lease in effect. The lease involved in Ridge was different in that the habendum clause there reflected that the lease shall remain in force for a term of five years "and as long thereafter as oil, gas, or either of them is produced from the said land by Lessee or as long as operations are being carried on." The court held that Ridge ceased to be a lessee under the original lease when the new lease was executed. Production by Ridge thereafter was referable to the new leases, not the original lease.

Section 5 – Duty of the Executive to the Non-Participating Royalty Interest

The duty of utmost good faith owed by an executive to the NPRI has been settled since *Schlittler v. Smith,* 128 Tex. 628, 101 S.W.2d 543, 545 (1937). The questions that have remained is what does the duty entail and when does it arise.

In *Portwood v. Buckalew,* 521 S.W.2d 904 (Tex. Civ. App. – Tyler 1975, writ ref'd n.r.e.), the Portwood heirs entered into a partition agreement dividing the surface of

a ranch but leaving the mineral estate undivided. Each heir was given executive rights over the surface tract provided to them. The partition agreement further provided that the heirs were to share all rentals, bonuses, or royalties in proportion to their ownership.

Buckalew alleged that Portwood had committed self dealing by executing oil and gas leases and taking royalty and bonus denominated as surface damages without sharing with the remaining heirs

The Tyler Court of Appeals citing *Schlittler v. Smith,* 101 S.W.2d 543 (Tex. 1937) held that an executive owes an implied covenant of utmost fair dealing so as to protect the interest of the non-participating royalty owner. The court stated that the executive "must exact for the non-executive every benefit that he exacts for himself" *Id.* at 911. It had little difficulty in construing the instrument involved to convey an overriding royalty interest rather than compensation for surface damages and affirmed the trial court's setting aside a jury verdict to the contrary and entering judgment for Bukalew.

In *Kimsey v. Fore,* 593 S.W.2d 107 (Tex. Civ. App. – Beaumont 1979, writ ref'd n.r.e.), Plaintiffs were owners of a term non-participating royalty interest lasting 5 years from the grant thereof and so long thereafter as oil, gas, or other minerals are produced. A well was drilled within the term of the non-participating royalty interest, but it proved to be non-productive. The lease expired in May 1971. A second lease was then executed providing specifically that if production were obtained before the term royalty expired, lessee would bear the full burden thereof. The lease had a three-year primary term and, not unsurprisingly, it was not drilled until after the term royalty had expired. The jury found in favor of the Plaintiff, but the trial court entered a judgment NOV for the mineral owner.

The Beaumont Court of Appeals concurred with the court in *Portwood v. Buckalew* in holding that the test of utmost fair dealing is an implied covenant arising from the royalty deed imposed upon the owners of the executive right. The mineral interest owner unsuccessfully argued that to imply covenants, such as a duty to use utmost fair dealing, constitutes the remaking of the party's contract in opposition to the principles of *Freeport Sulfur Co. v. American Sulfur Royalty Co.* 6 S.W.2d 1039 (Tex. 1928) and *Danciger Oil & Refining Co. v. Powell*, 154 S.W.2d 631 (Tex. 1941). However the court felt that the implication of a duty of good faith in the instances presented in the case was necessary to give effect to and effectuate the purpose of the contract as a whole.

This brings us to perhaps the seminal case defining the duty of the executive right holder *Manges v. Guerra,* 673 S.W.2d 180 (Tex. 1984). In that case, Guerra and Manges were mineral co-tenants under a 72,000-acre ranch. Manges owned one-half of the minerals, all of the surface, and all of the executive rights. Guerra participated in bonus, delay rentals, and royalty. Manges leased a portion of the property to himself for a 10-year primary term and a 1/8 royalty. The lease further provided for a $2 per acre delay rental. After leasing, Manges farmed out the lease reserving a 50% working interest free of any drilling cost. The Texas Supreme Court noted that "The duty of utmost good faith

owed by an executive has been settled since *Schlittler v. Smith,* 101 S.W.2d 543, 545 (1937)." It noted that "the fiduciary duty arose from the relationship of the parties and not from the contract. While a contract or deed may create the relationship, the duty of the executive arises from the relationship and not from expressed or implied terms of the contract or deed. That 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." Id at 183

This was the first instance in which the duty of utmost good faith had been equated to a fiduciary duty. The actual language used in *Manges*, however, outlining the scope of that duty, falls short of a true fiduciary duty. A true fiduciary would be under an obligation to subordinate its own interest for that of its beneficiary. In Manges, the court stated that the duty required the executive to acquire for the non-executive every benefit that the executive exacts for himself. The court did treat the duty as being analogous to that of a fiduciary in that a breach would expose the executive to the imposition of exemplary damages.

After *Manges*, the court in In *Mims v. Beall*, 810 S.W.2d 876, 879 (Tex.App.—Texarkana 1991, no writ), pointed out that although the *Manges* court called the executive's duty both a fiduciary duty and one of utmost good faith, it did not require the executive to subordinate his own interests to those of the NPRI owner. Instead, the executive must exact every benefit for the NPRI owner that he exacts for himself, which is not a true fiduciary duty. *Id.*

In *Mims*, the plaintiff was a 1/4 non-participating royalty interest owner. The NPRI sued the executive when the executive leased to his son for a 1/8 royalty and no bonus. The NPRI claimed the 1/8 royalty was unreasonably low and violated the standard of utmost good faith. The court affirmed a jury finding that the action of the executive in leasing to his son who thereby assigned the lease to a third party retaining an overriding royalty interest in which the NPRI did not share constituted a breach of that duty. The court also confirmed that a malicious breach of the duty could support an award of exemplary damages.

In *Dearing v. Spiller,* 824 S.W.2d 728 (Tex. App. Forth Worth 1992, writ denied), Plaintiff's predecessor in interest conveyed a 600-acre tract to Defendant reserving a 1/2 mineral interest and also conveying the executive rights. The property was leased to Shell in 1944. Shell drilled and produced on the leases until 1980 when production declined. At that time, one well was holding all 600 acres. Defendant, the executive rights holder, bought the well and plugged it, thereby terminating the lease. The executive rights owner was offered a one-quarter royalty and $100 acre bonus from a third party which was rejected, Defendant leased to a related company for a 1/8 royalty and no bonus. Plaintiff sued claiming that such action constituted self-dealing and a breach of the duty of utmost good faith. The court, after a thorough discussion of the evolution of the duty from *Schlittler* to *Manges* concluded that an executive is forbidden from self-dealing. It stated that it did not "mean to imply that an executive is barred, as a matter of law, from developing the premises himself. However, when the market value of the lease is so much greater than the terms the executive grants to himself, there is clear evidence of a breach of his duty of utmost good faith. *Id.* at 734. The court further

held that there was sufficient evidence to conclude that the breach was malicious and confirmed the award of exemplary damages even though there were no actual damages assessed by the judgment but instead an order for accounting of all expenses and revenues since the date of the lease.

In 2003, the Texas Supreme Court, although reaffirming the *Manges* standard, held that it did not arise if the executive does not first enter into an oil and gas lease. The imposition of a fiduciary duty begins only after the execution of a lease.

In *In re Bass*, 113 S.W.3d 735, 743 (Tex. 2003), the non-participating royalty interest owner sued the mineral estate owner alleging breach of an implied duty to develop. Bass had performed a seismic survey on the property but had never entered into a lease. The Court first distinguished the imposition of a fiduciary duty from the implication of a covenant to develop stating that a fiduciary duty arises out of agency law based upon a special relationship between the two parties. On the other hand, 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 party's intent. The Court stated that these two duties are distinct and have developed under different legal theories.

The court concluded that as a result of the relationship of executive and non-executive, Bass owed the NPRI a duty to acquire every benefit that it acquired for itself. However, that duty only arises after a mineral lease is executed. As Bass had not exercised his rights as executive and, therefore, had not acquired any benefits for himself through executing the lease, no duty was breached. *Id.* at 745. Currently, under *Bass*, an executive may be allowed to refuse to lease knowing that no fiduciary standard is applied if a lease is not entered.

This postponement of the duty until leasing, was confirmed in *Hlavinka v. Hancock,* 116 S.W.3d 412 (Tex. App. Corpus Christi 2003, pet. denied). In *Hlavinka*, the NPRI owner sued the executive claiming breach of fiduciary duty by failing to lease the property. The Defendant was a co-tenant and the executive right holder. Plaintiff owned 60% of the minerals but had no executive rights. The Defendant received an offer to lease the tract for a three year primary term at $150 per acre plus a 1/5 royalty. The evidence indicated that nearby land had leased for a 1/4 royalty and $250-acre bonus. The evidence, indicated that Defendant believed the lease was worth more and, therefore, it resisted leasing. Plaintiff claimed that the Defendant breached the fiduciary duty by failing to lease.

The court did not believe the facts supported a breach of fiduciary duty. It indicated there was no self-dealing and no arbitrary refusal to lease but merely an attempt to receive better terms. The facts did not indicate any element of unjust enrichment as present in *Manges*. The court further noted that the duty to develop has been consistently distinguished from a fiduciary duty and cited *In re Bass* for the proposition that "the executive did not breach a fiduciary duty to the non-executives without having exercised his executive power." *Id.* at 420.

An interesting side issue in *Hlavinka* was the claim that the duty owed by the executive to the non-executive was breached by the failure to notify or inform the NPRI owner of the lease negotiations. The Court made short shrift of this argument holding that "The information requested by appellees all pertained to continuing lease negotiations between the executives and possible lessees. As owners of the executive rights, the Hlavinkas owned the exclusive right to make a lease. *See* Dearing, 824 S.W.2d at 732;*Campbell,* 382 S.W.2d at 183. As non-executive mineral interest owners, appellees had no right to participate in oil and gas leasing. *See* Dearing, 824 S.W.2d at 732. We find no evidence of any breach of any duty to disclose. For there to be actionable nondisclosure, there must by a duty to disclose. Lesikar v. Rappeport, 33 S.W.3d 282, 299 (Tex.App.-Texarkana 2000, pet. denied)." *Id.* at 421.

Section 6 – Pooling of Non-Participating Royalty Interests

An executive cannot pool the interest of an NPRI in the absence of clear authorization. *Brown v. Smith,* 141 Tex. 425, 174 S.W.2d 43 (Tex. 1943). It has been noted that the *Brown* rule makes it more difficult to pool by allowing NRPI owners to to negotiate for a higher consideration to sign a pooling agreement or to ratify a pooled unit. *Brown* is still good law in Texas but the courts have softened the impact of the decision. The dilemma posed for lessees when dealing with outstanding NPRI interest is that locating a well on a site burdened by an NPRI will increase the royalty burden because those interest owners may choose not to ratify should a pooling occur. Locating a well off the tract burdened by the non-executive interest gives the NPRI an opportunity to ratify and share proportionately in the royalty.

One of the first cases decided after *Brown* was *Nugent v. Freeman,* 306 S.W.2d 167 (Tex. Civ. App. – 1957, writ ref's n.r.e.). In *Nugent*, Plaintiff owned an NPRI in a small tract included in a lease other adjacent. The lease was developed with three wells, none of which were located on Nugent's tract. Nugent sued claiming a pro rata portion of the royalties from the producing wells. Although the court followed *Brown* in holding that the executive had no authority to pool, it opened the door as to how an NPRI might voluntarily or unilaterally choose to pool his interest without meeting the formal requirements of a pooling agreement. Nugent claimed that he had ratified the pooled unit by filing suit. The court rejected that argument noting that suit had not been filed for over three years after it was apparent that no well would be drilled on the acreage. The court did raise the possibility that a non-executive owner whose interest was not pooled could subsequently ratify a pooled unit or a communit lease.

In *Minchen v. Fields,* 345 S.W.2d 282 (Tex. 1961), the rule of *Brown v. Smith* was applied to a non-executive defeasible term interest. The interest was in one of three tracts included in a larger tract. Production was obtained off of the tract burdened by the term interest. The court held that the execution of the lease did not affect the defeasible term interest so that production from off the tract would not maintain the interest into its secondary term.

In *Montgomery v. Rittersbacher,* 424 S.W.2d 210 (Tex. 1968), the Texas Supreme Court reaffirmed the rule of *Brown v. Smith* and held that the executive had no power to pool an NPRI interest without its consent. Montgomery had conveyed 80 acres to Rittersbacher reserving a NPRI. Rittersbacher owned another tract in which Montgomery had no interest. Rittersbacher leased both tracks in one lease containing a pooling clause and an entireties clause. A portion of the lease in which there was no NPRI was pooled with other acreage. Montgomery sued claiming that by virtue of the entireties clause he was entitled to a proportionate share of royalty. He also sought to ratify the unit by institution of suit.

The court expanded somewhat the holding of *Brown* indicating that for either a pooling clause or an entirety clause an NPRI's consent must be obtained. Further, the Court noted that had the executive wished to eliminate or limit the NPRI's right to ratify it could have "easily taken affirmative steps to exclude the interest from the operations of the clause." *Id.* at 213.

In *Standard Oil Company of Texas v. Donald,* 321 S.W.2d 602 (Tex. Civ. App. - Forth Worth 1959, writ ref's n.r.e.), the court confirmed an NPRI's ability to ratify a community lease. In that case, the holders of royalty in the producing tract argued that communitizing the lease by ratification violated the rule of nonapportionment as reflected in *Japhet v. McRae,* 276 S.W. 669 (Tex. Comm. App. 1925). The court noted that *Japhet v. McRae* was distinguished in *Parker v. Parker,* 144 S.W. 2d 303 (Tex. Civ. App. – Galveston 1940, writ ref'd); *French v. George,* 159 S.W. 2d 566 (Tex. Civ. App. – Amarillo, 1942, writ ref'd), and *Landgrebe v. Rockville Oil Company*, 273 S.W. 2d 636 (Tex. Civ. App. – San Antonio 1954, writ ref'd n.r.e.) in which the rule of nonapportionment was inapplicable in the face of consent to pool or communitize by all mineral or royalty owners.

In *Brown v. Getty Reserve Oil, Inc.*, 626 S.W.2d 810 (Tex. App. – Amarillo 1981, writ dismissed), a situation was presented where one lease was executed covering two tracts of land. There were differing NPRI owners under each tract. None of the NPRI owners executed the lease. A well was drilled on one tract. The lessor attempted to unitize the non-participating royalty interest by division order. Those NPRI owners under the non-producing tract executed the division order, but the production tract owners did not. The lessor suspended the interest, and the case ensued.

The non-producing tract NPRIs argued that their counterparts on the producing tract had ratified the lease through pleadings filed in the case citing *Montgomery* for the proposition that a lease can be ratified through pleadings. The court distinguished *Montgomery* in that there suit was an attempt to enforce an unauthorized act constituting an implied ratification. The court indicated that the NPRI owners were not suing to enforce an unauthorized act. The lessor had authority to lease their interest through its executive rights, and they were seeking their percentage of royalty undiminished by communitization or pooling. Therefore, their actions do not constitute an implied ratification.

In *De Benavides v. Warren,* 674 S.W.2d 353 (Tex. App. – San Antonio 1984, writ ref'd n.r.e.), the Plaintiff sought a declaratory judgment to determine whether a term non-participating royalty had terminated. The Defendant, the NPRI owner, counterclaimed for the imposition of a constructive trust. In *De Benavides*, the plaintiff had assigned the defendant a 10-year 1/16 NPRI. In support of the claim of termination, it argued that there had been no production or that production in paying quantities had ceased on the tract and that the royalty had terminated. The court disagreed holding that production off the tract from a unit formed in 1965 extended the lease in spite of the NPRI's failure to ratify. The court noted that the executive owed a duty of good faith and had no authority to pool without the NPRI's consent. The election to ratify was open until the defendant actually learned of the pooling. The Court noted that the defendant ratified promptly upon learning of the unit.

In MCZ, Inc. v. Triolo, 708 S.W.2d 49 (Tex. App. – Houston [1st Dist.] 1986, writ ref'd n.r.e.). An NPRI owner specifically ratified a unit in which a portion of the tract in which he owned an interest was included. Later, a second unit was formed. The NPRI owner took the position that his first ratification did not constitute a ratification of subsequent units but only the initial one. The court agreed and held that two distinct acts or transactions were involved, one of which the NPRI ratified and one which he did not. The court indicated that "to impose ratifications upon Turner it would be necessary to view the formation of the separate pooling units involving the 150-acre tract as one transaction; that is contrary to the facts. The two units were designated in instruments executed months apart." *Id.* at 54.

In *London v. Merriman,* 756 S.W.2d 736 (Tex. App. - Corpus Christi 1988, writ denied), London owned 2 adjoining tracts and held the executive right to lease the minerals on both tracts. The Merrimans owned a 1/16 non-participating royalty interest in the western tract created by reservation when the land was conveyed to London. London executed a single oil and gas lease, which included both tracts. A successful well was drilled on the eastern tract in which London owned all of the royalty interest. No wells were drilled on the western tract. Merriman sued claiming that London had breached a duty to protect the tract in which it owned a royalty interest against drainage. The trial court found that Merriman had ratified the lease by filing suit entitling them to their proportionate share of royalties from the date of suit until a forced pooling order was entered by the Railroad Commission. London asserted that the terms of the lease precluded ratification and consequent pooling. The lease was a standard Producers 88 Lease with a pooling clause. The Court of Appeals noted that a lease which purports to authorize the lessee to pool the NPRI is essentially an offer to create a community lease by ratification. If ratified, the pooling effects a cross-conveyance of interests citing *Ruiz v. Martin*, 559 S.W.2d 839, 842 (Tex. Civ. App. – San Antonio 1977, writ ref'd n.r.e.). London argued that the clause in the lease involved was distinguishable from the pooling clause in *Ruiz.* At the end of the pooling clause, there was language which was characterized as "non-unitization" or "anti-communitization" clause. London contended that this negated any intent to pool and keeps the royalties separate. The court disagreed stating that the non-unitization clause simply provided that "no pooling or unitization of royalties is intended merely from the inclusion of the two tracts in one lease." The Court

noted that the result did not stem merely from including the lease in two tracts but from the previous lease provisions which authorized the unitization or pooling of the royalties and that by filing suit the Merriman's impliedly ratified the lease.

In *PYR Energy Corp. v. Samson Resources Co.,* 456 F.Supp.2d 786 (E.D. Tex. 2006), the court noted that the *Brown* rule preventing the executive from pooling an NPRI without its consent applies both to non-participating royalty interests and to overriding royalty interests. The court went further to note exceptions to the general rule, including that indicated in *Union Pacific v. Hutchison* where a pooling clause was included in the lease and application of custom and surrounding circumstances in the industry. The court reviewed the language of both the assignment and an applicable joint operating agreement and did not find that there was language in which the NPRI granted authority to pool. Further, the court found that the industry custom exception, although having some appeal, was not supported by Texas law.

In *Union Pacific Resources Company v. Hutchison,* 990 S.W.2d 368 (Tex. App. – Austin, 1999, pet. denied), the court considered whether language in the assignment of an NPRI constituted preauthorization or consent to pool. The court noted that the act of reserving an overriding royalty interest "negatives the existence of an intention to confer upon [Fuller] the power or authority to" pool with its resulting diminution of her royalty interest" citing *Brown*. It further noted that just because the executive right was transferred, was insufficient in and of itself to constitute an authority to pool citing *Montgomery v. Rittersbacher*. The court then examined the parties intent as evidenced by the instrument and determined that the effect of an unqualified assignment was to vest in the assignee all benefits possessed under the lease, including an express power to pool. The court noted that the assignor did more than reserve an overriding royalty and the assignee acquired more than mere executive rights. "She transferred to Fuller the identical right to pool she had under the Morgan Lease, and he acquired that special right as a matter of law because it was among the rights included in the all-inclusive description contained in her assignment, namely "all right, title, and interest in and to the Morgan Lease together with the rights incident thereto or used or obtained in connection therewith."