

ARTICLE

ONE OIL AND GAS RIGHT TO RULE THEM ALL

*Monika U. Ehrman**

TABLE OF CONTENTS

I. INTRODUCTION	1064
II. THE NATURE OF THE EXECUTIVE RIGHT.....	1068
A. <i>Overview of the Executive Right and Its Major Issues</i>	1068
B. <i>Executive Right Issues Arising After Severance</i>	1069
1. <i>The Natural Presumption Against Waste</i>	1069
2. <i>Failure to Respect the Property Owner's Intentions</i> ..	1071
3. <i>Economic Inefficiencies Resulting from the Severance of the Executive Right</i>	1072
III. THE CURRENT STANDARD OF CONDUCT APPROACH TO EXECUTIVE RIGHT PROBLEMS.....	1074
A. <i>The Standards of Conduct</i>	1075
B. <i>Review of Executive Right Jurisprudence Prior to Lesley v. Veterans' Land Board</i>	1076
C. <i>Lesley v. Veterans Land Board and Its Effect on Executive Right Jurisprudence</i>	1081

* Associate Professor of Law, The University of Oklahoma College of Law; B.Sc. (Petroleum Eng.), University of Alberta; J.D., SMU Dedman School of Law; LL.M., Yale Law School. I thank Professor Robert Ellickson, Yale Law School, for comments given on an earlier version. This Article also benefited from feedback given during the 2015 Oklahoma Junior Scholars Conference and the 2016 Faculty Speaker Series at Texas A&M University School of Law, with particular thanks to Vanessa Casado-Peréz, Gabriel Eckstein, Glynn Lunney, and Franklin Snyder. I also thank my colleagues, Sarah Burstein, Kit Johnson, and Roger Michalski for their feedback. The University of Oklahoma Donald E. Pray Law Library provided extremely helpful research and editorial support. Finally, I thank the editors of the Houston Law Review for their careful reading and insightful comments and edits.

1. <i>The Conveyancing Issue</i>	1084
2. <i>The Nature of the Duty that the Executive Owes to the Nonexecutive</i>	1086
3. <i>Other Considerations by the Court.</i>	1088
D. <i>Executive Right Jurisprudence Following Lesley v. Veterans Land Board</i>	1089
IV. POTENTIAL RESOLUTIONS FOR THE EXECUTIVE RIGHT	
PROBLEM	1092
A. <i>Non-Retroactive Prohibition of Executive Right Severance</i>	1092
B. <i>Adverse Possession of the Executive Right</i>	1092
C. <i>Employment of a Variable Standard of Conduct</i>	1094
1. <i>Overview of the Various Duties Applicable in Executive Rights Cases</i>	1094
2. <i>Determining When the Various Duties Apply</i>	1095
3. <i>Criticism and Support for the Variable Duty Approach</i>	1099
D. <i>Enactment of Legislation Similar to Dormant Mineral Acts</i>	1100
E. <i>Finding an Implied Covenant to Develop the Mineral Estate in the Severing Instrument</i>	1103
V. PRACTICAL SOLUTIONS	
A. <i>Prior to a Severance</i>	1104
B. <i>After a Severance</i>	1105
VI. CONCLUSION	
	1105

I. INTRODUCTION

The proverbial “bundle of sticks” is an analogy familiar to real property scholars.¹ The analogy compares property ownership to a bundle of sticks—that is, ownership composed of separate and individual property rights—where each “stick” represents a right or stream of benefits available to the property owner. Under the centuries-old common law *ad coelum* doctrine, real property contained all lands from the core of the earth to the sky. Although

1. See *United States v. Craft*, 535 U.S. 274, 278 (2002) (citations omitted) (stating that a “common idiom describes property as a ‘bundle of sticks’—a collection of individual rights which, in certain combinations, constitutes property. State law determines only which sticks are in a person’s bundle.”).

this “heaven-to-hell” doctrine is now limited, oil and gas still composes that part of subsurface real property, sometimes called the mineral estate. In oil and gas law, the mineral property bundle is composed of five essential attributes: (1) the right to develop (and the right of ingress and egress); (2) the right to make decisions affecting exploration and development of the mineral estate; (3) the right to receive bonus payments; (4) the right to receive delay rentals; and, (5) the right to receive royalty payments.² The right to make decisions affecting exploration and development of the mineral estate is also called the “executive right.”³

Commonly, the executive right refers to the right to execute an oil and gas lease,⁴ which is both a contract and a conveyance of the subsurface mineral estate. The oil and gas lease not only governs the rights and obligations between the parties; it is also a property construct—either a profit à prendre or a fee simple determinable, depending on the jurisdiction.⁵ In states that classify the oil and gas lease as a profit à prendre (e.g., Oklahoma), the lessee—the party that takes the lease—owns an incorporeal and nonpossessory right to take or an irrevocable license. In states that classify the oil and gas lease as a fee simple determinable (e.g., Texas), the lessee owns a mineral property interest in fee simple subject to the condition of continued oil and gas production.⁶ If actual or constructive production ceases, the oil and gas lease automatically terminates and the mineral estate reverts to the lessor—the party that granted the lease.⁷

Although the executive right is part of the mineral estate’s bundle of sticks, it is, in fact, the most important property right. Without the right to execute an oil and gas lease or self-develop, (1) there is no development of the mineral estate; (2) there is no bonus, which is the amount paid as an incentive to enter into an oil and gas lease; (3) there are no delay rentals, which are the

2. *Altman v. Blake*, 712 S.W.2d 117, 118 (Tex. 1986) (citations omitted).

3. *See Craft*, 535 U.S. at 278 (2002) (citations omitted); *see also Altman*, 712 S.W.2d at 118 (citations omitted) (“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.”).

4. *See Altman*, 712 S.W.2d at 118.

5. *See, e.g., Jupiter Oil Co. v. Snow*, 819 S.W.2d 466, 468 (Tex. 1991) (citations omitted); JOHN S. LOWE ET AL., *CASES AND MATERIALS ON OIL AND GAS LAW* 193 (West 7th ed. 2018) (forthcoming Summer 2018) (on file with author) [hereinafter *LOWE*].

6. *See Moore v. Jet Stream Inv., Ltd.*, 261 S.W.3d 412, 426 (Tex. App.—Texarkana 2008, pet. denied); *LOWE, supra* note 5, at 193

7. *See id.*

payments made during the primary term of an oil and gas lease that serve as constructive production; and (4) there are no royalty payments, which are a cost-free share of production that arises out of an oil and gas lease. Therefore, the executive right is the most important and governing right of all the mineral property rights. Like the One Ring in Tolkien's *The Lord of the Rings*, the executive right rules them all.

The holder of the executive right (the "executive") obtains the right through a conveyance or deed instrument, which may or may not include an associated mineral or royalty interest.⁸ If the executive holds the right absent any associated mineral or royalty interest, he holds a "naked" right.⁹ At present, there is not a bright-line "for the characterization of sole ownership of the executive right in Texas."¹⁰ Few cases involve an executive holding only the right without an associated mineral or royalty interest.¹¹ In fact, the executive right is commonly coupled with a fractional interest in the minerals or royalty.¹²

Challenges arise when the executive right is severed from the subsurface mineral estate. If the intentions of the executive conflict with those of the holder of the associated mineral interest (the "nonexecutive"), tensions form concerning the owed—whether actual or perceived—obligations or duties. For example, whereas an executive with a real estate surface development may desire prohibiting oil and gas operations to satisfy buyer or lender preferences, the nonexecutive mineral or royalty interest owner desires oil and gas development and production to acquire potential future revenues. Analogously, the severed executive right is comparable to one person owning the cake—the mineral interest—and another person owning the right to eat the cake or the right to allow someone else to eat it.

Over the past century, courts have used a standard of conduct approach to review the relationship between the executive and nonexecutive. These standards have varied, moving between ordinary good faith, fiduciary, and good faith and utmost fair dealing. But determining compliance with an inconsistent

8. See 55 TEX. JUR. 3D Oil and Gas § 97 (2004); *Day & Co. v. Texland Petrol.*, 786 S.W.2d 667, 669 n.1 (Tex. 1990).

9. See Christopher S. Kulander, *Big Money vs. Grand Designs: Revisiting the Executive Right to Lease Oil & Gas Interests*, 42 TEX. TECH L. REV. 33, 39 (2009).

10. J. Robert Beatty & Monika Ehrman, *The Nature of the Severed Executive Right*, 32 ST. B. TEX. OIL, GAS & ENERGY RES. SEC. REP. 21, 23 (2007).

11. Cf. Kulander, *supra* note 9, at 39 (citations omitted) ("No case in Texas, or any surrounding state, suggests that the executive right *cannot* be held exclusively from the rest of the mineral estate.") (emphasis in original).

12. See Ernest E. Smith, *Implications of a Fiduciary Standard of Conduct for the Holder of the Executive Right*, 64 TEX. L. REV. 371, 374 (1985).

standard relies primarily on a fact-based analysis, which provides little certainty in oil and gas jurisprudence and mineral title examination.

This Article identifies major issues that arise out of the severance of the executive right from the underlying mineral estate, focusing on scenarios where the preferred outcome of the executive does not harmonize with that of the nonexecutive. That is, when the executive wishes to prohibit oil and gas development and the nonexecutive does not desire the same. First, severance of the executive right violates the basic premise underlying oil and gas jurisprudence—the belief that mineral resources should not be wasted. This fundamental disapproval of waste shapes the producing state’s regulatory system, which essentially codifies this aversion in the rules of the regulating agency. Second, the ownership intentions of a disagreeing executive and nonexecutive cannot be reconciled for mutual benefit. Therefore, the rights of one property owner—usually the nonexecutive—are likely to be disregarded in favor of another—usually the executive. The nonexecutive requires oil and gas production in order to obtain the benefit of his property interest. But an executive interested in surface development likely acquired the executive right to effectuate the intent of his desired goals. Those goals likely do not include oil and gas production. Finally, the loss of a defining characteristic of the mineral estate—the right to execute the oil and gas lease—leads to economic inefficiencies in the ensuing transactions after severance. Therefore, severance of the executive right prevents optimization of the property interest.

To address these issues, this Article examines several resolution mechanisms: (1) prohibition of severance of the executive right from the associated mineral estate (non-retroactive); (2) adverse possession of the executive right by the nonexecutive; (3) adoption of a variable standard of conduct approach; (4) enacting legislation similar to dormant mineral acts, which encourage development of mineral resources by declaring mineral interests abandoned after a prescribed period of time and reuniting the severed mineral and surface estate; and, (5) finding an implied covenant to execute an oil and gas lease in the instrument that severs the executive right from the mineral interest.

Part II of this Article discusses the nature of the executive right and describes the major issues that arise out of executive right severance with non-agreeing property owners. Part III examines standards of conduct and reviews the jurisprudence of executive right decisions. Part IV discusses possible solutions to the problem of the executive right. Part V reviews practical

solutions with respect to the executive right, and Part VI concludes this Article. Finally, discussion within the paper shall be limited to the executive right as it pertains to the leasing of the mineral interest. This Article also focuses on Texas law due to the limited (practically non-existent) forced pooling power under the Mineral Interest Pooling Act (“MIPA”).¹³

II. THE NATURE OF THE EXECUTIVE RIGHT

A. Overview of the Executive Right and Its Major Issues

The executive right began as a power—not a property right—that was revocable upon the death of the principal.¹⁴ In this case, *Pan American Petroleum Corp. v. Cain*, the Supreme Court of Texas “classified the executive right as an agency power given as a security.”¹⁵

This classification ended more than thirty years later in *Elick v. Champlin Petroleum Co.* when the Houston Court of Appeals for the 14th District held that a non-mineral interest owner could hold the executive right.¹⁶ There, “the court decided that the reservation of executive rights was not an unlawful restraint on the alienation of the mineral estate.”¹⁷ *Elick* held that “[t]he fact that 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 interest any more than if appellants’ reserved exclusive executive rights to lease the mineral interest.”¹⁸ The dissent, written by Justice Sears, criticized the majority’s holding, stating that the “majority opinion does what no other Texas court has done; it has provided appellants with an irrevocable executive right over a mineral estate in which they have no interest. This has never before been done in the history of

13. This focus on Texas law is necessary due to Texas’s lack of a comprehensive forced pooling statute. See Paula C. Murray & Frank B. Cross, *The Case for a Texas Compulsory Unitization Statute*, 23 ST. MARY’S L.J. 1099, 1125–26 (1992). Other states, such as Arkansas, Oklahoma, and North Dakota, would solve the joinder of the executive to a mineral lease by force pooling the desired mineral interest into the drilling unit, thereby rendering unnecessary the cooperation of the executive. See ARK. CODE ANN. § 15-72-301–15-72-324 (West 2018) (describing pools and drilling units rules); OKLA. STAT. ANN. Tit. 52, § 87.1 (West 2018) (authorizing the Oklahoma Corporation Commission to pool tracts within a drilling unit); N.D. CENT. CODE ANN. § 38-08-08 (West 2018) (describing integration of fractional tracts).

14. See *Pan Am. Petrol. Corp. v. Cain*, 355 S.W.2d 506, 509 (Tex. 1962).

15. Beatty & Ehrman, *supra* note 10, at 22 (citing *Pan Am. Petrol.*, 355 S.W.2d at 509).

16. *Elick v. Champlin Petrol. Co.*, 697 S.W.2d 1, 4 (Tex. App.—Houston [14th Dist.] 1985, writ ref’d n.r.e.).

17. Beatty & Ehrman, *supra* note 10, at 22 (citing *Elick*, 697 S.W.2d at 5).

18. *Elick*, 697 S.W.2d at 5.

oil and gas law.”¹⁹ The dissent argued that “[t]he only persons with authority to execute mineral leases are the owners of the minerals.”²⁰ So how could a grantor convey all of his interest in the mineral estate and reserve the executive right upon those same minerals? Justice Sears concluded that “if an executive has no concurrent ownership in the mineral estate, he should have no right to execute leases thereon.”²¹ Despite *Elick’s* dissent, “in *Day & Co. v. Texland Petroleum*, the Texas Supreme Court confirmed *Elick’s* holding and reclassified the executive right as a separate property right that, like a royalty interest, does not terminate upon death of the holder.”²²

With the reclassification of the executive right as a separate severable interest in real property, problems arose concerning the actions of the executive and the effect of those actions on the nonexecutive. These problems range from self-dealing, negotiating favorable dealings at the expense of the nonexecutive, failing to lease, and instituting prohibitions on mineral development. Courts struggled with these problems, ultimately deciding to use a standard of conduct approach to evaluate the duty of the executive and whether that duty was breached.

B. *Executive Right Issues Arising After Severance*

The major problems that occur when severance of the executive right results in a relationship without common goals for the executive and nonexecutive are: (1) waste; (2) failure to honor the intentions of property owners; and, (3) inefficiencies arising out of the mineral interest and future transactions.

1. *The Natural Presumption Against Waste.* In the oil and gas context, waste denotes the “ultimate loss of oil and gas”²³ and is categorized as physical or economic.²⁴ Physical waste includes loss of hydrocarbons through spills, venting and incomplete flaring; economic waste includes loss of income via inefficient commodity pricing.²⁵ Unrestricted petroleum production in excess of market demand may also be characterized as economic waste.²⁶

19. *Id.* at 7 (Sears, J., dissenting) (citations omitted).

20. *Id.* at 6.

21. Beatty & Ehrman, *supra* note 10, at 22 (citing *Elick*, 697 S.W.2d at 8).

22. *Id.* at 23 (citing *Day & Co. v. Texland Petrol., Inc.*, 786 S.W.2d 667, 669 (Tex. 1990)).

23. WILLIAMS & MEYERS, MANUAL OF OIL AND GAS TERMS 1123 (Howard R. Williams & Charles J. Meyers eds., 15th ed. 2012).

24. *Id.*

25. *See id.*

26. *Id.*

This fundamental tenet drives the regulatory structure of the governing agency, in addition to acting as a directing force in the evolution of the body of oil and gas common law. For example, regulatory agencies provide well spacing and distance requirements to optimize production, prevent reservoir damage, and protect petroleum from being stranded. And the Rule of Capture (i.e., the “Milkshake Rule” from the film, *There Will be Blood*) limits trespass liability to allow parties to drain hydrocarbon from wells on legal locations.²⁷ These mechanisms act to promulgate petroleum development.

Conversely, an executive who seeks to prohibit or even delay development causes both physical and economic waste. No development means there is no flow of hydrocarbons from the subsurface to the surface, where it can be captured, produced, and sold. The nonexecutive is also affected by waste because his revenue interest benefits from a productive oil and gas lease.²⁸

*Example 1.*²⁹ Assume that *A* is a widow and owns the fee mineral interest of Whiteacre. *A* then conveys her mineral interest in Whiteacre to her children, *B* and *C*, but reserves the executory right. Therefore, *A* no longer owns a fee possessory interest in Whiteacre; and *B* and *C* own a joint and undivided interest in Whiteacre. *A* later remarries *H*. Many happy years later, *A* dies, and *H* inherits *A*'s executory right to Whiteacre.

B and *C* are approached by Natural Gas Company. Natural Gas Company wants to lease Whiteacre and drill an exploratory well. *B* and *C* cannot execute the lease since they do not possess the executory right; so *B* and *C* approach *H* and request that *H* execute a lease with Natural Gas Company. *H*, having secretly always disliked his stepchildren, refuses to execute the lease.

B and *C*'s remedy may have been that *B* and *C* could represent to Natural Gas Company that they are the actual mineral interest owners of Whiteacre and try to persuade Natural Gas Company to drill on Whiteacre. If *B* and *C* did so, would *H* have a remedy against his stepchildren or Natural Gas Company?

Currently, it appears there are some answers to these questions. If *B* and *C* sue *H* for breach of duty evidenced by *H*'s

27. See Michael F. Forlenza, *Stalking the Wild Beast: The Rule of Capture in Texas*, HOUS. GEOLOGICAL SOC'Y (Sept. 30, 2008), <https://www.hgs.org/node/4344> [https://perma.cc/9EEJ-74EX] (“[I]f you have a milkshake and I have a milkshake, and I have a straw and my straw reaches across the room and starts to drink your milkshake: I drink your milkshake! I drink it up!”) (quoting *THERE WILL BE BLOOD* (Miramax Films 2007)).

28. The nonexecutive is also able to sell his interest, which would not require oil and gas production. But certainly, the value for an interest without the associated right or with an executive who desires no development would be of less value than the opposite.

29. Beatty & Ehrman, *supra* note 10, at 7.

failure to lease, a court would need to determine whether or not the failure to lease was arbitrary or by self-interest to the nonexecutives' detriment. In this example, *H* declines to lease because he dislikes *B* and *C*. It is likely, but not certain, that a jury would find that *H*'s failure to lease was motivated by self-interest. However, there are questions of whether self-interest requires a pecuniary benefit.

Example 2. *A* and *B* own the mineral interest and their sibling, *C*, owns the surface interest, executive right, and an associated nonparticipating royalty interest. *C* is approached by a real estate developer, *D*, who seeks to develop the surface overlaying *A*'s and *B*'s minerals. *C* assigns the surface interest and the executive right to *D*, who plans to subdivide and sell the surface interest as individual lots. *D* then files restrictive covenants on the surface interest prohibiting oil and gas development. Oil and gas companies approach *D* to execute a lease, but *D* refuses. *A* and *B* receive no income from their interest and are unable to lease or self-develop the mineral interest. *C* also receives no income via its nonparticipating royalty interest but is not concerned since *C* received money from the sale of the surface and executive right.

The above example mirrors the facts in the leading Texas executive rights case, *Lesley v. Veterans Land Board*.³⁰ In *Lesley*, the nonexecutive received no income because the executive sought to develop a real estate suburb free of any oil and gas development.³¹

2. *Failure to Respect the Property Owner's Intentions.* Property ownership is a central construct in American ideology. The history of private mineral ownership is a foreign concept to most of the rest of the world, where minerals are owned by the State or Crown.³² Because of the physical need to access the subsurface through the surface, the subsurface is classified as the dominant estate and the surface is classified as the servient estate, subject to an easement.³³ Thus, if the surface and mineral estates are severed, the mineral estate enjoys an easement of reasonable access and development via the burdened surface.³⁴

There appears to be no such classification with respect to the executive right. Even though development of the mineral interest

30. See *Lesley v. Veterans Land Bd.*, 352 S.W.3d 479, 481–83 (Tex. 2011).

31. See *id.* at 481–82.

32. KENDOR P. JONES ET AL., SPLIT ESTATES AND SURFACE ACCESS ISSUES, LANDMAN'S LEGAL HANDBOOK § 9.01 (Rocky Mt. Min. L. Fdn., 5th ed. (2013)).

33. *Coyote Lake Ranch, LLC v. City of Lubbock*, 498 S.W.3d 53, 60 (Tex. 2016).

34. *Id.*

requires the executive right, there is currently no ability of a nonexecutive to develop the mineral estate on his own (self-develop) or to lease it to another.³⁵ But should there be? If the executive purchased for value or received through other assignment the executive right, why should the executive's intentions be subordinate to those of the nonexecutive? Both property owners own an individual property interest. And if the executive wishes to purchase the executive right to prevent oil and gas development, then shouldn't that choice be his prerogative? Likewise, for those nonexecutives who chose to sell and sever the executive right from their mineral interest, did they not do so with the knowledge that there may be unintended consequences for them or a successor-in-interest at a later date?

3. *Economic Inefficiencies Resulting from the Severance of the Executive Right.* Economic inefficiencies result from the severance of the executive right from its associated mineral interest. In addition to waste and problems effecting the intent of the property owners, the severed property interests—the executive right and the non-developable mineral interest—have arguably less value as their individual components than they do as a whole. Subsequent owners of the non-developable mineral interest have no ability to lease the mineral interest or to develop the interest on their own, i.e., they have the cake but are unable to eat it.³⁶ Subsequent owners of the naked executive right can only sell the executive right but are not entitled to a royalty, which is a cost-free share of production. Executives who have royalty or mineral interest, in addition to the executive right, are obviously better situated.

For potential lessees seeking to execute an oil and gas lease, they must understand the mineral ownership so that they can execute a lease with the proper authorized party. This additional work doing mineral title examination and seeking successors-in-interest to the severed executive right holders is a costly and burdensome endeavor that can delay or prevent leasing of the mineral estate.³⁷

35. See Christopher S. Kulander, *The Executive Right to Lease Mineral Real Property in Texas Before and After Lesley v. Veterans Land Board*, 44 ST. MARY'S L.J. 529, 544 (2013); *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) (citing *Day & Co. v. Texland Petrol., Inc.*, 786 S.W.2d 667, 669 n. 1 (Tex. 1990))).

36. Kulander, *supra* note 35, at 544.

37. See DAVID G. EBNER, ROCKY MTN. MIN. L. SPECIAL INST., MINERAL TITLE EXAMINATION II, PROFESSIONAL RESPONSIBILITIES OF MINERAL TITLE EXAMINERS ¶ 27 (1982), Westlaw 13B RMMLF-INST 9; Cf. Thomas G. Ciarlone Jr., *Leasing the Mineral*

Finally, if property characteristics fundamental to the interest are removed, at what point in time is the interest no longer an interest? Former UCLA School of Law Dean Emeritus Richard Maxwell analogized this problem to that of a “mineral bug.”³⁸ In his analogy, Maxwell assigns the various mineral property interests as appendages of the insect. He describes:

The mineral bug can be given a development head, a leasing power leg, a royalty leg, a rental leg, and a bonus leg, all attached to an expense-bearing body. The device works well in analyzing the common practice of first conveying a full mineral interest and then verbally stripping away some of the mineral attributes, to leave something less than a full mineral interest in the grantee. For example, our mineral bug may have been divested of its development head and its leasing leg. Is a headless, three-legged mineral bug still a mineral bug?³⁹

There are two important arguments that flow from Maxwell’s mineral bug example. First, does the removal of the executive right kill the mineral bug? Without the “leasing power leg,” there is: (1) no development head; (2) no royalty leg; (3) no rental leg; and, (4) no bonus leg. Also, this consequential failure to form the other appendages indicates that the executive right may be akin to the critical head of the insect and not an appendage. Second, it raises the question whether the executive right should be an appendage at all. If the executive right is required to form the remainder appendages, maybe the executive right is similar to the heart of the mineral bug, not an appendage, but an inseparable and necessary piece of the body?

III. THE CURRENT STANDARD OF CONDUCT APPROACH TO EXECUTIVE RIGHT PROBLEMS

For much of the past century, disputes between the executive and the nonexecutive revolved around the duty of the executive to the nonexecutive. This conflict in duty generally arose in the context of self-dealing or negotiating a good bargain for the executive at the expense of the nonexecutive. But there was not much disagreement between the executive and nonexecutive regarding the desire for oil and gas development. Recently,

Owner Who’s Gone AWOL, AM.BAR ASS’N (Sept. 26, 2012), <http://apps.americanbar.org/litigation/committees/energy/articles/summer2012-0912-leasing-mineral-owner-whose-gone-awol.html> [<https://perma.cc/RYY8-8PJU>] (discussing best practices for title examination when leasing mineral estates in Texas).

38. Richard C. Maxwell, *Mineral or Royalty—The French Percentage*, 49 SMU L. REV. 543, 547 (1996).

39. *Id.* at 548.

however, conflicts between the executive and nonexecutive are centering on *whether* to develop the mineral interest. This conflict was central in the 2011 case of *Lesley v. Veterans Land Board* and is only likely to increase in the future.⁴⁰ For example, the oil and gas industry is facing an onslaught of opposition from anti-fossil fuel campaigns like the “Keep it in the Ground” movement and Bill McKibben’s 350.org.⁴¹ It also faces surface owners concerned with actual and perceived effects of oil and gas development, such as groundwater contamination from spills, faulty completion jobs, and induced seismicity.⁴² The challenge of statewide development and increasing populations adds to the complexity.

To address these early questions regarding the duty owed between the executive and nonexecutive, courts adopted a standard of conduct approach. Using this approach, they analyzed the executive’s action under a court-determined standard.⁴³ Deciding on the appropriate duty proved difficult, resulting in almost a century of inconsistent rulings. First, courts imposed a duty of “ordinary care” but later moved between “fiduciary” or “quasi-fiduciary” and “utmost good faith and fair dealing.”⁴⁴ In its most recent cases, following *Lesley v. Veterans Land Board*, the Supreme Court of Texas applied a good faith and fair dealing standard, in addition to clarifying the commencement of the duty.⁴⁵ And in its application, it becomes apparent that using a standard of conduct approach to settle disputes between executives and nonexecutives is not a tenable solution.

A. *The Standards of Conduct*

In oil and gas law, the most familiar standard of conduct after execution of an oil and gas lease is the “reasonable prudent operator” (“RPO”) standard, which the lessee owes to the lessor. In Texas, the RPO standard “has long been recognized by the

40. *Lesley v. Vet. Land Bd.*, 352 S.W.3d 479, 481 (Tex. 2011).

41. Bill McKibben, Opinion, *How to Drive a Stake Through the Heart of Zombie Fossil Fuel*, L.A. TIMES (Jan. 19, 2016, 6:30 AM), <http://www.latimes.com/opinion/op-ed/la-oe-0119-mckibben-how-to-kill-the-zombie-fossil-fuel-industry-20160119-story.html>; see Monika U. Ehrman, *A Call for Energy Realism: When Immanuel Kent Met the Keep it in the Ground Movement*, __ UTAH L. REV. __ (accepted for publication, forthcoming 2019).

42. See SHANNON L. FERRELL ET AL., PETROLEUM PRODUCTION ON AGRICULTURAL LAND IN TEXAS: MANAGING RISKS AND OPPORTUNITIES, TEX. A&M AGRILIFE EXTENSION § 2.2–2.3, <http://agrillifeextension.tamu.edu/wp-content/uploads/2016/03/Texas-Oil-Gas-Leasing-Handbook-web.pdf> [<https://perma.cc/A4R5-NLFR>] (last visited Feb. 3, 2018).

43. Smith, *supra* note 12, at 372–73.

44. *Hlavinka v. Hancock*, 116 S.W.3d 412, 417 (Tex. App.—Corpus Christi 2003, pet. denied) (citing 1 ERNEST E. SMITH & JACQUELINE LONG WEAVER, TEXAS LAs OF OIL AND GAS § 2.6(C)(1) (2d ed. 2017)).

45. See *Lesley v. Vet. Land Bd.*, 352 S.W.3d 479, 490–92 (Tex. 2011).

common law.”⁴⁶ Under this standard, a claim of improper operation by a lessor against its lessee “should be tested against the general duty of the lessee to conduct operations as a reasonably prudent operator in order to carry out the purposes of the oil and gas lease.”⁴⁷ The RPO standard is met by the lessee acting: (1) in good faith; (2) with competence; and, (3) with due regard to the lessor’s interest, in addition to its own.⁴⁸ This RPO standard, as between the executive and nonexecutive, can be defined as ordinary good faith or the “reasonabl[y] prudent executive.”⁴⁹

In the relationship between an executive and nonexecutive, however, there exists a higher level of conduct. It first began as “utmost fair dealing,” which was characterized as fiduciary in nature, but may have its origins in the “good faith” standard.⁵⁰ Now, courts generally refer to the standard as a fiduciary duty.⁵¹ There is a marked difference in these two standards. Under the “good faith” standard, an executive is required to enter into “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 in a third party.”⁵² By contrast, in a true fiduciary duty, similar to the one imposed on the trustee-beneficiary relationship, the executive must “subordinate his interests to those of the nonexecutive.”⁵³

46. See, e.g., *Exxon Corp. v. Miesch*, 180 S.W.3d 299, 323 (Tex. App.—Corpus Christi 2005), *aff’d in part, rev’d in part sub nom.*; *Exxon Corp. v. Emerald Oil & Gas Co.*, 348 S.W.3d 194 (Tex. 2011), *remanded to*, No. 13-00-00104-CV, 2012 WL 664944 (Tex. App.—Corpus Christi Mar. 1, 2012) (mem. op.); Monika Ehrman, *Duties of the Executive After Lesley v. Veterans Land Board*, Address Before the 38th Annual Ernest E. Smith Oil, Gas & Mineral Law Institute., The University of Texas School of Law 3 (Mar. 30, 2012) (article available at UT Law CLE eLibrary).

47. *Amoco Prod. Co. v. Alexander*, 622 S.W.2d 563, 568 (Tex. 1981); Ehrman, *supra* note 46, at 3.

48. *Miesch*, 180 S.W.3d at 323 (citing *Hurd Enters. v. Bruni*, 828 S.W.2d 101, 109 n.10 (Tex. App.—San Antonio 1992, writ denied)).

49. See *Kulander*, *supra* note 35, at 587.

50. See *Lesley*, 353 S.W.3d at 488. Compare *Andretta v. West*, 415 S.W.2d 638, 641–42 (Tex. 1967) (finding that where there is privity of contract and a confidential relationship, executive right holders “are chargeable in equity as constructive trustees” to hold royalties subject to the demand of the nonexecutive interest), with *Wintermann v. McDonald*, 102 S.W.2d 167, 173 (Tex. 1937) (referring to agency right as one to be performed “with prudence and good faith, and with ordinary care and diligence”); Ehrman, *supra* note 46, at 3.

51. See *Manges v. Guerra*, 673 S.W.2d 180, 183 (Tex. 1984).

52. *Hlavinka v. Hancock*, 116 S.W.3d 412, 417 (Tex. App.—Corpus Christi 2003, pet. denied) (citing *SMITH & WEAVER*, *supra* note 44); Ehrman, *supra* note 46, at 3–4.

53. See *Smith*, *supra* note 12, at 380; John B. Fowles, Comment, *Operation Executive Freedom (of Contract): Following the Executive’s Fiduciary Obligation from Manges to Magruder in Mineral Leasing*, 2004 BYU L. REV. 235, 237 (2004).

B. Review of Executive Right Jurisprudence Prior to Lesley v. Veterans' Land Board

Examination of the executive's standard of conduct begins in 1937 with the Texas Supreme Court's decision in *Schlittler v. Smith*.⁵⁴ In *Schlittler*, Smith conveyed property to Schlittler and reserved a one-half royalty interest.⁵⁵ The case centered on "a dispute over the meaning of the word 'royalty' in a general warranty deed."⁵⁶ The high court disagreed with the trial court's interpretation of the royalty reservation, holding that the grantee's "self-interest . . . may be trusted to protect the grantor as to the amount of royalty reserved."⁵⁷ It added that "there should be the utmost fair dealing on the part of the grantee in this regard."⁵⁸

While *Schlittler* applied the utmost good faith standard in the limited context of the negotiation of a fair royalty,⁵⁹ *Wintermann v. McDonald*, a case decided the same day, "suggested a broader principle at work."⁶⁰ *Wintermann* "involved the construction of a 1931 enactment and the Texas Relinquishment Act, which authorized the owners of the soil of certain formerly public lands to act as the agent of the State in making oil and gas leases."⁶¹ This authorization is analogous to the common-law executive right.⁶² The court held that "[t]he landowner owes to the State good faith in the performance of a duty which he has assumed, and he should discharge that duty with prudence and good faith, and with ordinary care and diligence."⁶³

Almost thirty years later, the Texas Supreme Court revisited the executive right duty in *Andretta v. West*.⁶⁴ "The Wests leased their property to Superior Oil Co.'s predecessor and later conveyed a one-fourth non-participating interest in their one-eighth royalty to Andretta's predecessor."⁶⁵ The Wests later argued that Superior should have drilled an offset well and the parties settled "by

54. *Schlittler v. Smith*, 101 S.W.2d 543 (Tex. 1937); Ehrman *supra* note 46, at 4.

55. *Lesley*, 352 S.W.3d at 488 (citing *Schlittler*, 101 S.W.2d at 544 (reserving a one-half term interest in "the royalty rights [on all minerals] that may be produced")).

56. *In re Bass*, 113 S.W.3d 735, 744 (Tex. 2003); Ehrman at 3, *supra* note 46.

57. *Schlittler*, 101 S.W.2d at 545; Ehrman, *supra* note 46, at 4.

58. *Schlittler*, 101 S.W.2d at 545.

59. *Lesley*, 352 S.W.3d at 488.

60. *Id.* (citing *Wintermann v. McDonald*, 102 S.W.2d, 167, 173 (Tex. 1937)); Ehrman, *supra* note 46, at 4.

61. *Lesley*, 352 S.W.3d at 488 (citing *Wintermann*, 102 S.W.2d at 170–71).

62. *Id.*

63. *Id.* (quoting *Wintermann*, 102 S.W.2d at 173).

64. *Andretta v. West*, 415 S.W.2d 638, 641 (Tex. 1967); Ehrman *supra* note 46, at 4.

65. *Lesley*, 352 S.W.3d at 488.

accepting payment of a one-eighth royalty on Superior's well on the adjoining tract."⁶⁶ The court held:

Andretta was entitled to one-fourth of the substitute royalty and that limitations on his claim did not begin to run until he knew or should have known of the royalty because he and the Wests were in a confidential relationship, given the power 'entrusted' to the Wests by the executive right and their superior knowledge.⁶⁷

In *Andretta*, the court seized upon the notion of the "confidential relationship," in which one of the parties is in trust to another.⁶⁸ Expanding on *Andretta*, the court in *HECI Exploration Co. v. Neel* stated that "a fiduciary relationship exists between an owner of the executive rights and nonparticipating royalty owners in Andretta's position because the former has the power to make and amend the lease and thereby affect the latter's rights."⁶⁹

The slow progression to the application of a fiduciary standard culminates in the infamous *Manges v. Guerra*.⁷⁰ One of the most powerful holdings in support of the fiduciary standard as applied to executives was set forth in *Manges*.⁷¹ In *Manges*, the Texas Supreme Court explained that the executive has a fiduciary duty to the nonexecutive.⁷² The court cited "cases that have long characterized this executive/nonexecutive relationship as one 'of trust',⁷³ with a duty of 'utmost fair dealing.'"⁷⁴ The *Manges* court required "the executive . . . to acquire for the nonexecutive every benefit that [the executive] exacts for himself" and imposed exemplary damages upon the executive for his failure to meet that standard.⁷⁵

In *Manges*, mineral estate co-tenant Manges entered into two contracts with the Guerras to purchase a combined 93,000 acres of land along with one-half of the mineral estate and executive

66. *Id.*; Ehrman, *supra* note 46, at 4.

67. *Lesley*, 352 S.W.3d at 488–89 (citing *Andretta*, 415 S.W.2d at 641 (Tex. 1967)).

68. *Andretta* 415 S.W.2d at 641.

69. *HECI Exploration Co. v. Neel*, 982 S.W.2d 881, 888 (Tex. 1998) (citations omitted); Ehrman, *supra* note 46, at 5.

70. *Manges v. Guerra*, 673 S.W.2d 180, 183 (Tex. 1984).

71. *Id.* at 184–85; Ehrman, *supra* note 46, at 5.

72. *Lesley*, 352 S.W.3d at 490 (citing *Manges*, 673 S.W.2d at 183); Ehrman, *supra* note 46, at 5.

73. *Lesley*, 352 S.W.3d at 490.

74. *Id.*

75. *Manges*, 673 S.W.2d at 183–84; *see also Lesley*, 352 S.W.3d at 490 (noting that while a fiduciary duty often "requires a party to place the interest of the other party before his own, . . . [the Texas Supreme Court] did not suggest in *Andretta*, *HECI*, or *Manges* that this requirement was part of the executive's duty"); Ehrman, *supra* note 46, at 4.

rights.⁷⁶ The Guerras retained ownership of the other one-half mineral interest.⁷⁷ After his acquisition, Manges entered into several transactions that effectively allowed him to develop the Guerras' mineral estate without rendering the benefits to the Guerras.⁷⁸ After the Guerras sued, Manges leased a large part of the mineral interest to himself at unfair terms.⁷⁹ The Guerras then sued Manges for self-dealing.⁸⁰ The jury was instructed that:

[T]he possessor of an "Executive Right" owes to the co-mineral owners the same degree of diligence and discretion in exercising the rights and powers granted under such Executive Rights as would be expected of the average land owner who because of self-interest is normally willing to take affirmative steps to seek or to cooperate with prospective lessees . . . that in the exercise of the executive rights, the holder thereof is required to use utmost good faith and fair dealing as to the interest of the nonexecutive mineral interest owners. You are further instructed that the holder of the executive rights has a duty to prevent drainage of oil or gas from any lands covered by the executive rights. In any lease executed by the holder of the executive rights, the holder thereof is required to obtain all benefits that could be reasonably obtained from a disinterested third party.⁸¹

At trial, the jury returned a verdict for the Guerras, finding Manges violated his executive duty.⁸² On appeal, the Supreme Court of Texas affirmed the trial court's judgment "canceling the lease and deed of trust and awarding punitive damages against Manges for his willful 'failure to negotiate for mineral leases with third persons.'"⁸³ The court stated that "[a] fiduciary duty arises from the relationship of the parties and . . . [t]hat duty requires the holder of the executive right, Manges in this case, to acquire for the nonexecutive every benefit that he exacts for himself."⁸⁴ Accordingly, the court "held that Manges breached his fiduciary duty to the Guerras by making a lease to himself under numerous unfair terms."⁸⁵ Thus, *Manges* clarified the duty set forth in

76. *Manges*, 673 S.W.2d at 181–82.

77. *Id.*; Ehrman, *supra* note 46, at 5.

78. *Manges*, 673 S.W.2d at 182.

79. *Id.* at 181–82.

80. Beatty & Ehrman, *supra* note 10, at 24 (citing *Manges*, 673 S.W.2d at 183).

81. *Manges*, 673 S.W.2d at 183.

82. *Id.*

83. *Lesley v. Veterans Land Bd.*, 352 S.W.3d, 479, 490 (Tex. 2011) (citing *Manges*, 673 S.W.2d at 184).

84. *In re Bass*, 113 S.W.3d 735, 744–45 (Tex. 2003) (citing *Manges*, 673 S.W.2d at 183).

85. *Id.* at 745 (citing *Manges*, 673 S.W.2d at 184).

Schlittler by “creating a fiduciary duty between executive and nonexecutive interest holders in mineral deeds.”⁸⁶

Less than ten years later, the Texarkana Court of Appeals, in *Mims v. Beall*, interpreted *Manges* as equating the quasi-fiduciary and utmost good faith duties.⁸⁷ In *Mims*, the court reasoned that the duty of “utmost good faith” requires the executive to acquire for the nonexecutive “every benefit that he exacts for himself.”⁸⁸ The appellate court agreed with the judgment in *Manges*, concluding that a “malicious breach of a fiduciary duty will support an award of exemplary damages.”⁸⁹

The next important case occurred in 2003 with *In re Bass*.⁹⁰ Although the court reaffirmed the standard of conduct under *Manges*, it essentially distinguished *Manges* by holding that no fiduciary duty is owed to the nonexecutive if the executive does not first enter into an oil and gas lease.⁹¹ In *Bass*, the mineral estate owner, Bass, owned a tract of about 22,000 acres, which was burdened by two 1/3rd of 1/8th interests of non-participating royalty owners.⁹² In the mid-90s, Bass contracted with Exxon to run a seismic survey on the land but had never entered into a lease.⁹³ The McGills, heirs of one-third of that royalty interest, sued Bass for breaching an implied duty to them by refusing to lease the minerals;⁹⁴ additionally, the “McGills argued that Bass had breached his fiduciary duty to the royalty interest owners by refusing to develop the minerals.”⁹⁵ As proof of the alleged breach, the McGills sought discovery from Bass of the privileged seismic data,⁹⁶ asserting that the data would reveal whether development would be profitable.⁹⁷

86. *Id.* (citing *Manges*, 673 S.W.2d at 184–85) (holding that a mineral estate owner owes non-participating royalty interest owners a duty of good faith and utmost fair dealing to develop the mineral estate). Note that this “fiduciary duty” set forth in *Manges* is less strict than the “strict fiduciary” duty found in the trustee-beneficiary relationship. See *Schlittler v. Smith*, 101 S.W.2d 543, 545 (Tex. 1937). This Article thus refers to it as a “quasi-fiduciary” duty even though subsequent court decisions continue to refer to the duty as a “fiduciary duty.”

87. Beatty & Ehrman, *supra* note 10, at 24 (citing *Mims v. Beall*, 810 S.W.2d 876, 878–79 (Tex. App.—Texarkana 1991, no writ)).

88. *Mims*, 810 S.W.2d at 879.

89. *Id.* at 881 (citing *Manges*, 673 S.W.2d at 184–85).

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

91. *Id.* at 744–45.

92. *Id.* at 737–38.

93. *Id.* at 738.

94. *Id.* at 737–38.

95. Beatty & Ehrman, *supra* note 10, at 25 (citing *Bass*, 113 S.W.3d at 738).

96. *Bass*, 113 S.W.3d at 738.

97. *Id.*

The Texas Supreme Court held that the trial court abused its discretion in compelling discovery because the McGills failed to prove a breach of fiduciary duty.⁹⁸ Here, the court first analyzed whether Bass owed the McGills a duty to develop Bass's land under a fiduciary duty. The court began its analysis with the statement that a fiduciary duty arises out of "agency law based upon a special relationship between two parties,"⁹⁹ whereas 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."¹⁰⁰ The court noted that "these two duties are distinct and have developed under different legal theories."¹⁰¹ Next, the court examined the interest owned by the McGills, classifying it as a non-participating royalty interest.¹⁰² Because the court defined all such interests as nonexecutive interests, the relationship between Bass and the McGills was therefore one between an executive and nonexecutive.¹⁰³ Following *Manges*, an executive owes a nonexecutive a fiduciary duty; so Bass owed the McGills "a duty to acquire every benefit for the McGills that Bass would acquire for himself."¹⁰⁴

Relying on the facts in *Schlittler*, the *Bass* court stated "that the executive owes a duty of the utmost good faith dealing to protect the amount of the grantor's royalty only after a mineral lease is executed."¹⁰⁵ As Bass did not execute an oil and gas lease, the court concluded that Bass's duty to protect the McGills' royalty interest did not arise.¹⁰⁶ The court further concluded that *Manges* also supported the premise that execution of an oil and gas lease is required before a fiduciary duty is imposed.¹⁰⁷ It noted that *Manges* may be distinguished from *Bass* in that *Bass* did not

98. *Id.* at 745; *Lesley v. Veterans Land Bd.*, 352 S.W.3d 479, 490 (Tex. 2011).

99. *Bass*, 113 S.W.3d at 743 (citing *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 200 (Tex. 2002)).

100. *Beatty & Ehrman*, *supra* note 10, at 25 (citing *Bass*, 113 S.W.3d at 743).

101. *Bass*, 113 S.W.3d at 743.

102. *Id.* at 745.

103. *Id.* at 745 n.2 (citing *Plainsman Trading Co. v. Crews*, 898 S.W.2d 786, 789–90 (Tex. 1995) (citing *Lee Jones, Non-Participating Royalty*, 26 TEX. L. REV. 569, 569 (1948) ("A nonparticipating royalty interest consists of '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, oil, gas, and mineral leases executive by the owner of the mineral fee estate.'"))).

104. *Beatty & Ehrman*, *supra* note 10, at 25 (citing *Bass*, 113 S.W.3d at 744–45).

105. *Id.* (citing *Bass*, 113 S.W.3d at 744). See discussion *supra* Part III.B.

106. *Bass*, 113 S.W.3d at 745.

107. *Id.*

involve evidence of self-dealing;¹⁰⁸ therefore “[b]ecause Bass ha[d] not acquired any benefits for himself, through executing a lease, no duty ha[d] been breached.”¹⁰⁹

C. Lesley v. Veterans Land Board and Its Effect on Executive Right Jurisprudence

Critically, *Lesley* is the first modern executive right case where the goals of the parties conflicted—the executive *did not* want mineral development while the nonexecutive did. In *Lesley*, Betty Yvon Lesley and others (collectively, “Lesley”) conveyed about 4,100 acres of land southwest of Fort Worth in 1998 to the predecessor of Bluegreen Southwest One, L.P. (“Bluegreen”), a real estate developer.¹¹⁰ The conveyance was done in two deeds that conveyed the property in two separate tracts.¹¹¹ Each deed contained a reservation of part of Lesley’s half undivided mineral interest.¹¹² In addition to the property, Bluegreen acquired the executive right in the entire 4,100-acre mineral estate, which was “the full, complete and sole right to execute oil, gas and mineral leases covering all the oil, gas and other minerals in the following described land.”¹¹³ Accordingly, after the Bluegreen acquisition, Lesley became a nonexecutive mineral interest owner and Bluegreen became the fee simple owner and executive of the 4,100-acre mineral estate. The successors of Wyatt and Mildred Hedrick (collectively, “Hedrick”), who owned the other half undivided mineral interest of the estate, also became nonexecutive mineral interest owners.¹¹⁴

Subsequent to its acquisition, Bluegreen developed the property into the 1,200 lot subdivision of “Mountain Lakes” and added restrictive covenants to “enhance[] and protect[] the value,

108. *Id.*

109. *Id.*

Because *Manges* held that the executive owes the nonexecutive a fiduciary duty, the McGills correctly state that Bass owes them a duty to acquire every benefit for the McGills that Bass would acquire for himself. . . . What differentiates this case 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 right 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*. . . . [W]ithout exercising his power as an executive, Bass has not breached a fiduciary duty to the McGills as nonexecutives.

Id.

110. *Lesley v. Veterans Land Bd.*, 352 S.W.3d 479, 481 (Tex. 2011); Ehrman, *supra* note 46, at 8.

111. *Lesley*, 352 S.W.3d at 481 n.6.

112. *Id.* at 481.

113. *Id.*

114. *Id.*

desirability and attractiveness' of the subdivision."¹¹⁵ In particular, the covenants included a provision prohibiting "commercial oil drilling, oil development operations, oil refining, quarrying or mining operation."¹¹⁶ These covenants, recorded in a Declaration of Covenants,¹¹⁷ could be "modified or abrogated by the written agreement or signed ballot of two-thirds . . . of the Owners (including the Developer) entitled to vote."¹¹⁸ Finally, Bluegreen's deeds, which conveyed the lots to about 1,700 owners, "included the mineral interest, excepting only the restrictive covenants and the mineral interests previously reserved" to Lesley and the other undivided mineral interest owner.¹¹⁹ Absent from the deeds was any mention or reference to the executive right.¹²⁰

Meanwhile, in the mid-to-late 2000s, there was an eruption of oil and gas activity as Barnett Shale development occurred. The Barnett Shale is a hydrocarbon-rich formation in North Texas and is one of the nation's richest natural gas deposits.¹²¹ Exploration and production companies and leasing agents raced through these Shale communities to acquire the valuable mineral leases. The associated lease bonus amounts surged to \$30,000 per mineral acre in some of the core areas.¹²²

Not surprisingly, Lesley and Hedrick desired to benefit from the Barnett Shale activity and so, in 2005, they sued Bluegreen and the Mountain Lakes lot owners. One of the lot owners was the Veterans Land Board of the State of Texas (the "Veterans Land Board" or the "Board").¹²³ In part, their lawsuit complained about the restrictive covenants limiting mineral development.¹²⁴ The trial court's order on the various motions for summary judgment

115. *Id.* The author notes that during her travels in Erath County, Texas, she has failed to notice any "mountains," but she has visited the excellent Old Doc's Soda Shop and Dublin Bottling Works in Dublin.

116. *Id.*

117. *Veterans Land Bd. v. Lesley*, 281 S.W.3d 602, 620 (Tex. App.—Eastland 2009) (subsequent history omitted), *noted in* D. Davin McGinnis & Olga Kobzar et al., *Recent Developments in Texas and United States Energy Law*, 5 TEX. J. OIL, GAS, & ENERGY L. 131, 140 (2009); Ehrman, *supra* note 46, at 8.

118. *Lesley*, 352 S.W.3d at 481–82; Ehrman, *supra* note 46, at 8–9.

119. *Lesley*, 352 S.W.3d at 482; Ehrman, *supra* note 46, at 9.

120. *Lesley*, 352 S.W.3d at 482.

121. *Id.*; *Information on the Barnett Shale*, NAT. GAS INTELLIGENCE, <http://www.naturalgasintel.com/barnettinfo#top> [<https://perma.cc/FH4L-ST38>] (last visited Mar. 13, 2018).

122. Steve Kaskovich, *The Barnett Shale Blues*, D MAGAZINE (Mar. 2013), <https://www.dmagazine.com/publications/d-ceo/2013/march/the-barnett-shale-blues/> [<https://perma.cc/5JJJ-P9RZ>]; Ehrman, *supra* note 46, at 9.

123. *Lesley*, 352 S.W.3d at 482; Ehrman, *supra* note 46, at 9. The petitioner's original lawsuit was filed in the 266th Dist. Ct. Erath Cnty., TX, Cause No. CV 28, 679. *Lesley*, 352 S.W.3d at 479.

124. *Id.* at 482.

and the Veterans Land Board's plea to the jurisdiction issued declarations with respect to the reformation of Lesley's deeds, limitations, and the immunity of the Board.¹²⁵ As these issues are outside the scope of the executive rights topic, this paper will not discuss those issues and their subsequent treatment on appeal. In addition to the foregoing issues, the trial court found the following with regards to the executive right:

- Bluegreen's deeds to the lot owners *did not* convey the executive right.¹²⁶ Therefore Bluegreen remained the sole and exclusive owner of the right.¹²⁷
- Bluegreen, as executive, breached its duty to Lesley and Hedrick by: (1) imposing restrictive covenants forbidding mineral development; and, (2) failing to lease the minerals.¹²⁸
- Even though Bluegreen remained the sole and exclusive owner of the executive right, Lesley and Hedrick had the right to develop their mineral interests themselves (i.e., the self-help remedy).¹²⁹

Bluegreen and about 460 of the individual lot owners, including the Board, appealed the trial court's order to the Texas Court of Appeals in Eastland.¹³⁰ In 2009, the Eastland Court reversed the trial court's order in its entirety.¹³¹ On executive rights, it held that:

- "Bluegreen's deeds to the lot owners did not expressly reserve the executive right, and it could not be excepted by implication with the restrictive covenant, so it passed to the lot owners."¹³²
- The executive "owes a mineral interest owner no duty until the right is exercised by leasing the minerals, and then its duty is only to acquire for the mineral interest owner every benefit it acquires for itself."¹³³ Bluegreen, having never exercised the executive right, thus owed no duty to Lesley and Hedrick.¹³⁴

125. *Id.*

126. *Id.* (emphasis added).

127. *Id.*

128. *Id.*

129. *Lesley*, 352 S.W.3d at 482; Ehrman, *supra* note 46, at 10.

130. *Lesley*, 352 S.W.3d at 482 (citing *Veterans Land Bd. v. Lesley*, 281 S.W.3d 602, 602–03 (Tex. App.—Eastland 2009)).

131. *Lesley*, 352 S.W.3d at 482; Ehrman, *supra* note 46, at 10.

132. *Lesley*, 352 S.W.3d at 482–83 (citing *Veterans Land Bd.*, 281 S.W.3d at 616–17).

133. *Id.* at 483 (citing *Veterans Land Bd.*, 281 S.W.3d at 618–19).

134. *Id.* (citing *Veterans Land Bd.*, 281 S.W.3d at 618–19).

- Lesley and Hedrick’s right to develop their own minerals passed to Bluegreen along with the executive right.¹³⁵ That is, the nonexecutive has no right to develop its minerals.¹³⁶

Lesley and Hedrick appealed to the Supreme Court of Texas, which granted their petition for review.¹³⁷ On August 26, 2011, the court issued its opinion.¹³⁸

The court reviewed two main issues with respect to executive rights: (1) whether the executive right was conveyed by Bluegreen’s deeds to the individual lot owners; and, (2) the nature of the duty owed by the executive to the nonexecutive.¹³⁹

1. *The Conveyancing Issue.* In reviewing whether Bluegreen conveyed the executive right to the individual lot owners through their deeds, the court briefly touched upon the history of the executive right, as discussed above in Part II.¹⁴⁰ Beginning with *Day & Co.*, the court noted the similarities in circumstances to those in *Lesley*.¹⁴¹ In *Day & Co.*, Day was deeded an 80-acre tract, which reserved an undivided one-half mineral interest but expressly conveyed the entire executive right.¹⁴² Day then deeded ten acres to the Shoafs and reserved an undivided one-quarter mineral interest—the deed did not mention the executive right.¹⁴³ The Texas Supreme Court held that the one-quarter mineral interest conveyed by Day to the Shoafs and the one-quarter mineral interest reserved to Day “were each accompanied by the executive right covering that interest”¹⁴⁴ The court reasoned 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 is reserved or excepted in a deed, the executive right covering that interest is also retained unless specifically conveyed. Likewise, when a

135. *Id.* (citing *Veterans Land Bd.*, 281 S.W.3d at 620).

136. *See id.* at 483 (citing *Veterans Land Bd.*, 281 S.W.3d at 620).

137. *Id.*

138. *Id.* at 479.

139. *Id.* at 484, 487.

140. *Lesley*, 352 S.W.3d at 486. *See* discussion *supra* Part II; Ehrman *supra* note 46, at 10.

141. *Lesley*, 352 S.W.3d at 486–487 (citing *Day & Co., Inc., v. Texland Petrol., Inc.*, 786 S.W.2d 667, 668 (Tex. 1990)); Ehrman, *supra* note 46, at 10.

142. *Lesley*, 352 S.W.3d at 468 (citing *Day & Co.* 786 S.W.2d at 668); Ehrman, *supra* note 46, at 11.

143. *Lesley*, 352 S.W.3d at 468 (citing *Day & Co.* 786 S.W.2d at 668).

144. *Id.* (citing *Day & Co.* 786 S.W.2d at 669 n.1 (citations omitted)).

mineral interest is conveyed, the executive right incident to that interest passes to the grantee unless specifically reserved.¹⁴⁵

Using the *Day* court's reasoning, the Texas Supreme Court explained that Bluegreen's deeds to the lot owners conveyed the executive right along with the property as Bluegreen did not specifically except the right.¹⁴⁶ Lesley and Hedrick, though, argued that the deed exception for the restrictive covenant limiting mineral development "effectively reserved the executive right to Bluegreen because the covenant prohibited the lot owners from developing the minerals and thus from leasing them."¹⁴⁷ Lesley and Hedrick, however, did not account for the provision allowing for modification or abrogation by a two-thirds vote of the lot owners.¹⁴⁸ Moreover, the court pointed out that the restrictive covenant deed exception does not withdraw the executive right from the conveyance but rather subjects the exercise of the right to the covenant.¹⁴⁹ So a *limited* executive right—one subject to the mineral development restriction—was conveyed with the property to the lot owners.¹⁵⁰

2. *The Nature of the Duty that the Executive Owes to the Nonexecutive.* In its opinion, the *Lesley* court discussed the nature of the executive right and the preceding case law.¹⁵¹ It noted that revenue for most mineral interest owners comes through oil and gas leasing.¹⁵² Thus, "[i]f the exclusive right to lease the minerals could be exercised arbitrarily or to the non-executive's detriment, the executive power could destroy all value in the non-executive interest, appropriating its benefits for himself or others."¹⁵³ The court then admonished those critical of the judicial support of nonexecutive rights, stating that the "law has never left nonexecutive interest owners wholly at the mercy of the executive."¹⁵⁴

Respondents argued that under *Bass*, an executive who does not lease his land and therefore does not acquire any lease benefits

145. *Id.* (citing *Day & Co.* 786 S.W.2d at 669 n.1 (citations omitted)).

146. *Lesley*, 352 S.W.3d at 486–87.

147. *Id.* at 487.

148. *Id.*

149. *Id.*

150. *See id.* Note that the parties did not address the effect of the executive right covering the lot owners. Lesley and Hedrick argued only that the executive right in their minerals is owned either by Bluegreen or by the lot owners. *Id.* at 487 n.39.

151. *Id.* at 487–91.

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

153. *Id.*

154. *See id.*, noted in *Jones*, *supra* note 103, at 573 (stating that "[i]t seems clear that

for himself, has not breached his duty to the nonexecutive.¹⁵⁵ Lesley and Hedrick countered that Bluegreen's reading of *Bass* placed it in conflict with *Manges*, "which upheld a damage award for a failure to lease," where such failure is in effect "a non-exercise of the executive right."¹⁵⁶

The court disagreed with Lesley and Hedrick's asserted conflict, stating that the damage award in *Manges* was a result of the self-dealing perpetrated by Manges leasing to himself and not the failure to lease to a third-party.¹⁵⁷ In *Manges*, the "tacit assumption . . . was that the minerals would be leased to someone," whereas in *Bass*, "the parties disputed whether the minerals should be leased at all."¹⁵⁸ The court, however, also disagreed with Bluegreen and the lot owners, stating that Respondents could not hide behind *Bass* and argue they had no duty to the nonexecutive because they themselves did not enter into a lease, stating:¹⁵⁹

It may be that an executive cannot be liable to the nonexecutive 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 nonexecutive's detriment, the executive may have breached his duty.¹⁶⁰

But the above *Lesley* holding is not as strong as the one set forth in *Manges*. In *Manges*, the court stated that the "duty requires the holder of the executive right . . . to acquire for the nonexecutive every benefit that he exacts for himself."¹⁶¹ Thus, if the executive does not perform this acquisition, he breaches his duty to the nonexecutive. In contrast, the *Lesley* court held that if the executive's refusal to lease is arbitrary or motivated by self-interest to the detriment of the nonexecutive, then the executive *may* have breached his duty.¹⁶² Here, the court chose to use the

the Texas courts will not leave the royalty owner completely at the mercy of the holder of the exclusive-leasing privilege").

155. *Id.* at 491; *In re Bass*, 113 S.W.3d 735, 745 (Tex. 2003); Ehrman, *supra* note 46, at 12.

156. *Lesley*, 352 S.W.3d at 491; Ehrman, *supra* note 46, at 12.

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

158. *Id.*

159. *Id.*

160. *See id.* at n.78 (disapproving of *Aurora* and *Hlavinka* to the extent they hold differently).

161. *Manges v. Guerra*, 673 S.W.2d 180, 183 (Tex. 1984); Ehrman, *supra* note 46, at 12.

162. *Lesley*, 352 S.W.3d at 491 (emphasis added); 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/?p=188> [<https://perma.cc/8YU6-ELSJ>] (last visited Mar. 18, 2012) [hereinafter Norwood]; Ehrman, *supra* note 46, at 12.

words “may have breached,” which could mean that it is a possibility the executive breached his duty. The Texas Supreme Court failed to state directly that “the executive has breached,” which would be a stronger holding by the court that an arbitrary or selfish refusal to lease by the executive constitutes a breach of fiduciary duty.¹⁶³

Finally, the *Lesley* court declined to issue a general rule on an executive’s failure to lease, stating that it “need not decide here whether as a general rule an executive is liable to a nonexecutive for refusing to lease minerals” because of the differing circumstances within each case.¹⁶⁴ The court explained that Bluegreen did not refuse to lease the 4,100-acre mineral tract; rather, “it exercised its executive right to limit future leasing by imposing restrictive covenants on the subdivision.”¹⁶⁵

Ultimately, the court’s holding favors *Lesley* and Hedrick, stating that Bluegreen “breached its duty to [Lesley] by filing the restrictive covenants.”¹⁶⁶ Although the covenants benefitted only Bluegreen’s interest in the surface estate and its mineral interest was impacted the same as *Lesley*’s and Hedrick’s, the court followed the holding in *Manges*, where *Manges* was found to breach his duty by securing loans for his personal benefit even though he encumbered his own mineral interest as well as the *Guerra*’s.¹⁶⁷

But although *Lesley* appears to offer nonexecutives more protection than *Bass* from executives who fail to lease, its narrow holding does not offer a bright-line rule with regard to an executive’s failure to lease.

3. Other Considerations by the Court.

a) *Bluegreen Could Have Relied on the Accommodation Doctrine.* The court addressed the competing needs of the surface use and the mineral estate.¹⁶⁸ Although Bluegreen acquired the executive right for a specific purpose—to limit mineral development on property set aside for subdivision construction—

163. See *Norwood*, *supra* note 162; Ehrman, *supra* note 46, at 12–13.

164. *Lesley*, 352 S.W.3d at 491; Ehrman, *supra* note 46, at 13.

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

166. *Id.*

167. *Id.*

168. *Id.*

the common law's accommodation doctrine would have provided appropriate protection to the surface owner.¹⁶⁹

b) *Nonexecutives Do Not Have the Right to Develop Their Own Wells*. Petitioners Lesley and Hedrick, joined by the General Land Office as amicus curiae, argued the nonexecutive retains the right of development if the executive owes no duty to the nonexecutive to lease its minerals.¹⁷⁰ The court summarily disposed of this argument, pointing out “the right to develop is a correlative right and passes with the executive rights.”¹⁷¹

The court thus affirmed in part and reversed in part and remanded the case to the trial court for further proceedings.¹⁷²

D. *Executive Right Jurisprudence Following Lesley v. Veterans Land Board*

Two major executive right cases emerge out of Texas following *Lesley*. The first is *KCM Financial LLC v. Bradshaw*, in 2015,¹⁷³ and the second is *Texas Outfitters v. Nicholson*, in 2017.¹⁷⁴

In *KCM Financial LLC v. Bradshaw*, the court examines the nature of the executive duty with respect to a nonparticipating royalty interest. Generally, in *KCM*, the executive leased for a below-market royalty that would be shared with the nonexecutive and obtained an above-market bonus for the benefit of only the executive.¹⁷⁵ The Texas Supreme Court reviewed its prior holdings discussed *supra*, and it confirmed its application of the “utmost good faith” standard, which is lesser than the fiduciary.¹⁷⁶ The high court states:

Our decision today reaffirms a principle that has existed in our jurisprudence for eighty years: An executive owes a duty

169. *Id.* at 492 n.79 (citing Tarrant Cnty. Water Control & Imp. Dist. v. Haupt, Inc., 854 S.W.2d 909, 911 (Tex. 1993) (“The accommodation doctrine, also known as the ‘alternative means’ doctrine, was first articulated . . . as a means to balance the rights of the surface owner and the mineral owner in the use of the surface: ‘Where there is an existing use by the surface owner which would otherwise be precluded or impaired, and where under established practices in the industry there are alternatives available to the lessee whereby minerals can be recovered, the rules of reasonable usage of the surface may require the adoption of an alternative by the lessee.’”)).

170. *Lesley*, 352 S.W.3d at 492; Ehrman, *supra* note 46, at 14.

171. *Lesley*, 352 S.W.3d at 492 (citing French v. Chevron, U.S.A., Inc., 896 S.W.2d 795, 797 n.1 (Tex. 1995)).

172. *Id.*

173. *KCM Fin., LLC v. Bradshaw*, 457 S.W.3d 70 (Tex. 2015).

174. *Tex. Outfitters v. Nicholson*, 534 S.W.3d 65 (Tex. App.—San Antonio 2017, pet. filed).

175. *KCM Fin.*, 457 S.W.3d at 79.

176. *Id.* at 83.

of utmost good faith and fair dealing to a non-executive and is prohibited from engaging in self-dealing in connection with the formation of a mineral-lease agreement. However, the failure to obtain a market-rate royalty does not, in and of itself, constitute a breach of that duty. Texas law imposes no such obligation, and given the relative rights and interests that are implicated in negotiating the terms of a mineral lease, such a requirement would have the effect of depriving the executive of its exclusive right to make and amend leases.¹⁷⁷

Thus, *KCM* involved an executive that entered into an oil and gas lease where the dispute centered around whether the lease terms were fair to the nonexecutive or involved self-dealing on the part of the executive.¹⁷⁸ In contrast, *Texas Outfitters* deals with an executive who refused to lease. And unlike *Bass* and *Lesley*, the *Texas Outfitters* court finds that the executive right holder failed to carry out his duty as the executive by refusing to enter into an oil and gas lease.

In *Texas Outfitters*, the Carters owned a 1,082-acre tract and 50% of its mineral interest in Frio County, Texas.¹⁷⁹ Their relatives, the Hindeses, owned the remainder 50% mineral interest.¹⁸⁰ In 2002, Frank Fackovec, the sole owner of Texas Outfitters, purchased the surface, the executive right, and a 4.16% royalty interest for \$1 million from Dora Jo Carter, who “partially owner-financed the sale.”¹⁸¹ Fackovec purchased the property to operate a hunting business.¹⁸² In 2010, the Carters were offered oil and gas leases—a March 2010 lease with a 22% royalty and \$450 per acre bonus and a June 2010 lease from El Paso Exploration & Production Company, which offered a 25% royalty and \$1,750 per acre bonus.¹⁸³ It is this El Paso lease that is the subject of contention between the parties. During a meeting between Fackovec and Dora Jo Carter regarding the leasing propositions, Fackovec informed Carter that he had developed his hunting business into a deer breeding operation and thus had no interest in leasing.¹⁸⁴

177. *Id.* at 89.

178. For further analysis of the *KCM* case, please refer to Christopher S. Kulander, *The Executive Right to Lease After KCM Financial LLC v. Bradshaw and a Louisiana Solution to a Texas Problem*, 48 ST. MARY’S L.J. 637, 652–64 (2017).

179. *Tex. Outfitters*, 534 S.W.3d at 68.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.* at 69.

Over the course of one year, the Carters and Fackovec entered into negotiations and settlement discussions, which were all unsuccessful.¹⁸⁵ The Carters then sued Texas Outfitters, alleging breach of the duty of utmost good faith and fair dealing by failing to lease.¹⁸⁶ After the filing of the lawsuit, Texas Outfitters received two offers to lease, but no lease was executed.¹⁸⁷ Texas Outfitters sold the surface and executive right to a third-party purchaser for \$4.5 million.¹⁸⁸ During the subsequent bench trial, the trial court admitted the parties' correspondence, which included (i) various iterations to settle; (ii) the Hindeses' lease with El Paso, and (iii) the mineral deed that Dora Jo Carter had executed in favor of Texas Outfitters.¹⁸⁹ The court found for the Carters, awarding them \$867,654.32,¹⁹⁰ and made findings of fact and conclusions of law.¹⁹¹ Most importantly, the trial court found that Texas Outfitters breached its duty as an executive to the Carters by refusing to execute a lease.¹⁹²

Texas Outfitters appealed, but the San Antonio appellate court affirmed. In its analysis of *Lesley*, the San Antonio court affirmed that: (1) "the executive owes other owners of the mineral interest a duty of 'utmost fair dealing'"; (2) the executive duty is not a fiduciary duty; and (3) the executive can breach its duty either when executing a lease (self-dealing) or by refusing to execute a lease.¹⁹³

Appellant Texas Outfitters presented four issues on appeal. In addition to three evidentiary issues, it questioned whether its decision to defer leasing in an attempt to obtain a higher bonus was "an act of self-dealing that . . . unfairly diminished the value of the non-executive interest."¹⁹⁴ The court held that there was sufficient evidence that Texas Outfitters refused to execute any leases to protect its pre-existing surface use, and therefore the evidence supported a finding that Texas Outfitters breached its

185. *Id.*

186. *Id.* at 70.

187. *Id.*

188. *Id.*

189. *Id.*

190. The damages amount is the amount of bonus the Carters would have received had Texas Outfitters executed the El Paso oil and gas lease. John McFarland, *Texas Outfitters v. Nicholson – the Duty of the Holder of the Executive Right to Lease*, OIL AND GAS LAW BLOG (Aug. 24, 2017), <https://www.oilandgaslawyerblog.com/2017/08/texas-outfitters-v-nicholson-duty-holder-executive-right-lease.html> [<https://perma.cc/JNS6-CA9U>].

191. *Tex. Outfitters*, 534 S.W.3d at 70.

192. *Id.*

193. *Id.* at 71.

194. *Id.* at 72.

executive duty by refusing to execute an oil and gas lease.¹⁹⁵ In a detailed review of the various negotiations and settlement discussions between the Carters and Texas Outfitters, the court decided that the evidence established that “Texas Outfitters’ refusal to lease was arbitrary or motivated by self-interest to the Carters’ detriment.”¹⁹⁶

In *Texas Outfitters*, sufficient evidence supported the trial court’s finding that Texas Outfitters breached its executive duty by its refusal to lease.¹⁹⁷ However, in upholding judgment for the Carters, the court cautioned that its opinion was not a rule or principal supporting the proposition that an executive is liable to a non-executive for a mere failure to execute any oil and gas lease.¹⁹⁸ It added that this opinion “should not be understood as announcing any rule or principal beyond those the supreme court announced in *Lesley* or *KCM Financial*.”¹⁹⁹ And so, after more than a half century after *Pan American Petroleum*, there is still no clear resolution or solution to the executive right problem.

IV. POTENTIAL RESOLUTIONS FOR THE EXECUTIVE RIGHT PROBLEM

There are various strategies that can be deployed to attempt a resolution of the executive right problem. These solutions are as follows: (1) non-retroactive prohibition of executive right severance; (2) adverse possession of the executive right; (3) employment of a variable standard of conduct; (4) enacting legislation similar to dormant mineral acts, which would render an automatic reversion of the executive right to the mineral estate after a statutory period of time; (5) judicial construction of an implied covenant or covenant that runs with the land to develop the mineral estate, which would arise out of the instrument severing the executive right.

A. *Non-Retroactive Prohibition of Executive Right Severance*

Prohibiting severance of the executive right from the associated mineral interest is not a solution for past severances and ensuing conflicts. Rather, it addresses future conflicts by disallowing the separation of the cake from the right to eat it. This prohibition, however, is likely to be found an unreasonable

195. *Id.* at 77.

196. *Id.* at 78.

197. *Id.* at 80–81.

198. *Id.* at 80.

199. *Id.*

restraint against alienation and therefore unconstitutional.²⁰⁰ Moreover, it could not apply retroactively since any retroactive application would also likely be found unconstitutional.²⁰¹

B. Adverse Possession of the Executive Right

Adverse possession is a mechanism rewarding utility in real property by awarding the adverse possessor a legal claim to title by satisfying certain statutory or common law requirements. “The doctrine of adverse possession is based on statutes of limitation for recovery of real property.”²⁰² These statutes “operate to bar one’s right to recover real property held adversely by another for a specified period of time . . . [and] vest the adverse possessor with as perfect title as if there had been a conveyance to the adverse possessor by deed.”²⁰³ Further, these limitation statutes:

[F]unction to suppress dormant claims and quiet titles . . . for the purposes to require diligence on the part of landowners and to penalize landowners who sit on their rights too long, and to reward the economic activities of a possessor who is utilizing land more efficiently than the true owner is.²⁰⁴

To acquire title to real property by adverse possession, the possession must satisfy the statutory period and must be: (1) actual; (2) open, visible, and notorious; (3) exclusive; (4) continuous; and, (5) hostile and under a claim of right.²⁰⁵ Applying these elements to the executive right is difficult. The executive right encompasses the right to execute an oil and gas lease and presumably self-development of the mineral estate.²⁰⁶ Self-development appears to be capable of satisfying all five elements. But executing an oil and gas lease likely satisfies only the first, second, third, and fifth elements. It is the fourth element of continuity that poses a problem. The action of lease execution is not a continuous event but could result in a continuous event—

200. *Williams v. Williams*, 73 S.W.3d 376, 380 (Tex. App.—Houston [1st Dist.] 2002, no pet.) (“A general restraint on the power of alienation, when incorporated in a deed or will otherwise conveying a fee simple right to the property, is void.”).

201. *See Mellinger v. City of Houston*, 3 S.W. 249, 252 (Tex. 1887) (“[N]o bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts shall be made,” (Const. art. 1, § 16) thus giving protection to rights, by prohibiting the enactment of retroactive laws, which the constitution of the United States does not give in terms”) (quoting TEX. CONST. art. I, § 16).

202. HERBERT HOVENKAMP ET AL., *THE LAW OF PROPERTY: AN INTRODUCTORY SURVEY* § 4.2 (6th ed. 2014).

203. *Id.*

204. *Id.*

205. *Id.* at 54–55.

206. *See supra* notes 3–4 and accompanying text.

production of oil and gas. In order to give effect to adverse possession by lease execution, a court would have to hold that continuously attempting lease execution for a period of years or lease execution that results in production for the requisite period of years would satisfy the element.

Ultimately, adverse possession by method of lease execution is not likely to emerge as a successful strategy to the executive-right problem. Any potential lessee, when running a mineral title search, would notice record severance of the executive right and would neither risk claims of trespass nor drill an illegal well. Adverse possession by self-development may offer a solution to a nonexecutive who has oil and gas development knowledge or is willing to take a great risk. After all, if the executive learns of and stops the nonexecutive from self-development, the nonexecutive is likely liable for a range of tort and real property claims. And if the executive sued the nonexecutive who drilled successfully, the executive has just been given the gift of a “free well.”

C. *Employment of a Variable Standard of Conduct*

As examined above, courts have spent decades analyzing the duty of care owed by the executive to the nonexecutive. This duty has evolved from a pre-*Manges* utmost good faith standard to a post-*Manges* quasi-fiduciary standard. But post-*Manges*, courts are reluctant to stray from the quasi-fiduciary standard and commence their analysis with that standard. They then create exceptions to the *Manges* quasi-fiduciary duty, explaining why this higher duty does not apply.

After *Manges*, in *Bass*, where there was not an indication of the *Manges* self-dealing, the court could have easily distinguished *Bass* from *Manges* with a simple statement that the quasi-fiduciary duty applies in cases like *Manges*, where self-dealing was an issue; whereas cases such as *Bass* require a lower duty. Likewise, the *Lesley* court also had an opportunity to clarify the failure-to-lease issue by expressly indicating that a refusal to lease on malicious or bad-faith intent was a breach of quasi-fiduciary duty while the utmost good faith standard governed a refusal to lease based on economics or another satisfactory reason. But none of these cases did, instead crafting exceptions to the *Manges* standard.

So is the quasi-fiduciary standard the correct standard to begin all analyses of executive right duty cases? In fact, it is infinitely more logical and practical to first analyze the facts at hand and then choose an appropriate standard of care, rather than

automatically beginning with the quasi-fiduciary standard and creating multiple exceptions.²⁰⁷

1. Overview of the Various Duties Applicable in Executive Rights Cases.

The standard of duty “imposed on the executive by the courts has ranged from that of fiduciary to that of ordinary care and good faith.”²⁰⁸ There are four basic types of standards that may be applied in executive duty cases: (1) strict fiduciary;²⁰⁹ (2) quasi-fiduciary; (3) utmost good faith and fair dealing; and, (4) ordinary care and good faith.²¹⁰

A strict fiduciary duty is akin to the duty imposed on the trustee to the beneficiary and is the highest of all duties. It requires the executive to subordinate his interests to those of the nonexecutive.²¹¹ The quasi-fiduciary duty is often referred to as the “fiduciary duty” in executive rights cases, but the quasi-fiduciary duty requires only that the executive “acquire for the nonexecutive every benefit he exacts for himself.”²¹² Below the quasi-fiduciary duty, the duty of utmost good faith and fair dealing merely “requires the parties to ‘deal fairly’ with one another and does not encompass the often more onerous burden that requires a party to place the interest of the other party before his own as with the other fiduciary relationships.”²¹³ Finally, the ordinary care and good faith duty requires an executive to exercise the degree of care that a person of ordinary prudence would exercise in the same or similar circumstances, which is similar to the RPO standard discussed earlier.²¹⁴

Trial courts ultimately determine the applicable standard of care via their jury instructions; and disadvantaged parties may appeal their decision to use a particular standard. For example, in *Hope v. Pickens*, the trial court refused to give a fiduciary duty instruction, instead using the “utmost good faith and fair dealing”

207. See Smith, *supra* note 12, at 374.

208. *Pickens v. Hope*, 764 S.W.2d 256, 258 (Tex. App.—San Antonio 1988, writ denied).

209. *E.g.*, *McCall v. Nettles*, 37 So. 2d 635, 637 (Ala. 1948); *Donahue v. Bills*, 305 S.E.2d 311, 313 (W. Va. 1983), *noted in* Smith, *supra* note 12, at 372 n.2.

210. *Bradshaw v. Steadfast Fin., L.L.C.*, 395 S.W.3d 348, 361 (Tex. App.—Fort Worth 2013, pet. submitted); *e.g.*, *Gardner v. Boagni*, 209 So. 2d 11 (La. 1968); *Rio Algom Corp. v. Jimco Ltd.*, 618 P.2d 497 (Utah 1980), *noted in* Smith, *supra* note 12, at 372.

211. Smith, *supra* note 12, at 373.

212. *Manges v. Guerra*, 673 S.W.2d 180, 183 (Tex. 1984).

213. Jim Hartnett, Jr., *Fiduciary Duties & Liability—Case Law Update: 23rd Annual Litigation Update*, ST. B. OF TEX., at 5 (2007) (citing *Crim. Truck. & Tractor Co. v. Navistar Int'l Transp. Corp.*, 823 S.W.2d 591, 594 (Tex. 1992)).

214. *Pickens v. Hope*, 764 S.W.2d 256, 265 (Tex. App.—San Antonio 1988, writ denied). See *supra* Part III.A.

instruction.²¹⁵ The nonexecutive, Hope, appealed, arguing that a *Manges* or quasi-fiduciary duty instruction should have been given.²¹⁶ The appellate court disagreed, stating that the higher fiduciary standard did not apply and affirmed the instruction.²¹⁷ The appellate court concluded that the executive did not owe the nonexecutive a (quasi) fiduciary duty under *Manges*, “distinguish[ing] *Manges* on the basis of cotenancy and *Manges*’s self-dealing.”²¹⁸

2. *Determining When the Various Duties Apply.*

a) *Strict Fiduciary.* The strict fiduciary standard is seldom used in executive rights duty cases apart from certain situations, including when: (1) an express trust is created; (2) close family members turn over management of their oil and gas affairs to the member with special business expertise; or, (3) if a partnership is formed.²¹⁹ It was likely never adopted because of the commercial nature of executive rights transactions and generally:

[T]he imposition of a fiduciary duty seems improper. Business people carrying out arms-length transactions have no reason to expect any standard of conduct other than simple good faith—that is, an obligation not to defraud and not to act in bad faith, and an obligation to carry out the purpose of the transaction with reasonable diligence.²²⁰

However, one important situation that may require the adoption of the strict fiduciary standard is when the nonexecutive’s interest is affected by third-party drainage. In that case, the executive should have to intervene on behalf of the nonexecutive to (i) execute a lease, (ii) drill a protective well, or (iii) pay the nonexecutive compensatory royalties.

b) *Quasi-fiduciary.* To determine if the quasi-fiduciary duty applies, courts must first classify the relationship of the parties and then must review the terms of the rights-creating instrument or contract.

i. *Classify the Parties’ Relationship.* Applying the quasi-fiduciary duty may not be warranted if the parties’ relationship does not justify this higher standard. The quasi-fiduciary duty has its roots specifically in relationship theory and generally in agency

215. *Bradshaw*, 395 S.W.3d at 361 (quoting *Pickens*, 764 S.W.2d at 264, 267).

216. *Id.* (quoting *Pickens*, 764 S.W.2d at 266).

217. *Id.*

218. *Id.*

219. Smith, *supra* note 12, at 373.

220. *Id.*

law.²²¹ The relationship theory traces its origins to *Manges*, where the court held:

The duty of utmost good faith owed by an executive has been settled since *Schlittler v. Smith* . . . *The fiduciary duty arises 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 the express 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 nonexecutive every benefit that he exacts for himself.²²²

In *Manges*, even though the relationship between Manges and the Guerras was that of mineral interest co-tenants, Manges held the executive right over the Guerras' interest.²²³ Manges's executive authority over the entire mineral interest resulted in the Guerras' complete dependency on Manges's actions to develop their interest. The parties relationship as co-tenants, in addition to Manges's obvious self-dealing, the court applied the quasi-fiduciary standard.²²⁴

Moreover, the *Bass* court asserted that the "fiduciary duty arises out of agency law based upon a special relationship between two parties."²²⁵ But 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."²²⁶ The court noted that "these two duties are distinct and have developed under different legal theories."²²⁷

Thus, the relationship theory itself arose from agency law, whereby "[a]n agent is a fiduciary with respect to matters within the scope of his agency."²²⁸ Specifically, there are two types of fiduciary relationships: formal and informal.²²⁹ Fiduciary relationships created by statute, common law, or sometimes contract are deemed "formal relationships," while relationships

221. *Bradshaw*, 395 S.W.3d at 368–69.

222. *Manges v. Guerra*, 673 S.W.2d 180, 183 (Tex. 1984) (citations omitted) (emphasis added).

223. *Bradshaw*, 395 S.W.3d at 359–60.

224. *Id.* at 364.

225. *In re Bass*, 113 S.W.3d 735, 743 (Tex. 2003) (citing *Danciger Oil & Ref. Co. v. Powell*, 154 S.W.2d 632, 635 (Tex. 1941)).

226. *Id.* at 743 (citing *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 200 (Tex. 2002)).

227. *Id.*

228. RESTATEMENT (SECOND) OF AGENCY § 13 (1958).

229. *See Tex. Bank & Tr. Co. v. Moore*, 595 S.W.2d 502, 507 (Tex. 1980); Hartnett, *supra* note 213, at 2.

created by facts are classified as “informal relationships.”²³⁰ These informal relationships arise “where one person trusts in and relies upon another, whether the relation is a moral, social, domestic or merely personal one.”²³¹

Examples of fact patterns that give rise to informal fiduciary relationships include: (1) where the parties trust or rely upon one another;²³² (2) where there is an acquisition of a high degree of trust, influence, or confidence;²³³ and, (3) “where there is “[d]ominance by one [party] and weakness and dependence by the other.”²³⁴ Applying these patterns to breach of executive duty cases helps determine whether the executive should be held to the quasi-fiduciary standard.

The executive-nonexecutive relationship is an informal relationship, created by fact. Although a contract or instrument is involved in the creation of executive rights, the writing does not create the relationship between the parties. Rather, the instrument that severs the executive rights from the mineral interest or assigns the executive rights creates only the parties; but the facts of the case determine the nature of the relationship.

ii. Review the Instrument’s Terms. Post-*Manges*, Texas appellate courts have focused also on the terms of the deed reservations or instruments, in addition to the parties’ relationships.²³⁵ For example, in *Comanche Land & Cattle Co. v. Adams*, the relationship between the parties was that of non-participating royalty interest owner²³⁶ and executive—not mineral co-tenants, as in *Manges*. But there the court “held that the executive breached its fiduciary duty when it entered into a joint venture mining agreement with another business entity that defeated the rights of the royalty owners.”²³⁷ The plaintiffs

230. Hartnett, *supra* note 213, at 2.

231. *Crim. Truck. & Tractor Co. v. Navistar Int’l Transp. Corp.*, 823 S.W.2d 591, 594 (Tex. 1992).

232. *Id.*; *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 176 (Tex. 1997).

233. Hartnett, *supra* note 213, at 4.

234. *Id.*

235. *Bradshaw v. Steadfast Fin., L.L.C.*, 395 S.W.3d 348, 360 (Tex. App.—Fort Worth 2013, pet. submitted).

236. *Plainsman Trading Co. v. Crews*, 898 S.W.2d 786, 789–90 (Tex. 1995).

A non-participating royalty interest . . . may be 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, oil, gas, and mineral leases executed by the owner of the mineral fee estate.

Id.

237. *Kulander*, *supra* note 9, at 48 (citing *Comanche Land & Cattle Co. v. Adams*, 688 S.W.2d 914, 916 (Tex. App.—Eastland 1985, no writ)).

conveyed both the minerals and executive rights to Comanche, reserving a twenty-year term and one-half royalty interest on all royalties.²³⁸ Comanche then entered into a joint venture mining agreement with another party, which explicitly provided for no royalty.²³⁹ Thus, the executive in *Comanche* could completely control the amount of production accruing to the royalty owner, and it was in a position to manage and manipulate the share of production to which the nonexecutive was entitled.²⁴⁰

iii. Utmost Good Faith and Fair Dealing. Simply stated, the utmost good faith standard should be used where the quasi-fiduciary standard does not apply. In general, the nonexecutive is typically a royalty interest owner with a set or fixed royalty, unlike the variable royalty interest owner in *Comanche*. For example, in *Pickens v. Hope*, the court held that “[b]ecause, however, the non-participating royalty owner must depend upon the mineral fee owner for the enjoyment of his interest, the courts have implied a covenant of the utmost fair dealing in the exercise of the executive rights to lease or develop the minerals.”²⁴¹

The *Pickens* court “distinguished *Comanche* based on that case’s specific NPRI reservation (a one-half royalty interest on all royalties that might be paid during the term of the reserved interest), as compared to the stated fractional NPRI reserved by Hope’s parents.”²⁴² Thus, the difference on a variable royalty versus a set stated royalty is that:

[W]hereas in *Comanche*, the executive could control the amount of production accruing to the royalty owner and so was in a position to manage and manipulate the share of production to which the nonexecutive would be entitled and could, by other provisions in the lease, obtain benefits that were not obtained by the nonexecutive, none of those possibilities existed as to Hope.²⁴³

3. *Criticism and Support for the Variable Duty Approach.*

With all the variation and limitations imposed on the quasi-fiduciary duty, it is logical to assume that the “standard imposed upon the executive should vary with the nature and purpose of the

238. *Comanche Land & Cattle*, 688 S.W.2d at 915.

239. *Id.*

240. *Bradshaw*, 395 S.W.3d at 361.

241. *Pickens v. Hope*, 764 S.W.2d 256, 263 (Tex. App.—San Antonio 1988, writ denied) (citations omitted).

242. *Bradshaw*, 395 S.W.3d at 361 (citing *Pickens*, 764 S.W.2d at 267).

243. *Id.* (citing *Pickens*, 764 S.W.2d at 267).

transaction.”²⁴⁴ But as Professor Smith indicates, “[t]here are problems of judicial efficiency . . . in attempting to apply varying standards of conduct in accordance with the original purpose of the transaction that created the executive right.”²⁴⁵ These judicial inefficiencies, however, may be offset by the time and resources saved during the appeals of the executive duty standard.

Additional problems may involve the transactional history of the current parties and predecessors-in-interest.²⁴⁶ Professor Smith’s article provides an example whereby a real estate developer acquires the executive right to protect Blackacre’s surface.²⁴⁷ This real estate purchaser—and now executive—should owe no other duty other than good faith to the seller, who reserved a one-half royalty.²⁴⁸ But if the original predecessors-in-interest conveyed their executive rights to another (the current seller), who was an expert in oil and gas leasing, a duty beyond ordinary good faith is certainly owed by the executive to those nonexecutives.²⁴⁹

However, this variable duty approach also has multiple benefits: (1) the executive is aware immediately of his expected standard of care and may appropriately weigh the consequences of his actions; (2) the nonexecutive’s awareness of the standard of care lends certainty to the types of remedies available to him in a suit for breach of duty and provides insight into whether litigious action is warranted given the court’s application of a definite standard; and (3) courts have flexibility to determine the level of duty without the need to begin their analysis with the quasi-fiduciary duty, which may lessen the necessity of appeal on that particular issue.

D. *Enactment of Legislation Similar to Dormant Mineral Acts*

Dormant mineral acts prescribe the reversion of the mineral interest to the surface interest (a merger of interests) following abandonment or nonuse.²⁵⁰ In addition to a prescribed period of time, several other elements similar to those found in abandonment or nonuse must be satisfied.²⁵¹ Application of a mineral dormant act solution is appropriate to the executive right

244. Smith, *supra* note 12, at 374.

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.*

250. Vitauts M. Gulbis, Annotation, *Validity and Construction of Statutes Providing for Reversion of Mineral Estates for Abandonment or Nonuse*, 16 A.L.R.4th 1029, 1031–33 (1982).

251. *Id.* at 1034.

because, like the mineral interest, the executive right is a severed corporeal hereditament—a separate stick in the bundle of sticks.²⁵² And as in the severed surface-mineral interest relationship, the executive right remains independent from the associated mineral interest post-severance.²⁵³ Therefore “mere possession of the surface is not an adverse possession of the minerals,” and likewise the mere possession of the mineral interest is not an adverse possession of the executive right.²⁵⁴ Further, the property interests of the mineral interest and the executive right are similar enough that adoptees could anticipate any legal challenges, such as constitutionality, and craft such statute to clarify legislative intent prior to those challenges being brought.

States have a vested economic interest to encourage exploitation of the mineral interest and have a longstanding tradition of doing so, particularly those that are rich in oil and gas resources.²⁵⁵ Thus, “to encourage the exploitation of mineral resources and clear title of old, unused mineral claims, some states have enacted legislation which changes the common law by permitting the reversion of mineral interests which have remained dormant for a specified number of years to the surface owner.”²⁵⁶ These statutes:

[O]rdinarily provide that if a severed mineral interest remains unused, or if the owner fails to periodically rerecord his interest, after a certain number of years the mineral interest is extinguished and merges with the title of the surface owner. The statute, in effect, may create a presumption of abandonment if the mineral interest remains unused for the statutory period.²⁵⁷

Thus, the state legislature could enact legislation similar to a dormant mineral act, but it would instead result in the reversion of the non-used executive right back to its associated mineral interest. Essentially, the act would provide that if the executive right is not used after a certain number of years, the executive right is extinguished and merges with the title of the mineral interest owner. Aside from the obvious legislative hurdles this

252. *Id.*

253. *Id.*

254. *See id.*

255. *Id.* *See* Coastal Oil & Gas Corp. v. Garza Energy Tr., 268 S.W.3d 1, 26–42 (Tex. 2008) (Willett, J., concurring) (suggesting that the Texas Supreme Court should interpret the law to promote hydraulic fracturing due to the history and importance of oil and gas exploration to the Texas economy).

256. Gulbis, *supra* note 250, at 1034.

257. *Id.*

legislation would have to clear, there are several legal challenges to its validity.

First, there may be constitutional challenges.²⁵⁸ “Although the encouragement of mineral exploitation and facilitating the clearing of titles have been held to be legitimate objectives within the police power of the state, courts have disagreed whether the extinguishment of dormant mineral interests is a reasonable means of meeting the statutory objective.”²⁵⁹ Likewise, certain dormant mineral statutes have been challenged as “unconstitutionally impairing contracts, taking without compensation, and denying procedural and substantive due process.”²⁶⁰

The retrospective effect of dormant mineral acts presents another potential problem.²⁶¹ How far back should the retrospective provision of a dormant mineral act apply to interests created prior to the effective date of the statute?²⁶² With respect to the dormant mineral acts:

[S]ome courts have held that statutory ‘grace periods,’ providing an opportunity for compliance with the statute by owners of mineral interests created before the effective date, are sufficient to comply with due process requirements, other courts have held that the statute cannot be constitutionally applied to interests before the end of a period of time, equal to the statutory period of prescription, after the effective date of the statute.²⁶³

The latter consider “dormant mineral acts as so modifying pre-existing, vested property rights that retrospective application would violate due process.”²⁶⁴

Generally, although there is contrary authority, courts which have determined the constitutionality of statutes providing for the reversion of mineral interests for abandonment or nonuse have concluded that such statutes do not violate the due process, equal protection, or impairment of contract clauses of the state or federal constitutions. The legislative purpose of encouraging the exploitation of mineral resources by facilitating determination of title to such interests has been held to be within the police powers of the state, and, although there is contrary authority, reversion to the surface

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.*

263. Gulbis, *supra* note 250, at 1034.

264. *Id.*

owner has been held to bear a rational relationship to the legislative purposes.²⁶⁵

Enactment of legislation similar to a dormant mineral act may be effective in merging the severed property interests; but a legislative solution, particularly one that proposes infringing upon ownership and removing property rights, is not likely to be successful in the current legislative environment.²⁶⁶

E. Finding an Implied Covenant to Develop the Mineral Estate in the Severing Instrument

Implied covenants are not a novel use in oil and gas law. Historically, they have been used to protect the lessor's interest when such protections are not expressly included in the oil and gas lease.²⁶⁷ Although implied covenants have traditionally been found in the oil and gas lease, it may be beneficial to find implied covenants to develop or lease in the instrument that severs the executive right (e.g., a mineral deed).

There is a strong argument to find such implied covenants in these severing instruments.²⁶⁸ First is that the mineral estate is the dominant estate.²⁶⁹ Removing the executive right from the mineral interest in effect subjugates the mineral interest to the executive right, rendering it servient.²⁷⁰ Therefore, a nonexecutive should be able to file suit against the executive for breach of the implied covenant to lease and develop. If implied covenants arise out of the lease, whereby the mineral interest owner (then lessor) conveys the mineral estate to the lessee, then why shouldn't a nonexecutive have this same recourse? Use of these implied covenants as a protective measure are especially beneficial given that the nonexecutive has fewer remedies against an executive who fails to develop than does the lessor against a lessee who fails to develop.

265. *Id.* at 1037.

266. For more information on Dormant Mineral Acts and their possible application to executive right interests, see Kulander, *supra* note 178, at 690–96.

267. See *Amoco Prod. Co. v. Alexander*, 622 S.W.2d 563, 567 (Tex. 1981).

268. See *Fed. Land Bank of Houston v. U. S.*, 168 F. Supp. 788, 791 (Ct. Cl. 1958). The court states: “We believe as between the mineral fee owner and the royalty owner there is an implied covenant in the deed that the mineral fee owner will use the utmost fair dealing and diligence in obtaining lease agreements in order to protect the royalty owner's interest.” *Id.*

269. See, e.g., *Tarrant Cty. Water Control & Improvement Dist. No. One v. Fullwood*, 963 S.W.2d 60, 65 (Tex. 1998) (“A reservation of the mineral estate gives the grantor the dominant estate. . .”).

270. *Lesley v. Veterans Land Bd. of Tex.*, 352 S.W.3d 479, 487 (Tex. 2011) (“If the exclusive right to lease the minerals could be exercised arbitrarily or to the nonexecutive's detriment, the executive power could destroy all value in the nonexecutive interest.”).

The lessee-lessor analogy is apt because the lessor relies on the lessee, under the RPO standard, to earn revenue (royalty, cost-free share of production). Without production, there is no royalty interest. Like the nonexecutive, the lessor requires production in order to earn revenue.

Each of the above solutions is wrought with deficiencies that fail to completely address the issue between an oppositely-aligned executive and nonexecutive. Even though a variable duty approach may offer a logical solution to the executive duty issue due to the existing standard of conduct approach, the reality is that practitioners are left with a still-vague quasi-fiduciary standard and multiple limitations post-*Manges*. Indeed, what remedies are nonexecutives left with post-*Lesley*? The irony of the quasi-fiduciary executive duty is that though it is a higher duty than the RPO duty owed by a lessee to its lessor, and the remedies available to the breached nonexecutive are far outweighed by those available to the breached lessor. Moreover, the quasi-fiduciary duty standard does not allow removal of the breaching executive, as would a similar breach of fiduciary duty by a trustee to a beneficiary.²⁷¹

The apparent inequity in the relationship between executive and nonexecutive could be better addressed with the familiar implied covenant imposition. But imposing implied covenants similar to those found between the lessor and lessee, including the duty to develop and the duty to protect against drainage, not only raises concerns of undermining free contracting between parties, it also opposes the modern trend of executive rights jurisprudence that has moved away from implied covenants.

V. PRACTICAL SOLUTIONS

Faced with difficulties in adopting any new solutions or waiting for the legislature to adopt a solution, practitioners, executives, and nonexecutives face the challenge of protecting property interest. The easiest solution is likely the use of contract language to mitigate risk of property intentions being disregarded.

A. *Prior to a Severance*

If the severance has not yet occurred, one should ensure that there are contractual obligations or express covenants between the executive and the nonexecutive:

271. See *Manges v. Guerra*, 673 S.W.2d 180, 184–85 (Tex. 1984) (reversing lower court's removal of *Manges* as executive but affirming actual and exemplary damages).

- Set forth the remedies available to the nonexecutive and the duty owed by the executive.
- Insist that the nonexecutive be informed in writing of every leasing offer made to the executive.
- Depending on the nonexecutive's leverage, require that the nonexecutive consent prior to the executive's execution of a lease.
- Consider setting a term limit on the executive right — for five, seven or ten years, etc. Had Lesley limited Bluegreen's executive right to a term of seven years, Lesley would have been able to capture the leasing opportunities in 2005.²⁷²
- Except the right to self-develop from the conveyance of the executive right.²⁷³
- Do not sever the executive right or assign a partial interest in the executive right.

B. After a Severance

If the severance has already occurred, attempt negotiations with the executive:

- Offer a portion of the nonexecutive's mineral interest as worthwhile consideration to receive an agreement that sets forth the expectations and remedies available to both parties. That is, in exchange for receiving a mineral interest or an additional interest, the executive may agree to concrete duties and requirements.
- As a nonexecutive with means, consider an acquisition of the executive right.
- If presented with a lease offer in a competitive area, attempt communications in writing with the executive to negotiate a deal with the potential lessee. A lease signed by the executive and ratified by the nonexecutives is valuable to a lessee, whose Land Department will appreciate the contracted clarification on delivery of royalties. Moreover, a nonexecutive may have a better idea of the whereabouts of an executive, who has not been located by the lessee.

272. See *Lesley v. Veterans Land Bd.*, 352 S.W.3d 479, 481 (Tex. 2011) (noting that the conveyance severing the executive right was in 1998).

273. See generally Christopher S. Kulander, *Big Money vs. Grand Designs: Revisiting the Executive Right to Lease Oil & Gas Interests*, 42 TEX. TECH. L. REV. 33 (2009).

VI. CONCLUSION

In Aesop's fable, "The Bundle of Sticks," an old man on his deathbed summons his sons around him to give them parting advice. He orders his servants to bring in a bundle of sticks and says to his eldest son, "Break it." The son strains, but with all his efforts, is unable to break the bundle. The other sons also try, but none of them are successful. "Untie the bundle," said the father, "and each of you take a stick." When they had done so, he called out to them, "Now, break." And each stick was easily broken. "You see my meaning," said the father, "union gives strength."²⁷⁴

As illustrated by the executive right jurisprudence, separation of property interests does not always result in increased value. The difficulties and inefficiencies in using these individual interests diminish any benefits of transferability and liquidity that could be generated in a property marketplace. One approach to the executive right problem is to simply deny the existence of the executive right. Rather, the right should be a fundamental and integrated component of the mineral estate—inseparable and indivisible.

But prohibition of severance or declaration of indivisibility is neither realistic nor does it address the scores of severed executive rights. The approach taken by the solutions discussed within this Article all have merit, as they do challenges. It is likely that there simply is not a uniform solution to the executive right problem. But the current standard-of-conduct-piecemeal-common-law approach to the executive right is unsatisfactory. Executives and nonexecutives alike must commence protracted and expensive litigation to determine rights, often waiting on appellate courts to hand down rulings governing fact-specific scenarios. A legislative solution mirroring the dormant mineral acts is likely the simplest approach and could follow the well-established example the dormant mineral acts. Present in several states, adoption of an analogous dormant "executive right" act may be a most appropriate and practical answer to the executive right problem. However, there is not currently a climate of legislative harmony that renders this dormant executive right a likely solution. The use of implied covenants in the severing instrument is a more likely solution. Oil and gas jurisprudence is comfortable with implied covenant use and the protections necessary to the nonexecutive support the use of an implied covenant to develop.

274. Beatty & Ehrman, *supra* note 10, at 22 (quoting Aesop, *The Bundle of Sticks*, available at Aesop's Fables, *The Bundle of Sticks*, LIT2GO, <http://etc.usf.edu/lit2go/35/aesops-fables/376/the-bundle-of-sticks/> [<https://perma.cc/P582-9CBH>] (last visited Mar. 30, 2018)).