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THE EXECUTIVE RIGHT TO LEASE AFTER *KCM FINANCIAL LLC V. BRADSHAW* AND A LOUISIANA SOLUTION TO A TEXAS PROBLEM*

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* Portions of this paper, describing the history of the executive right, updated as necessary, appear in *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 (2013) and JOHN LOWE ET AL., CASES AND MATERIALS ON OIL AND GAS LAW (6th ed. 2013). The author thanks Keith Ammann, Owen Anderson, Laura Burney, Pierre Grosdidier, Keith Hall, Donald Jackson, Michael Jones, Liz Klingensmith, Byron Kulander, Patrick Martin, David Pierce, Karen Precella, George Snell, Glynn Starling, and Mark Trachtenberg for their assistance in completing this project. Copy editing provided by Spy & Owl (http://spyandowl.com/). This Article is dedicated to the memory of the oil & gas lawyer and scholar Kirk Lane Worley, 1970—2015.

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ABSTRACT

In *KCM Financial LLC v. Bradshaw*, the Texas Supreme Court again addressed the duty an executive mineral owner owes to a non-executive interest. Prior to this case, the court described the duty with the terms "fiduciary" and as one requiring "good faith and fair dealing." *KCM Financial* addressed the duty once more in a unique fact pattern. Although the court declined to articulate a definitive rule regarding the scope of an executive's duty, it did hold a breach would have occurred had the executive engaged in acts of self-dealing that unfairly diminished the value of the non-executive interest. In *KCM Financial*, the executive's lease to the lessee contained a below-market landowner's royalty provision. The court held that the non-executive's claims against the lessee failed as a matter of law

because no evidence established that the lessee was complicit in the alleged breach of the duty owed by the executive mineral-owner lessor to the non-executive owner.

As one of the sticks in the mineral estate bundle, the executive right is perpetual in nature. This perpetual nature of the executive right and the possibility of liability for breach of the executive's duty to non-executive(s) may burden successor executives who may not desire the rights and responsibilities of an executive. Additionally, the perpetual nature of the executive right can complicate mineral title examination long after the reason for the original severance of the executive right has disappeared. This complication breeds litigation, and these burdens and problems become particularly pervasive when executive rights have been severed from their non-executive mineral estates. To remedy perpetual executive right problems for severed estates, this Article suggests applying an executive prescription of nonuse scheme similar to that found in Louisiana.

I. INTRODUCTION

The issue in *KCM Financial LLC v. Bradshaw*[1] was the scope of the duty that an executive rights holder owes to a non-executive.[2] The owner of a floating nonparticipating royalty interest (NPRI)[3] sued the executive mineral-owner lessor and the producer to whom the executive had leased the property.[4] Specifically, the terms of that lease—a 1/8th lessor's royalty paired with a significant bonus—prompted the non-executive NPRI owner to sue both the executive and the lessee for breach of the duty owed by an executive (and, perhaps, his lessee) to non-executive interest owners.[5] The Texas Supreme Court held that an executive-lessor's negotiation of an above-market bonus paid only to the lessor, plus a below-market lease royalty the lessor shared with the non-executive, could constitute breach of the executive's duty owed to the non-executive.[6] Without evidence of lessee

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

2. *Id.* at 74 (framing the issue as "examin[ing] the contours of the duty the executive-right holder (executive) owes to a non-participating royalty interest holder (non-executive)").

3. *See* Plainsman Trading Co. v. Crews, 898 S.W.2d 786, 788–89 (Tex. 1995) (clarifying a non-participating royalty interest is a non-possessory "interest in property which is carved only from the mineral estate").

4. *See KCM Fin.*, 457 S.W.3d at 74 (describing the NPRI's claims against the executive for breach of its duty and the NPRI's claims against the lessee for facilitating the breach).

5. *Id.* at 78.

6. *See id.* at 82–84 (clarifying that the executive's ability "to negotiate to the terms of a mineral lease" are subject to the duty of utmost good faith and fair dealing and noting the executive's duty cannot be wholly discharged by obtaining the minimally acceptable royalty).

collusion, however, a lessee that merely negotiates a good deal does not share in the lessor's potential liability to the non-executive.[7]

KCM Financial did not delineate the exact boundary of the executive's duty, which it previously had described as one of "utmost good faith and fair dealing."[8] The opinion by the Texas Supreme Court appears to continue its retreat from the full fiduciary duty it first articulated for mineral owner executives in *Manges v. Guerra*.[9] Instead, the court opined that the law should "balanc[e] the bundle of rights that comprise a mineral estate" as a whole.[10] After doing so, the court found that the non-executive NPRI-owner plaintiff had raised fact issues that prohibited summary judgment in favor of the lessor that had exercised its executive right.[11] Since no evidence suggesting collusion between the executive and the lessee was presented, the lessee was not held liable.[12] In reaching this conclusion, the court noted "the considerable burdens that a contrary holding would impose on the energy industry in Texas."[13]

Litigation culminating in *KCM Financial* involved the interests owned by the executive, the non-executive mineral interest owners, and the executive's lessee and comprised two cases and three appellate opinions. This Article first examines the executive right in Texas and then specifically describes the various interests encountered during the multiple iterations of litigation that constitute the *KCM Financial* conflagration. Each step of the litigation leading up to *KCM Financial* is analyzed, and this author then poses some

7. *See id.* at 85–86 (concluding lessee did not owe a fiduciary duty to the non-executive and no evidence was presented of improper behavior).

8. *See id.* at 82 (noting "the contours of the [executive] duty remains somewhat indistinct"); Manges v, Guerra, 673 S.W.2d 180, 183 (Tex. 1984) (reiterating "[t]he duty of utmost good faith owed by an executive" to a non-executive (first citing Schlittler v. Smith, 101 S.W.2d 543, 545 (Tex. 1937); then citing First Nat'l Bank of Snyder v. Evans, 169 S.W.2d 754, 757 (Tex. Civ. App.—Eastland 1943, writ ref'd); then citing Kimsey v. Fore, 593 S.W.2d 107, 111 (Tex. Civ. App.—Beaumont 1980, writ ref'd n.r.e.); then citing Portwood v. Buckalew, 521 S.W.2d 904, 911 (Tex. Civ. App.—Tyler 1975, writ ref'd n.r.e.); then citing Morriss v. First Nat'l Bank of Mission, 249 S.W.2d 269, 276 (Tex. Civ. App.—San Antonio 1952, writ ref'd n.r.e.)).

9. *Manges*, 673 S.W.2d at 183 (Tex. 1984). In *Manges*, the executive had entered into an option contract with the producer to develop the minerals which provided no bonus or delay rentals to the non-executive mineral owners and which did not obligate the producer to drill. *Id.* at 182. This was in direct contravention of the deed, which required Manges to include the Guerras "in all bonuses, rentals, royalties, overriding royalties and payments out of production." *Id.* at 181. The executive also had borrowed money from the producer, had refused leases over the non-executive minerals, and had issued deeds of trust on all the captioned mineral estate, pushing away other potential lessees. *Id.* at 182–83.

10. *KCM Fin.*, 457 S.W.3d at 83 (citing Altman v. Blake, 712 S.W.2d 117, 118 (Tex. 1986)).

11. *Id.* at 74.

12. *Id.* at 85–86.

13. *Id.* at 86.

unanswered questions and problems relating to the executive right after *KCM Financial*.

The Article then explores the history, law, and examples of the prescription of nonuse in Louisiana with regard to oil, gas, and minerals before ending with a proposal to apply such a legal mechanism to severed executive rights to lease in Texas. Unlike Texas, Louisiana approaches the problem of severed mineral estates and the executive right with the doctrine of prescription.[14] Under Louisiana's prescription of nonuse regime, a reservation of a mineral servitude is terminated if the right to explore or produce is not used within ten years.[15] Upon termination, the mineral interest is reunified with the surface estate from which it was originally severed.[16]

Under such a regime in Texas, should the executive right find itself completely severed from its respective fee mineral estate, after a certain period of nonuse of the severed executive right, it would revert to the non-executive minerals under the ownership of the party owning those minerals. Whatever the initial reason for the severance of the executive right, that reason may no longer exist decades later when executives are again approached about leasing opportunities.[17] Given the lack of clarity regarding the scope the executive's duty of utmost good faith and fair dealing,[18] which *KCM Financial* highlights, and the potential liability involved with violating such a duty,[19] owners of the executive right may no longer want the duties or the right.[20]

Additionally, unlike in some states, Louisiana's prescription of nonuse requires no notice to the executive right or mineral servitude owner before the right or servitude reunifies with the surface by action of law.[21] That

14. LA. STAT. ANN. § 31:27(1) (2016).

15. *Id.*

16. McMurrey v. Gray, 45 So. 2d 73, 75 (La. 1949) (affirming the trial judge's determination that servitude had reverted to the surface owners resulting from nonuse for ten years).

17. The executive right can be term-limited or defeasible, of course, depending on the language of the severing instrument. In this author's experience, however, most stripped executive rights are perpetual.

18. *KCM Fin.*, 457 S.W.3d at 74; *accord* Manges v. Guerra, 673 S.W.2d 180, 183 (Tex. 1984) (citations omitted).

19. *See, e.g.*, *Manges*, 673 S.W.2d at 181 (upholding a judgment awarding the non-executives $382,608.79 in actual damages, $500,000 in exemplary damages, and cancelling a harmful lease because the executive holder violated his duty of good faith by self-dealing).

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

21. LA. STAT. ANN. § 31:27(1) (2016); *see also* IND. CODE ANN. § 32-23-10-6 (2016) (permitting the successor of the lapsed mineral interest to notify "the owner of the mineral interest"). *But see* KAN. STAT. ANN. § 55-1605 (2016) (imposing a notice requirement upon the successor of the lapsed mineral interest)

approach saves courts from (1) disputes about whether notice was received by the mineral right owner; (2) what constitutes adequate notice; and (3) whether or not mineral development is necessary to keep the mineral estate.[22] Overall, such a policy would have the effect of simplifying title to minerals and "resetting" the state of the executive rights so that the ephemeral motivations of parties long gone regarding ownership of the severed executive right will not encourage modern litigation.

It is necessary to understand the limitations of the prescription of nonuse, as a vast number of oil and gas leases involve parties who own a mineral servitude, rather than actual title to the land.[23] Although this author recognizes that the likelihood of the Texas Legislature passing such law is currently low, a mechanism to return, by action of law, the severed executive right to the non-executive fee mineral interest from which it was severed would help prevent executive rights litigation.

II. THE EXECUTIVE RIGHT AND DUTY IN TEXAS

In Texas, the "executive right" is a real property interest that represents one of the sticks in the mineral estate bundle.[24] The holder of the executive right has the right to lease the land for development of the mineral estate.[25] If multiple fractional owners share interests in the mineral estate, which is common, each co-owner can lease his respective interest.[26] While the

22. *See* Scully v. Overall, 840 P.2d 1211, 1213–14 (Kan. Ct. App. 1992) (deciding whether publishing a "notice of lapse" in the newspaper and mailing a copy of the notice constituted actual knowledge (citations omitted)).

23. John M. McCollam, *A Primer for the Practice of Mineral Law Under the New Louisiana Mineral Code*, 50 TUL. L. REV. 729, 740 (1976).

24. *Lesley*, 352 S.W.3d at 480–82 (first citing Altman v. Blake, 712 S.W.2d 117, 118 (Tex. 1986); then citing French v. Chevron U.S.A., 896 S.W.2d 795, 797 (Tex. 1995); and then citing Day & Co., Inc. v. Texland Petr., Inc., 786 S.W.2d 667, 669 (Tex. 1990)). In Texas, the mineral estate in a specific mineral, such as uranium, or particular group of minerals, such as oil and gas, is generally thought to consist of five components: "(1) the right to develop (the right of ingress and egress), (2) the right to lease (the executive right), (3) the right to receive bonus payments, (4) the right to receive delay rentals, [and] (5) the right to receive royalty payments." *Altman*, 712 S.W.2d at 118 (citing RICHARD HEMINGWAY, LAW OF OIL AND GAS §§ 2.1–2.5 (1971). These attributes, when taken together, are often referred to as a "bundle of sticks," and it has been recognized that individual sticks can be sold while others are retained. *See* Concord Oil Co. v. Pennzoil Expl. & Prod. Co., 966 S.W.2d 451, 459 (Tex. 1998) ("The right to delay rentals is another attribute of the 'bundle of rights' associated with a severed mineral estate."); *see also* Pinebrook Prop., Ltd. v. Brookhaven Lake Prop. Owners Ass'n, 77 S.W.3d 487, 503 (Tex. App.—Texarkana 2002, pet. denied) (stating although Pinebrook owned the property in fee simple, "Pinebrook did not receive the full panoply of rights when it purchased its land").

25. *Lesley*, 352 S.W.3d at 480–82.

26. *See* JOSEPH SHADE & RONNIE BLACKWELL, PRIMER ON THE TEXAS LAW OF OIL & GAS 16 (5th ed. 2013) (describing how a mineral estate can be subdivided and the parts composing it, such as

executive right generally follows the mineral estates proportionately, an owner can choose to reserve or sever the executive right and convey a non-executive mineral interest.[27] Additionally, owners of the mineral estate could choose to create another type of non-executive interest, a NPRI.[28]

The origin of the executive right, although speculative, is probably related to facilitating leasing among several cotenants and, or, retention of control over the identity of future lessees by purchasers of land where part of the mineral interest is retained by the grantor.[29] Many writers also believe the executive interest was severed to allow an owner to use the sole leasing power to protect the surface estate.[30]

Of all the rights contained within the fee mineral estate, the executive right to lease is possibly the right wherein the exact extent, purpose, and limitations are the least clearly defined by statute or case law. In addition to being defined as one of the five rights of a mineral owner, the executive right has been defined by courts and treatises as the exclusive right "to execute oil and gas leases."[31] Definitions of the modern executive right can be read very broadly: "the right to take or authorize all actions that affect the exploration and development of the mineral estate . . . includ[ing] the right to engage in or authorize geophysical exploration, drilling or mining, and producing oil, gas, and other minerals."[32] However, courts rarely use the term in this broad sense. More commonly, they equate the executive

royalty interests and mineral interests, can be transferred); *see also id.* ("In oil and gas, fractionalized ownership is the rule not the exception.").

27. *See Texland*, 786 S.W.2d at 669 ("Even when [the executive right] is severed from the other rights or attributes incident to the mineral estate, it remains an interest in property.").

28. SHADE & BLACKWELL, *supra* note 26, at 20.

29. 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, 532–33 (2013) (describing generally what gave rise to the need for an executive right and benefits that have resulted). *See generally* Patrick H. Martin, *Unbundling the Executive Right: A Guide to Interpretation of the Power to Lease and Develop Oil and Gas Interests*, 37 NAT. RESOURCES J. 311 (1997) (discussing the origin of executive rights).

30. *See, e.g.*, Laura H. Burney, *Oil, Gas, and Mineral Titles*: *Resolving Perennial Problems in the Shale Era*, 62 U. KAN. L. REV. 97, 155 (2013) (observing Professor Smith's opinion that it is not likely that the parties to a normal land sale will expect the executive to act as a fiduciary, where the grantee demands an "exclusive executive right in order to protect his surface estate" and that, because a grantee's main concern is the surface use, it "will pay a premium for the exclusive executive right" (quoting Ernest E. Smith, *Implications of a Fiduciary Standard of Conduct for the Holder of the Executive Right*, 64 TEX. L. REV. 371, 373–74 (1985))).

31. 2 PATRICK H. MARTIN & BRUCE M. KRAMER, HOWARD R. WILLIAMS & CHARLES J. MEYERS OIL AND GAS LAW 198 (Lexis Nexis rev. ed. 2016); *accord* Altman v. Blake, 712 S.W.2d 117, 118 (Tex. 1986); 3 RICHARD HEMINGWAY, THE LAW OF OIL AND GAS 38 (West Pub. Co. 1991).

32. 1 ERNEST E. SMITH & JACQUELINE LANG WEAVER, TEXAS LAW OF OIL AND GAS § 2.6 (Lexis Nexis 2d ed. 2016).

right with the right to execute oil and gas leases.[33]

Most courts have held that the power to lease, unless the creating instrument provides otherwise, is irrevocable, perpetual, and freely assignable.[34] The nature of the freely assignably executive right is as follows:

> Non-executive mineral interest owners have no power to lease their minerals. Rather, that power resides in the hands of the owner of the executive right. Because the owner of a [nonparticipating] royalty interest normally has no right to participate in the leasing process, the owner of a royalty is dependent upon the action of the mineral estate owner in realizing income for their interest. Thus, all royalty rights, such as NPRIs are, by definition, non-executive rights. The executive right may also be severed from an interest in the mineral estate itself. As such, the owner of Blackacre may convey away an undivided one-half interest in the minerals, retaining the other one-half interest plus the exclusive executive right. The grantee in such a transaction has received an interest commonly referred to as a nonparticipating mineral fee.[35]

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

For decades, Texas courts have wrestled with describing exactly what standard of duty the executive owes to the non-executive.[36] Like "the necessary thresholds of certainty" for a jury "to decide a case or convict or acquit a defendant, such as 'clear and convincing evidence' and 'evidence beyond a reasonable doubt,' . . . the scope of the executive duty is" described by a spectrum of phrases.[37] The exact measure of care owed has been painstakingly parsed out, word by word, in a panorama of cases. These cases set forth "a rainbow of locutions starting with the lowest measure of care as 'a duty of ordinary good faith,' to a duty of 'utmost good faith without a fiduciary obligation,' to a duty of 'utmost good faith with a

33. *See* Martin, *supra* note 29, at 315–16 (defining the executive right as "the power to grant a lease with respect to the mineral interest of another person").

34. *See* OWEN L. ANDERSON ET AL., HEMINGWAY OIL AND GAS LAW AND TAXATION 41, § 2.2(A) (Thompson West eds., 4th ed. 2004) (differentiating cases where courts have held "that the power to lease another person's mineral interest is personal to the holder" from cases applying the majority view, which view "the power to lease [a]s assignable").

35. Kulander, *supra* note 29, at 544 (citations omitted).

36. *See* Pickens v. Hope, 764 S.W.2d 256, 264 (Tex. App.—San Antonio 1988, writ denied) ("Case law holds that some kind of duty is owed by the executive to the non-executive, but there may be a variance concerning the standard to which the executive will be held in the exercise of his executive right.").

37. Kulander, *supra* note 29, at 547.

fiduciary obligation,' up to the 'standard' fiduciary obligation" as it is commonly understood outside of the oil and gas law realm.[38] "An executive's duty in the realm of oil and gas law currently sits at the third tier mentioned above," right "below a 'standard' fiduciary duty."[39]

In *Manges v. Guerra*,[40] the Supreme Court of Texas seemed to equate the duty of utmost good faith and fair dealing with the highest fiduciary obligations.[41] These "fiduciary standards traditionally require putting the beneficiary party's interest above the agent's interest."[42] It has proved elusive, however, to determine "the most appropriate application of the general fiduciary duty to the specific confines of the executive right to lease [an] oil and gas real property interest."[43] "*Manges* did not [practically] apply the highest fiduciary duty"—which would be that the "executive rights owner must subordinate its own interest to those of the non-executive right interest holders—but instead held that the executive should get every benefit for [them] that it exacts for itself" and avoid self-dealing[44]—"a sort of 'fiduciary duty lite.'"[45]

Application of this "fiduciary duty lite" proved challenging. While the subsequent case of *In re Bass*[46] reaffirmed that Texas executives owe the non-executives a fiduciary duty,[47] the Texas Supreme Court applied the duty differently. In *Bass*, the fee mineral owner owned approximately twenty thousand acres burdened by a 1/12th NPRI.[48] In 1995, the mineral owner hired Exxon to conduct a seismic reflection survey on the tract but did not

38. *See id.* (describing the case law history of the executive's duty to the non-executive).

39. *Id.* (citing Lesley v. Veterans Land Bd., 352 S.W.3d 479, 481 (Tex. 2011)); s*ee also* Dearing, Inc. v. Spiller, 824 S.W.2d 728, 732 (Tex. App.—Fort Worth 1992, writ denied) ("This is a more stringent standard than simple good faith but has generally been considered one step below a true fiduciary obligation.").

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

41. *See id.* at 183 (noting the fiduciary duty of the executive "arises from the relationship of the parties" and requires the executive to "acquire for the non-executive every benefit that he exacts for himself" (first citing English v. Fischer, 660 S.W.2d 521, 524–25 (Tex. 1983); and then citing RICHARD HEMINGWAY, THE LAW OF OIL & GAS § 2.2(d) (2d ed. 1983))); *see also* Kulander, *supra* note 29, at 547–48 (describing how in *Manges* the Texas Supreme Court "compared and contrasted the duty of utmost fair dealing against the spectrum of possible fiduciary obligations" (citing *Manges*, 673 S.W.2d at 183–84)).

42. Kulander, *supra* note 29, at 547–48 (citing *Lesley*, 352 S.W.3d at 490).

43. *Id.* at 548.

44. *See* KCM Fin. LLC v. Bradshaw, 457 S.W.3d 70, 82 (Tex. 2015) (noting "acts of self-dealing *that unfairly diminish the value of the non-executive interest*" are the focus for determining breach of the executive's fiduciary duty (emphasis added)).

45. Kulander, *supra* note 29, at 548 (citing *Manges*, 673 S.W.2d at 183).

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

47. *Id.* at 745.

48. *Id.* at 738.

subsequently lease.[49] Because it did not, owners of an undivided portion of the NPRI sued, arguing that the mineral owner had violated its executive duty to them by not leasing.[50] The court disagreed, ruling that no duty to lease ever existed and that no executive duty generally existed before leasing occurred.[51] A couple of court of appeals cases subsequently cited *Bass* in holding no duty by the executive to lease.[52]

This state of executive jurisprudence changed in 2011 when the Texas Supreme Court released its opinion *Lesley v. Veterans Land Board*.[53] In *Lesley*, the executive, also the surface owner and a real estate developer, had an incentive to prevent oil and gas development to increase the value of the surface in the eyes of prospective lot buyers.[54] By creating anti-drilling covenants, the developer effectively condemned minerals owned by the undivided 75% non-executive mineral owner—the executive right became a means to *prevent* development.[55]

In ruling against the developer, the court made it clear that a surface owner did not have any effective eminent domain power to condemn mineral development through such covenants.[56] Moreover, the court held that the executive right had been exercised—and the duty to the non-executive invoked—whenever the executive did, or did not do, something that affected the value of the non-executive's estate.[57] While the court refused to establish a general rule that the executive is liable for any refusal to lease, it established that a refusal by the executive to lease that stemmed from arbitrary self-dealing could be actionable if proved.[58] Self-dealing by the executive was again the biggest variable in an executive rights case that attempted to construe the extent and timing of the fiduciary.

49. *Id.*

50. *Id.* at 737.

51. *Id.* at 745.

52. *See* Hlavinka v. Hancock, 116 S.W.3d 412, 419–20 (Tex. App.—Corpus Christi 2003, pet. denied), *disapproved by* Lesley v. Veterans Land Bd., 352 S.W.3d 479, 491 n.1 (Tex. 2011) (citing *In re* Bass and holding no fiduciary duty was breached because the executive did not acquire any benefits from the execution of any lease (citation omitted)); Aurora Petr., Inc. v. Newton, 287 S.W.3d 373, 377 (Tex. App.—Amarillo 2009, no pet.), *disapproved by Lesley*, 352 S.W.3d at 491 n.1 (concluding the executive did not breach their fiduciary duty because they never "acquired any benefit for themselves" (first citing *Bass*, 113 S.W.3d at 745; and then citing Veterans Land Bd. v. Lesley, 281 S.W.3d 602, 617–18 (Tex. App.—Eastland 2009, pet. granted), *overruled by Lesley*, 352 S.W.3d at 481)).

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

54. *Id.* at 481.

55. *Id.* at 481–82.

56. *Id.* at 491.

57. *Id.*

58. *Id.*

B. *The Duty to the Nonparticipating Royalty Interest Owners*

Three types of royalty interests are commonly found associated with oil and gas real property. Lessor's royalty (or landowner's royalty) under an oil and gas lease, the most commonly encountered royalty interest, is the lessor's interest in production, whether taken in-kind or (more typically) as proceeds from the lessee's sale of production, not subject to the costs of production.[59] A second type of royalty is the "overriding royalty interest" (ORI or ORRI), a royalty interest conveyed or reserved out of the *lessee's* working interest in a lease.[60] Both lessor's royalty and overriding royalty typically end when the lease expires,[61] with ORRIs often said to be carved out of the leasehold estate.

A third type of royalty is one reserved or conveyed by a mineral owner. This fractional royalty represents what is commonly known as a NPRI and is carved from the mineral estate.[62] An NPRI is an expense-free, real property mineral interest that does not participate (hence the name) in bonus, delay rentals, leasing, or exploration and development.[63] It may be perpetual or term-limited, as prescribed by the severing instrument—the instrument that conveys or reserves the NPRI.[64] Interpretation of the difference between a mineral or royalty interest can be difficult when instruments of conveyance or reservation fail to sufficiently define what type of interest is being created.[65] An NPRI, the Texas Supreme Court has explained, "is *non-possessory* in that it does not entitle its owner to produce the minerals himself. It merely entitles its owner to a share of the

59. *See* SHADE & BLACKWELL, *supra* note 26, at 19 (defining a royalty interest).

60. *See id.* ("An ORI is a non-cost bearing interest carved out of the working interest.").

61. *Id.* at 20.

62. *Id.*

63. 1 SMITH & WEAVER, *supra* note 32, at § 2.4(B)(2) (defining a "nonparticipating royalty interest"). Another kind of royalty, not discussed in this Article, is the ORRI. This is described as "an interest in the oil and gas produced at the surface, free of the expense of production." Paradigm Oil, Inc. v. Retamco Operating, Inc., 372 S.W.3d 177, 180 n.1 (Tex. 2012) (quoting Stable Energy, LP v. Newberry, 999 S.W.2d 538, 542 (Tex. App.—Austin 1999, pet. denied)). In modern times, ORRIs usually refers to "a non-cost bearing interest carved out of the [lessee's] working interest" under an oil and gas lease. SHADE & BLACKWELL, *supra* note 26, at 19.

64. SHADE & BLACKWELL, *supra* note 26, at 20. Term-limited NPRIs are commonly limited either to a definitive time period or to the life of an existing lease. 1 SMITH & WEAVER, *supra* note 32, at § 2.4(B)(2).

65. *See* Richard C. Maxwell, *Oil and Gas Conveyancing—Is There Truth in Labeling?*, 33 WASHBURN L.J. 569, 577 (1994) (noting that mineral interests and royalty interests are defined as such by their attributes and that, while such labeling is often used to designate what attributes are reserved or conveyed, "no attributes as such are spelled out but language of normative, or potentially normative, significance is used").

production proceeds, free of the expenses of exploration and production."[66]

The size of an NPRI can be expressed in two ways—either (1) a "fixed NPRI" or (2) a "floating NPRI."[67] The NPRI can be reserved or conveyed as a fixed fraction of gross production—a "fixed NPRI"—very commonly 1/16th, or it can be dependent upon the lessor's royalty of the existing lease and every lease covering the captioned land thereafter.[68] In the second instance, the NPRI fraction is typically multiplied by whatever lessor's royalty is found in the existing oil and gas lease covering the captioned land—a "floating NPRI."[69] For example, a common floating NPRI grant or reservation is "one-half of all royalty," meaning that the NPRI owner receives half of whatever the lessor's royalty is in the presently existing lease. The value of the floating NPRI is dependent, therefore, on the lessor's royalty.

Non-executive mineral owners and NPRI owners own very distinct interests and are potentially affected differently by the leasing activities of the executive right holder. With regard to the first, the executive leases the non-executive's minerals.[70] With regard to the second, the lessor's royalty negotiated by the executive may affect the amount received by the NPRI owner.[71] Whereas a fixed NPRI owner is paid at a rate established by the NPRI conveyance or reservation, the revenue received by a typical floating NPRI owner—one that generally does not share in the bonus—*is* dependent to a degree on the amount of lessor's royalty negotiated by the executive.[72] One seasoned commentator has noted, "The executive will be held to a high standard of duty . . . , when the quantum of oil and gas production due the nonparticipating royalty owner is within the executive's control."[73] One

66. Plainsman Trading Co. v. Crews, 898 S.W.2d 786, 789 (Tex. 1995) (citing Arnold v. Ashbel Smith Land Co., 307 S.W.2d 818, 825 (Tex. Civ. App.—Houston 1957, writ ref'd n.r.e)); *see* Hamilton v. Morris Res. Ltd., 225 S.W.3d 336, 344 (Tex. App.—San Antonio 2007, pet. denied) (quoting *Plainsman*, 898 S.W.2d at 789) (relying on *Plainsman's* definition of a NPRI).

67. 1 SMITH & WEAVER, *supra* note 32, at § 2.4(B)(2).

68. *Id.*

69. *Id.* For example, the owner of an NPRI that gave him the right to "one-eighth of royalty" would be entitled to receive 1/64th of the gross production from a lease containing a 1/8th lessor's royalty (1/8 × 1/8), but would receive 1/48th of the gross production from a lease containing a 1/6th lessor's royalty (1/8 × 1/6). This amount is paid out of the gross production the lessor's royalty owed to the lessor himself. Unless uncommon terms are at play, the lessee continues to pay only the amount of the lessor's royalty; he does not typically pay the sum of the lessor's royalty and the NPRI.

70. SHADE & BLACKWELL, *supra* note 26, at 82.

71. 1 SMITH & WEAVER, *supra* note 32, at § 2.4(B)(2).

72. *Id.* (acknowledging a floating royalty owner's share of production will vary with the size of the royalty reserved in an oil and gas lease).

73. William Burford, Case Law Update, *Proceedings of the Permian Basin Oil & Gas Law 2013*, Feb. 22, 2013, Midland, Texas, Chapter A, at 44.

can easily imagine a scenario in which a party owning 100% of the minerals, except for a floating NPRI, could lease for a high bonus and a low royalty to maximize the amount received by the (executive) mineral owner over the (non-executive) floating royalty owner. In light of such a scenario, what duty does the executive owe to a royalty owner?

That the executive must obtain for the non-executives what it obtains for itself is well known and commonly thought of as the fundamental rule defining the executive's duty.[74] More recently, this principle has been applied to the executive's duty toward NPRI owners. In *Friddle v. Fisher*,[75] the Court of Appeals in Texarkana considered a case that dealt with executive mineral interest owners, Fred and Ruth Fisher, who executed an oil and gas lease with Valence Operating Company.[76] The Fishers (and their lessee, Valence Operating Company) failed to inform Marvin Friddle, a NPRI owner whose interest burdened the leased tract, of the execution of the lease.[77] A producing well was then brought in on acreage pooled with the subject tract.[78] The lessee paid the Fishers the entire royalty attributable to the pooled acreage, including the portion of that royalty attributable to Friddle's NPRI—a sum of more than $90,000.[79] As often happens, that money apparently failed to materialize in Friddle's mailbox.[80]

Friddle brought suit against Valance and the Fishers, seeking as a remedy his alleged share of all the royalty.[81] Friddle's claim, as against Valence, was severed, while the Fishers' motion for summary judgment was granted.[82] Friddle appealed, arguing that his claims for conversion, unjust enrichment, fraud, and the establishment of a constructive trust "were not addressed in the Fishers' motion for summary judgment," and, thus, summary judgment was inappropriate.[83]

Citing the general executive duty as a source of further obligations, Friddle argued that the Fishers should have notified him of the oil and gas lease that covered his NPRI interest, initiation of the pooling clause within

74. *E.g.*, Manges v. Guerra, 673 S.W.2d 180, 183–84 (Tex. 1984) (concluding an executive right holder must obtain for the non-executive any benefit that the executive bargains for and receives) (citing RICHARD HEMINGWAY, THE LAW OF OIL & GAS, § 2.2(d) (2d ed. 1983)).

75. Friddle v. Fisher, 378 S.W.3d 475 (Tex. App.—Texarkana 2012, pet. denied).

76. *Id.* at 478.

77. *Id.*

78. *Id.*

79. *Id.* at 479.

80. *Id.* ("[Friddle argues] that the Fishers had received over $90,000 in payments that should have been paid to the holders of the NPRI.").

81. *Id.*

82. *Id.*

83. *Id.* at 478.

the oil and gas lease, and the beginning of production from a well on an adjacent tract pooled with the captioned land (a "non-tract well").[84] The Fishers argued that no duty to notify NPRI owners existed,[85] and asserted that Friddle had either actual or constructive notice of the lease and pooled unit.[86]

The Fishers also asserted that the statute of limitations barred recovery for any of Friddle's causes of action.[87] Partially because the well was a non-tract well that Friddle would not have found on the land covered by his NPRI, and partially because any record of the lease, pooling, and production would have appeared in the official public records *after* Friddle acquired his NPRI, Friddle countered that the district court had misapplied the Texas discovery rule because Friddle had neither actual nor constructive notice of his claim when the limitations curtain descended.[88]

As support for their argument regarding the duty owed to Friddle, the Fishers cited a Texas Supreme Court decision, *Montgomery v. Rittersbacher*.[89] The Supreme Court of Texas in *Montgomery* faced a similar question about payment of money owed to an NPRI owner, but one in which the lessee had paid all the money attributable to the leasehold into a court registry instead of to the lessor.[90] The court held that by bringing suit to claim the royalty, the claimant had automatically (if unknowingly) ratified the lease and was therefore entitled only to receive royalties accruing after the date the suit was filed.[91]

The appellate court reversed and remanded, first distinguishing *Montgomery* by holding that because the Fishers—who owed Friddle a

84. *Id.* "Non-tract well" meaning a well that is spudded from acreage pooled with the land burdened by the NPRI but not actually located on that land.

85. *See id.* at 480 (framing the Fishers' argument as "they fulfilled the only fiduciary duty they owed Friddle, which they allege was *solely* to acquire for him the same benefit they exacted for themselves" (emphasis added)).

86. *Id.* at 484.

87. *Id.* at 482–83.

88. *Id.* at 484.

89. *Id.* at 480 (citing Montgomery v. Rittersbacher, 424 S.W.2d 210 (Tex. 1968)).

90. *Montgomery*, 424 S.W.2d at 215.

91. The *Montgomery* court stated:

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

Id.

fiduciary duty, unlike the producer in *Montgomery*—had already collected the funds, the automatic ratification established in *Montgomery* did not apply.[92] Regarding the measure of the executive's duty to the non-executives, the court first noted that the executive rights holder owed Friddle a fiduciary duty of "utmost fair dealing."[93] But the court went further, opining that "[i]f the holder of the executive right receives royalties pursuant to the rights held by an NPRI holder, he is chargeable in equity as constructive trustee with the duty to hold the royalty attributable to the holder of the NPRI[.]"[94] Therefore, when the Fishers received the entire royalty attributable to both themselves and the non-executives, they were thereafter burdened with a "duty to hold the portion of funds which would be payable to [Friddle] as [a] constructive trustee[.]"[95]

In addition, the court curiously found that a *fact question* existed as to whether the executive had a duty to inform the NPRI holders of the lease, the pooling of same, or execution of a division order or other agreement, and whether that affected the rights of Friddle.[96] Also, the court held that the discovery rule tolled the statute of limitations, because even if the official public records contained notification of the lease, Friddle could not be charged with constructive notice of the lease "because it was executed and recorded after [Friddle] acquired [the NPRI]."[97] In addition, a fact question existed as to whether Friddle had actual notice of production, because the well on the unit that included the leasehold at issue was both marked by a sign and in obvious view.[98] Therefore, a factual dispute existed that could be resolved only by further investigation by the district court.[99] Finally, the court of appeals ruled that the previously granted summary judgment failed

92. The court distinguished *Montgomery* on the basis that the disputed funds were held by a third party that had not entered into a fiduciary relationship with the NPRI holder. *Friddle*, 378 S.W.3d at 480 (citing HECI Expl. Co. v. Neel, 982 S.W.2d 881, 888 (Tex. 1998)).

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

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

95. *Id.* at 482 (citing *Andretta*, 415 S.W.2d at 641–42).

96. *Id.* ("Here, we are unable to determine whether the Fishers had a duty to provide notification to the NPRI holders of the existence of the lease, pooling agreement, and/or unit declaration, because there are unresolved issues of material fact.").

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

98. *Friddle*, 378 S.W.3d at 485.

99. *Id.*

to address Friddle's conversion claim, further necessitating remand of the case.[100]

When the Texas Supreme Court further explained the executive's fiduciary issue in *Lesley*, it merely opined, "We come now to the principal issue in the case: the nature of the duty that the owner of the executive right owes to the non-executive interest owner[.]"[101] The court made no express distinction between non-executive mineral owners and NPRI owners, seemingly dissolving any distinction in the fiduciary duty between the two, a view seemingly further cemented by *Friddle*.[102] This lack of distinction is especially true if the royalty owner owns a fraction *of* the royalty, as opposed to a fractional royalty.[103]

III. *KCM FINANCIAL LLC V. BRADSHAW*

An executive could directly, and potentially negatively impact, the amount received by a floating NPRI owner "by negotiating a higher bonus in return for a lower royalty" in a lease.[104] Such an alleged situation was recently encountered by an appellate court in Texas in *Bradshaw v. Steadfast Financial, L.L.C.*,[105] an opinion released on February 14, 2013, by the Fort Worth Court of Appeals—which was eventually reversed in part and affirmed in

100. *Id.* at 485–86.

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

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

103. The Fort Worth Court of Appeals in *Range Resources Corp. v. Bradshaw* distinguished between a "fraction of a royalty" and a "fractional royalty":

> A "fraction of a royalty" conveys a fractional share of the royalty that is contained in an oil and gas lease—it is not fixed, but rather "floats" in accordance with the size of the landowner's royalty contained in the lease and, in addition to the landowner's royalty, the fraction of non-participating royalty also shares proportionally in any overriding royalty interest reserved in the oil and gas lease, and the holder of the executive right owes a duty to the NPRI owner in establishing the landowner's royalty in an oil and gas lease.

Range Res. Corp. v. Bradshaw, 266 S.W.3d 490, 493 (Tex. App.—Fort Worth 2008, pet. denied); *see also* Coghill v. Griffith, 358 S.W.3d 834, 838 (Tex. App.—Tyler 2012, pet. denied) (distinguishing a fractional royalty from a fraction of a royalty).

104. Kulander, *supra* note 29, at 612.

105. Bradshaw v. Steadfast Fin., L.L.C., 395 S.W.3d 348 (Tex. App.—Ft. Worth, pet. granted), *aff'd in part, rev'd in part sub nom.* KCM Fin. LLC v. Bradshaw, 457 S.W.3d 70 (Tex. 2015).

part by the Texas Supreme Court on March 6, 2016.[106] While the crux of the non-executive's complaint in *Bradshaw* was that the lease provided for a higher-than-market bonus and a lower-than-market lessor's royalty,[107] *Bradshaw* was actually the second fracas arising from the leases. The first, *Range Resources Corp. v. Bradshaw*, involved whether the NPRI owned by Betty Lou Bradshaw (Bradshaw) was a fixed or a floating NPRI.[108]

A. *Round One:* Range Resources Corp. v. Bradshaw

The ownership history of the mineral interest at issue, and the executive right associated with it, giving rise to *Bradshaw* and *Range Resources* provides an absorbing saga typical of mineral property in Texas. Steadfast Financial, LLC (Steadfast) initially owned all the surface and mineral rights to 1,994 acres in Hood County, Texas, known as the Mitchell Ranch.[109] In 2006, Steadfast sold the surface to Range Resources (Range) and then granted an oil and gas lease to Range Production I, L.P., (Range I) (collectively Range) covering the ranch to Range that provided for a 1/8th lessor's royalty and more than thirteen million dollars in bonus.[110]

By conveyances made prior to Steadfast's acquisition of the mineral rights in the captioned land, Bradshaw owned an NPRI encumbering 1,777 acres of the captioned mineral estate.[111] She inherited this interest from her parents, J. A. and Lota Fay Driskill.[112] The NPRI was a non-executive interest, as it did not carry with it the right to "participate in the execution of, the [b]onus payable for, or the delay rentals to accrue under oil, gas, and mineral leases executed by the owner of the mineral fee estate."[113] Furthermore, the instrument reserving the NPRI limited the executive's subsequent leasing prerogatives by stipulating that any future lessor's royalty could not be less than 1/8th for oil or gas produced and saved.[114]

106. KCM Fin. LLC v. Bradshaw, 457 S.W.3d 70, 90 (Tex. 2015).

107. *See Bradshaw*, 395 S.W.3d at 351 (framing Bradshaw's argument "as the executive rights holder[] breached its duty to her in a manner in which it negotiated and structured its April 27, 2006, transactions with Range by engaging in self-dealing, obtaining an excessively large bonus payment and above-fair-market-value price for the tract's surface by structuring the lease to substantially reduce the lease royalty reserved to one-eighth").

108. *Range Res.*, 266 S.W.3d at 491.

109. *Id.* at 492.

110. *Id.*

111. *Id.* at 491–92.

112. *Id.*

113. KCM Fin. LLC v. Bradshaw, 457 S.W.3d 70, 75 (Tex. 2015) (first quoting Lee Jones, Jr., *Non-Participating Royalty*, 26 TEX. L. REV. 569, 569 (1948); and then citing Plainsman Trading Co. v. Crews, 898 S.W.2d 786, 789–90 (Tex. 1995)).

114. *Range Res.*, 266 S.W.3d at 496 ("Paragraph [t]wo also sets out that all leases shall provide for

Steadfast then assigned portions of its lessor's royalty interest to various parties.[115] Specifically, the royalty reservation provided the following:

> [1] The Grantors herein reserve unto themselves, their heirs and assigns, and except from this conveyance an undivided one-half (1/2) Royalty (*Being equal to not less than an undivided one-sixteent[h] (1/16*) . . . of all the oil, gas and/or other minerals in, to, and under or that may be produced from said . . . land . . . .
>
> [2] Said interest hereby reserved is a Non-Participating Royalty . . . provided, however, that all such leases shall provide for Royalty of *not less than* one-eighth (1/8) . . . .
>
> [3] In the event oil, gas or other minerals are produced from said land, then said Grantors, their heirs and assigns, shall receive *not less than* one-sixteenth (1/16) portion (being equal to one-half (1/2) of the customary one-eighth (1/8) [r]oyalty) of the entire gross production and/or such net proceeds as hereinabove provided . . . .[116]

Bradshaw argued the royalty was floating—1/8th of royalty—whereas Range contended the interest reserved was a fixed NPRI—a perpetual one-sixteenth interest in production.[117] After noting the conveyance was unambiguous, the court applied the "four corners" test[118] to determine the scriveners' intent.[119] The court found this intent in the "not less than" language found in each granting paragraph.[120] First, the court interpreted that the intent of paragraph one's parenthetical language was to establish a minimum threshold of 1/16th NPRI.[121] Since paragraph one established a floor-NPRI value, the court believed it logical to assume that the deed created a floating NPRI instead of a fixed NPRI.[122]

Moving on to paragraph two, the court interpreted the second paragraph

a royalty of not less than 1/8th—a floor that would guarantee that the royalty provided (a fraction of royalty) would not be less than 1/16th.").

115. *Id.* at 492.

116. *Id.* at 493–94.

117. *Id.* at 493.

118. Analysis conducted under the four corners protocol means that the court only looks at all the language constituting an unambiguous document and nothing else when interpreting the intention of the drafters. Anadarko Petr. Corp v. Thompson, 94 S.W.3d 550, 554 (Tex. 2002).

119. *Range Res.*, 266 S.W.3d at 494.

120. *Id.* at 494–96.

121. *Id.* at 496.

122. *Id.*

as "all leases shall provide for royalty of not less than one-eighth[.]"[123] Reading the first two paragraphs together, the court thought it manifest that the conveyance scriveners had anticipated that, in the future, more leases with varying lessor's royalty amounts would follow.[124] Focusing on the words "shall" and (again) "not less than," the court noted that paragraph two ensured to the grantor that the retained floating NPRI would be computed upon at least a 1/8th lessor's royalty.[125] The court stressed the importance of reading all the paragraphs together, and here, after considering paragraph two in tandem with the parenthetical in paragraph one, the court ruled that the passages, taken together, ensured the NPRI owner at least 1/16th share of production.[126] Focusing on the "not less than" language in paragraphs one and two, the court determined that the instrument drafters had not contemplated the royalty as being fixed and, therefore, held that the grantors had "reserv[ed] 'an undivided one-half royalty'" in favor of Bradshaw.[127]

The court also held that the grantor was entitled to receive a minimum of one-sixteenth of production, since according to paragraph three, the grantor was entitled to "not less than one-sixteenth (1/16) portion '(being equal to one-half (1/2) of the customary one-eighth (1/8) [r]oyalty of the entire gross production. . .."[128] Ultimately, the NPRI at issue was found to entitle Bradshaw to one-half of any lessor's royalty on a lease covering the captioned land—a "floating" NPRI.[129]

B. *Round Two:* Bradshaw v. Steadfast Financial, L.L.C.

In 2006, as noted, Steadfast sold the surface to Range and leased the mineral rights to Range I acquiring a $7,505 per acre bonus.[130] Under the terms of the mineral lease, Steadfast reserved only a 1/8th lessor's royalty.[131] Bradshaw's NPRI entitled her to a fraction of the gross production from the lease but none of the lease bonus.[132]

123. *Id.*

124. *Id.* ("[T]he language indicating the anticipation of leasing in [p]aragraph [t]wo and the inclusion of the parenthetical itself in [p]aragraph [o]ne as contemplating future leases.").

125. *Id.* An argument could be made that paragraph two of the conveyance required the mineral grantee to issue future leases only with a lessor's royalty of one-eighth or greater. *See id.* at 496 ("Paragraph two also sets out that all leases shall provide for a royalty of not less than 1/8th . . . .").

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. This amounted to a bonus payment totaling more than $13 million dollars. *Id.* at 78.

131. *Id.*

132. *Id.*

After the first round of litigation in *Range Resources*, Bradshaw again sued Steadfast, Range, and other third parties, this time alleging that Steadfast had engaged in self-dealing and breached its duty by swapping a sub-market lessor's royalty rate for an above-market bonus, a trade-off that benefited Steadfast at Bradshaw's expense.[133] Bradshaw alleged that *both* Steadfast and Range had conspired to provide Steadfast with a higher-than-market rate on the bonus paid by Range for the lease in return for a lower-than-market lessor's royalty, and therefore Range should be also liable.[134] Bradshaw introduced evidence that the prevailing rate when the lease was signed was a 1/4th royalty and that the bonus was excessively higher than customary.[135]

As a remedy, Bradshaw requested formation of a constructive trust on the portions of the lessor's royalty assigned by Steadfast, "the accrued royalties and future payments of royalties to the NPRIs[,]" disgorgement of proceeds already received by Steadfast, "actual damages against Steadfast and Range as jointly and severally liable for Steadfast's breach of duty[,]" exemplary damages, and reformation of the lease's terms.[136] Bradshaw named those third parties (collectively Royalty Owners) to which Steadfast had assigned portions of its lessor's royalty in the suit and sought to have a constructive trust[137] placed over those royalty interests.[138] Bradshaw also sought a decree to set aside and void as fraudulent Steadfast's subsequent transfers and conveyances of its royalty interests.[139] Bradshaw argued that

133. Bradshaw v. Steadfast Fin., L.L.C., 395 S.W.3d 348, 351 (Tex. App.—Fort Worth 2013, pet. granted), *aff'd in part*, *rev'd in part sub nom.* KCM Fin. LLC v. Bradshaw, 457 S.W.3d 70 (Tex. 2015).

134. *Id.* at 355.

135. *See id.* (noting Bradshaw introduced other lease agreements entered into in Hood County that included a 1/4th royalty and an affidavit of a landman who believed the bonus paid to Steadfast was exceedingly high).

136. *Id.* at 353.

137. A constructive trust is a remedy in equity that courts may grant when one party, typically one owing another party some kind of special trust or fiduciary relationship—such as the executive's duty to non-executives—has been unjustly enriched at the expense of another party, and as a result, the injured party has lost identifiable property or money. *See* Omohundro v. Matthews, 341 S.W.2d 401, 405 (Tex. 1960) (noting a constructive trust is "imposed by law because the person holding the title to property would profit by a wrong or would be unjustly enriched if he were permitted to keep the property" (citation omitted)). The presence of fraud or collusion may replace the special relationship. The offender is then ruled to be holding the property or money in constructive trust for the injured party, thereby giving a court the ability to direct the use or the return of the property or money. *See* Meadows v. Bierschwale, 516 S.W.2d 125, 133 (Tex. 1974) ("When property subject to a constructive trust is transferred, a constructive trust fastens on the proceeds." (citation omitted)).

138. *Bradshaw*, 395 S.W.3d at 351.

139. *Id.* at 351. Bradshaw sought to void the conveyances as fraudulent under the Texas Uniform Fraudulent Transfer Act. *See generally* TEX. BUS. & COM. CODE §§ 24.001–.013 (representing the Texas Uniform Fraudulent Transfer Act).

she should have received half of what she alleged should have been the lessor's royalty given the local market.[140] In response, Steadfast and Range filed for summary judgment.[141] Steadfast argued that Bradshaw had no right to complain "because the lease providing for one-eighth royalty was specifically authorized by the language of the deed[,]" while Range argued it had an absolute right to enter into an arms-length transaction with Steadfast.[142]

The trial court granted summary judgment in favor of Range and Steadfast.[143] The Fort Worth Court of Appeals reversed the judgment of the trial court.[144] On appeal, the parties disagreed over whether the standard of duty owed by the executive to the NPRI owner should be: (1) a true fiduciary duty; (2) a duty of good faith and utmost fair dealing; or (3) a duty of ordinary care and good faith.[145] The court noted that the measure of control the executive holds over the NPRI is important in determining whether that duty has been violated.[146] Ultimately, the court found that Steadfast did, in fact, owe Bradshaw a fiduciary duty and that a fact issue remained with regard to whether Steadfast had breached this duty.[147] Since the court of appeals held a fact issue existed on this issue, it also remanded Bradshaw's aiding and abetting claim against Range because that claim was based on whether Steadfast breached its executive duty to Bradshaw.[148]

The court further declined to implement a constructive trust on the portions of the royalty assigned to third parties.[149] For the Royalty Owners Bradshaw maintained her claims against on appeal, the court of appeals held the constructive trust issue should also be decided on remand because that issue was also contingent on whether Steadfast engaged in self-dealing at the expense of Bradshaw.[150] Under the same rationale, the court also held Bradshaw's fraudulent transfer claim should be decided on remand once Steadfast's breach of the executive duty issue was determined.[151]

140. *Bradshaw*, 395 S.W.3d at 375.
141. *Id.* at 352–53, 371.
142. *Id.*
143. *Id.* at 352.
144. *Id.* at 376.
145. *Id.* at 361.
146. *Id.* at 370.
147. *Id.*
148. *Id.* at 372 ("Because the underlying tort—Steadfast's alleged breach of duty—is the basis for Bradshaw's civil conspiracy and aiding and abetting claims against Range, we sustain the second portion of Bradshaw's second issue." (citations omitted)).
149. *Id.* at 375–76.
150. *Id.* at 375–76 n.19.
151. *Id.* at 375–76.

C. *Round Three:* KCM Financial v. Bradshaw

On appeal to the Supreme Court of Texas, Bradshaw argued that the (non-market) high bonus and the (non-market) low lessor's royalty were "at least some evidence" of the executive's engaging in self-dealing at the direct expense of a non-executive NPRI.[152] Steadfast, however, claimed that it had no general duty to obtain the highest possible royalty.[153] In addition, Steadfast claimed that it had fulfilled its executive duty as a matter of law because the lessor's royalty it negotiated with Range met the required floor level of royalty as described in the 1960 deed.[154]

Considering case law on an executive's duty to the non-executives,[155] the court opined "that the executive owe[d] the non-executive a fiduciary duty and . . . defined that duty as an obligation to 'acquire every benefit' for the non-executive that the executive 'would acquire for himself.'"[156] The executive, however, "is not required to wholly subordinate its interests" to those of the non-executive parties if their interests conflict.[157] The executive retains considerable latitude in exercising his duty, although such latitude is not "unbridled[.]"[158] The "controlling inquiry" in cases alleging executive malfeasance is whether the executive engaged in self-dealing, for direct or indirect benefit, at the expense of the non-executive.[159]

In weighing each parties' arguments, the court noted that the sub-market royalty rate did not necessarily establish that Steadfast had acted improperly, but it also was not completely irrelevant.[160] The court described many

152. KCM Fin. LLC v. Bradshaw, 457 S.W.3d 70, 80 (Tex. 2015).

153. *Id.*

154. *Id.*

155. To determine the scope of the executive's duty to the non-executive, the court reviewed and considered *Schlittler v. Smith*, 101 S.W.2d 543 (Tex. 1937), *Andretta v. West*, 415 S.W.2d 638 (Tex. 1967), *Manges v. Guerra*, 673 S.W.2d 180 (Tex. 1984), and *HECI Expl. Co. v. Neel*, 982 S.W.2d 881 (Tex. 1998).

156. *KCM Fin.*, 457 S.W.3d at 81 (citing *In re* Bass, 113 S.W.3d 735, 745 (Tex. 2003).

157. *Id.* at 74.

158. *See id.* at 81 (describing the relationship between an executive and non-executive as a balancing act between the executive's need to maintain autonomy while protecting the non-executive from the executive's potential self-dealing abuse).

159. *Id.* at 82.

160. *Id.* (rejecting both parties' arguments "that the availability of a higher royalty rate can be categorically included or excluded from the scope of [the executive's] duty"). The court concluded:

> Our decision today reaffirms a principle that has existed in our jurisprudence for eighty years: An executive owes a duty of utmost good faith and fair dealing to a nonexecutive 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.

Id. at 89.

individual components that govern a mineral lease's value of which the executive has control, including royalties, delay rentals, bonuses, "the number and placement of wells[,]" and other provisions.[161] Each of these factors was noted to affect the executive's interests and the non-executive's interests in different ways,[162] and the court considered none by itself to be dispositive as to whether the executive had discharged its duty.[163] For example, the executive is not obliged to obtain the highest possible lessor's royalty or even the market-rate royalty, but that failure may still be a relevant factor in the analysis.[164] The court stressed the need to review the subject transaction as a whole to determine whether the terms of the lease, including the amount of royalty, comported with the executive's duty of utmost good faith and fair dealing.[165] In the present case, the court held fact issues related to the low royalty and the high bonus "preclude[d] summary judgment as to the non-executive's breach-of-duty claim against the executive."[166] Therefore, the Supreme Court of Texas affirmed the court of appeals on this issue.[167]

1. Lessee Absolved of Tort Liability

The court dismissed "Bradshaw's derivative-liability claim against Range" because of the absence of any evidence "that Range was complicit in the alleged underlying tort."[168] Since lease negotiations necessarily involve both the executive and the lessee, this demurral by the court would seem to limit the potential liability of the lessee to circumstances in which proof exists of a special relationship between the executive and the lessee which leads to a lessening of the royalty due the owner of a floating NPRI. However, the relationship between the lessee and the lessor can influence how the executive right is exercised and, in some instances—where proof of collusion detrimental to the non-executive is present—provide persuasive evidence that the executive fiduciary duty has been violated.

161. *Id.* at 82.

162. *See id.* (noting the non-executive interest holders may benefit from some provisions that affect the value of the lease, "including the right to receive royalties, delay rentals and bonuses," but not others).

163. *See id.* (noting the "contours of the [executive] duty remain somewhat indistinct" but the main focus is whether the executive right holder "engaged in acts of self-dealing that unfairly diminished the value of the non-executive interest").

164. *Id.*

165. *Id.* at 84.

166. *Id.* at 74–75.

167. *Id.* at 85.

168. *Id.*

For example, in *Mims v. Beall*,[169] the court considered a case in which the holders of executive rights leased the minerals to their son for a 1/8th royalty.[170] The owners of NPRIs covering the same tract sued, claiming that the lessor had breached its fiduciary duty to the NPRI holders because the "1/8 royalty was unreasonably low" when compared to similar leases in the region.[171] As in *Manges*, the trial court in *Mims* instructed the jury to apply the standard of utmost good faith and fair dealing to the actions of the executive holder.[172] The jury found that the lessors had breached their duty to the NPRI holders.[173] In holding for the non-executives on appeal, the *Mims* court noted the similarity to the Eastland Court of Appeals' decision in *Comanche Land & Cattle Co., Inc. v. Adams*,[174] and the lessors' 1/8th royalty lease to their son in the present case.[175]

In contrast to *Mims*, while the court in *KCM Financial* held that Bradshaw could press her claims against Steadfast, it made clear that it could not establish a definitive rule regarding an executive-right holder's duty to *maximize* lessor's royalty terms in an oil and gas lease.[176] Evidence that Range knew of Bradshaw's interest, "may have kn[o]wn of tensions between Bradshaw's and Steadfast's interests, and agreed to [the] one-eighth royalty and an eight-figure bonus payment" was insufficient to impute liability onto the lessee as a matter of law.[177]

The court wisely took notice of industry's worry about expanded liability for lessees.[178] Referring to the amicus brief filed by the Texas Oil and Gas Association, the court noted that "in negotiating with the executive, a lessee should not fear liability for doing nothing more than getting a good deal closed."[179] After notice of these points, the court refused to hold a lessee "directly or derivatively" responsible for policing a lessor's duty to a non-

169. Mims v. Beall, 810 S.W.2d 876 (Tex. App.—Texarkana 1991, no writ).

170. *Id.* at 878.

171. *Id.*

172. *Id.*

173. *Id.*

174. Comanche Land & Cattle Co. v. Adams, 688 S.W.2d 914 (Tex. App.—Eastland 1985, no writ).

175. *Mims*, 810 S.W.2d at 879 ("The present case is analogous to the *Comanche Land* [*&*] *Cattle Co. v. Adams* case in which the non-participating royalty interest was set at [one-half] of the royalty interest obtained by the executive rights holder." (footnote omitted)).

176. KCM Fin. LLC v. Bradshaw, 457 S.W.3d 70, 74 (Tex. 2015) ("Given the relative rights and interests at play, no bright line rule can comprehensively or completely delineate the boundaries of the executive's duty.").

177. *Id.* at 85–86.

178. *See id* at 86 (Tex. 2015) ("[W]e are not unmindful of the considerable burdens that a contrary holding would impose in the energy industry in Texas.").

179. *Id.* (citation omitted).

executive.[180] In short, the court discerned no collusion: "[W]e fail to discern any evidence raising a fact issue that Range was complicit in the alleged underlying tort."[181] Writing for the court, Justice Eva M. Guzman concluded, "Rather, the uncontroverted evidence reflects that Range merely secured a mineral-lease agreement on mutually acceptable terms."[182]

2. Constructive Trust Not Appropriate and No Finding of Fraudulent Transfer

On appeal to the Texas Supreme Court, Bradshaw reiterated her argument that she was entitled to a constructive trust on the royalties paid to the Royalty Owners.[183] To establish a constructive trust on the royalties paid, she was required to establish: "(1) a breach of a special trust or fiduciary relationship or actual or constructive fraud; (2) unjust enrichment of the wrongdoer; and (3) an identifiable res that can be traced back to the original party."[184] The supreme court declined to impose a constructive trust, believing that Bradshaw had not shown that such a measure would allow her to recover "identifiable property."[185]

The evidence indicated that she had no identifiable interest because she sought a "constructive trust emanat[ing] from [the retained one-half] interest, which Steadfast retained when it conveyed the mineral rights to Range, and not from the one-half of royalty interest reserved by [Bradshaw's parents] in the 1960 deeds."[186] Since the royalty interest Steadfast had conveyed to the other defendants was the one-half of royalty Bradshaw's parents had retained and was not the one-half of royalty Bradshaw owned, she was seeking to recover identifiable property she had never owned, a remedy outside the scope of a constructive trust.[187]

The court further declined to set aside the conveyances to the Royalty Owners as fraudulent under the Texas Uniform Fraudulent Transfer Act.[188] As argued by Bradshaw at the intermediate appellate level, she

180. *Id.*

181. *Id.* at 85.

182. *Id.*

183. *Id.* at 86–87.

184. *Id.*

185. *See id.* at 88 ("Unless the tracing requirement is observed with reasonable strictness, any suit in a debt or obligation could be used to impress a constructive trust on the assets of the defendant." (citing Peirce v. Sheldon Petr. Co., 589 S.W.2d 849, 853 (Tex. Civ. App.—Amarillo 1979, no writ))).

186. *Id.*

187. *See id.* at 87–88 (noting a "constructive trust is not merely a vehicle for collecting assets as a form of damages").

188. *Id.* at 89.

argued again that the royalty-interest transfers were fraudulent because "(1) Steadfast received less than a reasonably equivalent value in exchange for the transfers and (2) Steadfast was either insolvent at the time of such transfers were made or became insolvent as a result of the transfers."[189] Bradshaw failed, however, to provide any evidence to support these assertions.[190]

3. Analysis and Implications of the *KCM Financial* Holding

The court noted that the parameters of the executive's duty are "imprecise" and that the main indicator of a violation was whether the executive had partaken in acts of self-dealing at the expense of the nonexecutive.[191] This would include obvious acts such as negotiating a higher lessor's royalty for the executive's mineral interest than for the non-executive.[192] However, given the tenor of recent cases, more recondite activities that may not look like self-dealing at first blush are being scrutinized. From refusing to lease the non-executive's interest to getting a high bonus allegedly in return for a lowered lessor's royalty, all such schemes are now open to review.

A proper analysis requires "balancing the bundle of rights that comprise a mineral estate," not just the amount of royalties.[193] The Texas Supreme Court admonished that courts must analyze a transaction in its totality to decide whether a lessor breached its duty to a non-executive.[194] Specific aspects of a transaction, in this instance the bonus and the royalty interest, even if unusual, are not necessarily dispositive as to show a breach.[195] In *KCM Financial*, the court addressed the relationship between the executive's utmost good faith and fair dealing duty to the non-executive and the reality that "the executive [i.e., the lessor] is not required to grant priority to the non-executive's interest."[196]

In a sense, the "totality of the transaction" test as articulated by the court

189. *Id.*

190. *See id.* (holding no evidence was presented "that Steadfast was insolvent at the time it assigned its one-half royalty interest to the Royalty Owners or otherwise lacked sufficient assets" (citing TEX. BUS. & COM. CODE § 24.002(6), .003, .005(a)(2), .006)).

191. *Id.* at 74, 81.

192. *See id.* at 81 (requiring the executive to obtain for the non-executive "every benefit that he exacts for himself." (quoting Manges v. Guerra, 673 S.W.2d 180, 183 (Tex. 1984)).

193. *Id.* at 83 (quoting Altman v. Blake, 712 S.W.2d 117, 118 (Tex. 1986)).

194. *Id.* at 84 (inquiring into the transaction as a whole and, specifically, into whether the executive in negotiating the royalty comported with utmost good faith and fair dealing standard).

195. *Id.* ("[W]e cannot conclude that merely obtaining the minimally accepted royalty discharges . . . the executive's duty.").

196. *Id.* at 81.

is similar to that imposed on questions related to the possibility of bad-faith pooling. By the prevailing view, the lessor has the burden of proving bad-faith pooling.[197] Of course, this issue is one of fact to be determined on a case-by-case basis,[198] but the presence of certain factors will aid in this determination. One such factor is the presence of a special relationship between the executive and the lessee, as seen in *Mims*.[199] Another could be *inaction* by the executive that foils production over the non-executive's estate, such as refusing to lease one's own estate and thus making leasing non-executive cotenants uneconomical for lessees.[200] Ultimately, because the court has adopted such a case-specific test, it is likely that courts will be reluctant to issue summary judgments to resolve such factually unique cases.

In regard to a lessee who negotiates with an executive, the court's opinion is suggestive to any lessee that successfully negotiates a below-market royalty and an above-market bonus payment to the financial detriment to a non-executive party that inclusion in an expensive lawsuit may lurk ahead—even if, as in the situation of Range in *KCM Financial*, no evidence is presented of high jinks between an executive and lessee.[201] Yes, summary judgment was found warranted in this case, due to a lack of evidence that the lessee had been involved in the breach of the executive's duty to the NPRI holder.[202] But, practically speaking, this holding does not mean that lessees will no longer be named as defendants in executive-breach cases. It is easy to envision how a clumsily worded letter, internal memorandum, or errant e-mail may appear during discovery, which casts doubt on the lessee's clean hands.

197. *See, e.g.*, Amoco Prod. Co. v. Underwood, 558 S.W.2d 509, 512–13 (Tex. Civ. App.—Eastland 1977, writ ref'd n.r.e.) (determining the plaintiff–lessor had put on enough evidence to convince the jury that the lessee had not configured the unit in good faith, and thus, affirming the trial court's judgment). In *Amoco*, the lessor presented evidence—a letter—derived from the discovery process that was highly suggestive that the lessee had pooled seven tracts for the primary purpose of maintaining leases. *Id.* at 512. Evidence that many of the leases were near the end of their primary terms and that all but one lease contributed forty-five acres or less to the 688.02-acre tract was not alone dispositive of bad faith pooling, but all together swayed the court. *Id.* at 512–13.

198. *Id.* (noting the issue of good faith is "to be determined by the fact[-]finder" (citing Kiser v. Lemco Indus., Inc., 536 S.W.2d 585, 590 (Tex. Civ. App.—Amarillo, 1976, no writ).

199. Mims v. Beall, 810 S.W.2d 876, 882 (Tex. App.—Texarkana 1991, no writ) (declaring the executive's dealings with his son in context of a lessee constituted self-dealing)

200. *See* Lesley v. Veterans Land Bd., 352 S.W.3d 479, 491 (Tex. 2011) (noting an executive may breach his executive duty if his refusal to lease "is arbitrary or motivated by self-interest to the non-executive's detriment").

201. *See KCM Fin.*, 457 S.W.3d at 85 ("Whether a jury ultimately determines Steadfast breached a duty to Bradshaw, we fail to discern any evidence raising a face issue that Range was complicit in the alleged underlying tort.").

202. *Id.*

For these reasons, a lessee with evidence that an above-market-bonus and below-market-royalty lease will decrease royalty owed to a non-executive party should reconsider such an arrangement, certainly so if the lessee stands to reap no benefit from the NPRI-diminishing lease terms. In light of extensive title searches prior to leasing and drilling, the lessee knows both of the existence of an NPRI interest that covers the land over which it is attempting to lease and whether or not that NPRI is fixed or floating.[203]

This author predicts that, in such circumstances, floating NPRI owners will continue to argue that the lessee knew a lease with a lower-than-market royalty and higher-than-market bonus would diminish the income due to the NPRI owner. This imputed knowledge, along with some other indicia of alleged collusion between the lessee and the executive, could tilt a future case against a lessee—or at least a lessee's motion for summary judgment as in *KCM Financial*. Simply put, if there is no benefit to the lessee, then why should the lessee agree to terms that could get it entangled in litigation? And if there *is* a benefit to the lessee from such a lease, and the lessee knows of the floating NPRI interest that may be negatively affected, the lessee should consider carefully whether that NPRI owner could build a credible case against the lessee and whether the benefit it stands to reap by executing such a lease is worth the potential litigation.

Could the lease be canceled if a violation of the executive's duty is found to have occurred? In such a case, the violation would often have been evidenced by a lease that was somehow out of step with the local market with regard to the bonus and or lessor's royalty.[204] In that case, determination of monetary damages would seem to be calculable. In theory, a lessor should not be entitled to lease cancellation unless damages and/or lease reformation (to reflect market conditions) are an inadequate remedy. On the other hand, if a non-executive prevails in a case for violation of the executive's fiduciary lite duty, it is probably because the wronged non-executive has presented convincing evidence of a breach through self-dealing—the primary driver of executive breaches since *Manges*. Self-dealing smells bad to a court sitting in equity.

4. Problems and Unanswered Questions Posed by *KCM Financial*

This author has long believed that, even "if the executive owes a non-executive mineral cotenant a duty to lease the non-executive's interest" and,

203. *See id.* at 85–86 (holding the lessee was aware that the non-executive's interest burdened the estate).

204. The self-dealing could conceivably be evidenced by off-the-lease self-dealing related to other property transactions or the like.

possibly further, "even lease *its own* interest" against its will to protect the value of the non-executive's estate, such an elevated standard of care should not be expanded "to a fixed, perpetual NPRI" or similar interest carved from the executive's mineral estate.[205] With a fixed and perpetual NPRI (or similar interest), the executive cannot exert much influence over the NPRI holder's revenue other than by signing a lease—or not.[206] The executive generally cannot harm the recoupment of the fixed-NPRI non-executive, as the executive has no control over the amount of royalty that the NPRI holder receives, and since the NPRI holder is not entitled to bonus or delay rentals (unless it owns those separate interests), the executive's decisions in that regard have no bearing on the fixed-NPRI owner.[207] On the other hand, the impact of lease negotiations on the executive's fiduciary duty to *mineral* cotenants is much more significant, as the executive's decisions can impact all aspects of the non-executive's participation and compensation.[208]

One commentator has suggested that another way to analyze the tradeoffs of Steadfast in *KCM Financial* is to consider that Steadfast "traded *its* royalty interest to Range for an increased bonus, so, to make Bradshaw whole, she should receive the royalty reserved in the lease."[209] This author disagrees, believing that damages would be enough to make the non-executive whole without requiring transfer of a property interest, but the difference may be academic. In any event, back in the trial court, if Bradshaw wins, she can win a judgment only against Steadfast. Range and the assignees of Steadfast's royalty interest are not liable.[210]

205. *See* Kulander, *supra* note 29, at 611 (emphasis added).

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

207. *See id.* at 934 (describing the nature and extent to which the NPRI holder is entitled to participate in leasing and receiving certain payments); *cf.* Judon Fambrough, *What Estate Planners Should Know About Oil and Gas Law*, Presentation at the Univ. of Tex. Sch. of Law 11th Annual Estate Planning, Guardianship and Elder Law Conference, at 7 (2009) (describing how "a royalty interest is sometimes referred to as a cost-free interest because it bears no exploration and production costs" but "it does bear a pro rata share of post-production costs based on the size of the lease royalty").

208. *See, e.g.*, *KCM Fin.*, 457 S.W.3d at 81–82 (acknowledging the potential for abuse by an executive when exercising his right to lease minerals and that decisions made by the executive during such negotiations could greatly compromise a non-executive's interest).

209. John McFarland, *Texas Supreme Court Decides* KCM Financial v. Bradshaw, OIL GAS LAW. BLOG (Mar. 9, 2015), http://www.oilandgaslawyerblog.com/2015/03/texas-supreme-court-decides-kcm-financial-v-bradshaw.html.

210. *See KCM Fin.*, 457 S.W.3d at 75, 85–86, 90 (concluding there was insufficient evidence to hold Range and the assignees liable).

If no settlement is reached before trial and Steadfast is found liable, the measure of damages for breach of the executive's duty will pose an interesting question. Can Bradshaw seek the additional bonus Steadfast received for lowering its royalty, provided the jury finds that Steadfast did so? Steadfast received a $7,505 per acre bonus.[211] Across the 1,773 acres of captioned land, "the part of the bonus above the market rate" was calculated to be $7,996,375.[212] If this calculation is correct, it equals approximately $4,510 of above-market bonus per acre.[213] If the jury is satisfied that $4,510 per acre is the additional bonus Steadfast received for lowering its royalty from 1/4th to 1/8th,[214] perhaps Bradshaw can seek a portion of the $7,996,375 as damages, arguing that this figure represents the worth of the additional one-eighth royalty to Range and that Bradshaw ought to have received one-half of that additional 1/8th royalty, so she should get one-half of $7,996,375.

The issue "of the lessee's potential liability to a [non-executive] royalty owner" such as Bradshaw had not been directly considered by the Texas Supreme Court before *KCM Financial*.[215] Lessees must be pleased to see the result, though, which appears to have settled the question in their favor, at least where no collusion between the lessee and the executive can be shown. *Mims* provides a cautionary tale, however; one that highlights the relationship between the lessee and the executive.[216]

Other fact patterns involving lessee's possible duties to non-executives can be imagined. One commentator has posited the following scenario: Imagine that, instead of paying Steadfast a higher-than-market bonus, Range had assigned to Steadfast's individual owner an ORRI on lease production as additional consideration for completing the lease deal.[217] Further, imagine that the overriding royalty were worth the same as the higher-than-market bonus. The result would cost Range the same, but it is suggested that in the second scenario, Range might incur liability because the transaction appeared structured to make it look as though Range had conspired with the principal of Steadfast to the detriment of the non-

211. *Id.* at 81–82.

212. McFarland, *supra* note 209 (hypothesizing methods of valuating damages Bradshaw could potentially recover).

213. *Id.*

214. *Id.*

215. *Id.*

216. *See* Mims v. Beall, 810 S.W.2d 876, 878 (Tex. App.—Texarkana 1991, no writ) (focusing on the familial relationship between the executive parents and the lessee son).

217. McFarland, *supra* note 209.

executive.[218] Here, in contrast to the captioned case, the lessee as well as the executive might face joint liability for working together to the non-executive's disadvantage.[219]

IV. PRESCRIPTION OF NONUSE IN LOUISIANA—SOURCE OF AN IDEA

Perpetual severed executive rights can cause legal strife and complicate mineral ownership long after the original reason for separating the executive right has disappeared.[220] Can a legal mechanism be devised that continues to treat the severed executive right, which once covered a portion of the mineral estate (not NPRIs or other non-executive interests), as a real property interest but that, by action of law, reunites the severed executive right with the non-executive mineral fee from which it sprang after a period of nonuse?

One possible way to achieve this is to apply a version of the concept of a liberative prescription or dormant mineral statute to severed executive rights derived and separated from fee mineral estates. In such a scheme, the severed executive right would recombine with the non-executive fee mineral interest from which it was carved after a period of nonuse of that severed executive right.[221] If a more sweeping application of such a mechanism is desired, Louisiana's liberative prescriptive act shines, as it does not require the surface owner to give notice to the mineral owner,[222] and because the mineral owner must actually *use* the minerals rather than merely file a notice of claim in the official public records.[223]

To conceive of how such a mechanism might work, it is necessary first to examine the existing liberative prescription or dormant mineral statute from which one would like to borrow concepts—and the case law associated with such an act—to understand both how the act works and how it could be applied to the severed executive right. "Considerable variation exists in the

218. *Id.*

219. *Id.*

220. *See* Kulander, *supra* note 29, at 532–33 (citations omitted) (positing the perpetual severed executive right can complicate what it set out to remedy).

221. *Cf.* IND. CODE ANN. § 32-23-10-2 (2016) (requiring a mineral interest to revert to the owner of the interest from which it was carved out after twenty years of nonuse).

222. *See* LA. STAT. ANN. § 31:27 (2016) (providing for the extinction of a mineral servitude by "prescription resulting from nonuse for ten years" without a requirement of notice).

223. *Compare id.* § 31:29 (interrupting prescription of nonuse "by good faith operations for the discovery and production of minerals"), *with* IND. CODE § 32-23-10-2 (providing an exception for reversion after nonuse if "a statement of claim is filed" in accordance with section 32-23-10-4 of the Indiana Property Code), *and* KAN. STAT. ANN. § 55-1602 (permitting a mineral interest to survive the twenty-year prescription time frame if "a statement of claim is filed" in compliance with Kansas Statute Annotated section 55-1604).

statutory details among states that have adopted some form of" dormant mineral or liberative prescriptive law.[224] "The statutes tend to differ concerning what constitutes a 'mineral interest,' the types of 'use' that will preserve the mineral interest, the permissible period of nonuse, and . . . whether the statute is designed primarily to terminate unused mineral interests or merely to identify the owner of the interest."[225] Because of their broad scope, this Article focuses on the Louisiana prescription statutes as a possible source of ideas to implement a statutory scheme to reform perpetual executive rights.[226]

Unlike landowners in some states, such as Texas,[227] Louisiana landowners do not own the actual molecules of defined minerals underneath their land; ownership of the actual minerals in place cannot be reserved or conveyed to another.[228] Rather, landowners have "*the exclusive right* to explore" for and produce minerals.[229] Instead of a mineral estate, this is an exclusive right to explore for and produce minerals from one's land.[230] While this right is not a servitude in the captioned land, it may be conveyed

224. JOHN LOWE ET AL., CASES AND MATERIALS ON OIL AND GAS LAW 169 (6th ed. 2013). *Compare* IND. CODE § 32-23-10-2 (requiring mineral interest revert "*to the owner of the interest out of which the interest . . . was carved*" if the mineral interest goes unused for twenty years, unless "a statement of claim is filed" in conformance with section 32-23-10-4 of the Indiana Property Code (emphasis added)), *with* KAN. STAT. § 55-1602 ("An interest in coal, oil, gas or other minerals, if unused for a period of [twenty] years, shall lapse, unless a statement of claim is filed in accordance with [section 55-1604], and the ownership shall revert *to the current surface owner*." (emphasis added)).

225. LOWE ET AL., *supra* note 224, at 169.

226. To be clear, while this author does not advocate Texas simply copying Louisiana's liberative prescriptive act and applying it to Texas property law, he does see benefit in considering Louisiana's act as a source of ideas when considering reforms to Texas law.

227. Texas follows the ownership in place theory. *See* Stephens Cty. v. Mid-Kansas Oil & Gas Co., 254 S.W.290, 292 (Tex. 1923) (defining ownership in place as having the "exclusive right to possess, use, and dispose of the gas and oil").

228. *Compare* LA. STAT. § 31:6 ("Ownership of land does not include ownership of oil, gas, and other minerals occurring naturally in liquid or gaseous form, or of any elements or compounds in solution, emulsion, or association with such minerals."), *with id.* § 31:5 ("Ownership of land includes all minerals occurring naturally in a solid state. Solid minerals are insusceptible of ownership apart from the land until reduced to possession."), *and* Horton v. Mobley, 578 So. 2d 977, 983 (La. Ct. App. 1991) (reiterating the rule that oil and gas in place cannot be absolutely owned (first citing Leiter Minerals, Inc. v. California Co., 132 So. 2d 845, 850 (La. 1961); and then citing Frost-Johnson Lumber Co. v. Salling's Heirs, 91 So. 207, 211 (La. 1920)). *But see* LA. STAT. § 31:15 ("A landowner may convey, reserve, or lease his right to explore and develop his land for production of minerals and to reduce them to possession.").

229. LA. STAT. § 31:6 (emphasis added).

230. *See Horton*, 578 So. 2d at 983 (noting mineral rights create the right "to go upon land of another to explore for, produce[,] and reduce to possession" such minerals (citing Nabors Oil & Gas Co. v. La. Oil Ref. Co., 91 So. 765, 775–76 (La. 1922))); *see also* LA. STAT. § 31:6.

or reserved just like a mineral estate in other states, such as Texas.[231]

This exclusive right to develop is not a servitude until the right is held by someone other than the landowner.[232] Once severed, it becomes a mineral servitude.[233] This servitude is not absolute, however, and in Louisiana, it may be extinguished even in the absence of adverse possession.[234] Under the doctrine of liberative prescription (or, presently, "prescription of nonuse"),[235] the servitude will terminate for nonuse at the end of ten years.[236]

A. *History of Liberative Prescription in Louisiana*

Prescription has been used in Louisiana since the nineteenth century.[237] Louisiana recognized two distinct types of prescription: (1) acquisitive prescription (acquisition of ownership by adverse possession) and

231. *See Horton*, 578 So. 2d at 983 (acknowledging mineral rights may be reserved or sold (citing *Nabors*, 91 So. at 394)); *see also* LA. STAT. §§ 31:15, :21 (permitting a landowner to "convey, reserve, or lease his right to explore and develop his land for production of minerals," and defining a mineral servitude as the non-landowner's "right of enjoyment of land . . . for the purpose of exploring for and producing minerals and reducing them to possession and ownership").

232. *See* Patrick H. Martin & J. Lanier Yeates, *Louisiana and Texas Oil & Gas Law: An Overview of the Differences*, 52 LA. L. REV. 769, 804 (1992) (noting a "landowner can convey the right to produce minerals to another," which will result in creating a servitude upon the land (first citing LA. STAT. § 31:15; and then citing LA. STAT. § 31:21)); *see also* LA STAT. § 31:21 (explaining a mineral servitude encompasses "the right of enjoyment of land belonging to *another*" (emphasis added)).

233. *E.g.*, Lenard v. Shell Oil Co., 29 So. 2d 844, 850 (La. 1947); *see also* LA. STAT. § 31:21.

234. Interestingly, if a person acquires both ownership of land and a servitude covering the same land (by a servitude owner acquiring the land covered by the servitude or by a landowner whose land is subject to a servitude acquiring the outstanding servitude), the servitude is immediately terminated by "confusion," a process analogous to the concept of "merger of title" under the common law. LA. STAT. § 31:27(2) (2016); *see also* LA. CIV. CODE ANN. art. 1903 (2016) ("When the qualities of obligee and obligor are united in the same person, the obligation is extinguished by confusion.").

235. Statutory provisions dealing with the prescription of a mineral servitude are found in the Louisiana Mineral Code from sections 31:28 to 31:79; those dealing with the royalty are sections 31:80 to 31:104; those dealing with limitations on the length of the primary term of a mineral lease (ten years) are sections 31:114 to 31:148. LA. STAT. §§ 31:28–79, :80–104, :114–148.

236. LA. STAT. § 31:27(1); *see* Frost-Johnson Lumber Co. v. Salling's Heirs, 91 So. 207, 211 (La. 1920) (finding that the rights reserved by the granting parties had "been extinguished by the prescription by which servitudes are extinguished by nonuser for 10 years, according to articles 789, 3529, and 3546 of the Civil Code [of 1870]" (first citing LA. CIV. CODE art. 789 (1870) (amended and reenacted 1977); then citing LA. CIV. CODE art. 3529 (1870) (re-designated 1982); and then citing LA. CIV. CODE art. 3546 (1870) (re-designated 1982)).

237. *See* LA. CIV. CODE art. 3457 (1870) (amended and reenacted 1982) (defining the term "prescription" as "a manner of acquiring the ownership of property, or discharging debts, by the effect of time and under the conditions regulated by law"). This provision was incorporated into present article 3445 of the Louisiana Civil Code. *See* LA. CIV. CODE ANN. art. 3445 cmt (2016) (noting the provision "[wa]s based in part on Articles 3457 and 3546 of the Louisiana Civil Code of 1870")

(2) liberative prescription.[238] Liberative prescription had two subtypes: liberative prescription that would provide a procedural defense to lawsuits[239] (basically a statute of limitations) and liberative prescription that would result in loss of a servitude or some other real right because of nonuse.[240] The existence of the two types of prescription was reflected in article 3457 of the Louisiana Civil Code of 1870.[241]

Although liberative prescription principles had been applied to surface servitudes since the late nineteenth century, mineral servitudes were not considered. At the time, Louisiana had not taken a firm stance regarding the classification of mineral interests.[242] In 1920, the Louisiana Supreme Court, in *Frost-Johnson Lumber Co. v. Salling's Heirs*,[243] concluded that minerals could not be owned separate from the surface.[244] Rather, a mineral servitude could be separated from the surface, meaning that the exclusive right to explore and produce the minerals from the land could be

238. *See* LA. CIV. CODE art. 3458 (1870) (amended and reenacted 1982) (describing prescription by which one person acquired a right "by the continuance of his possession during the time fixed by law"); *id.* art. 3459 (amended and reenacted 1982) (detailing the effect of prescription by which debts are released the creditor's silence for a specified time period).

239. *See id.* art. 3528 (re-designated 1982) ("The prescription which operates a release from debts, discharges the debtor by the mere silence of the creditor during the time fixed by law, from all actions, real or personal, which might be brought against him.").

240. *See id.* art. 3529 (re-designated 1982) ("This prescription has also the effect of releasing the owner of an estate form every species of real rights, to which the property may have been subject, if the person in possession of the right has not examined it during the time required by law."). A "real right" in Louisiana is a right in a tangible or intangible thing that is not ownership but is more than a contractual right to use the thing. *See In re* Morgan R.R. & S.S. Co., 32 La. Ann. 371, 375 (La. 1880) (defining a "real right" as a *jus in re*, which includes "rights of use, enjoyment, and disposal").

241. *See* LA. CIV. CODE art. 3457 (1870) (amended and reenacted 1982) ("*Prescription* is a manner of acquiring the ownership of property, or discharging debts, by the effect of time and under the conditions regulated by law. Each of these prescriptions has its special and particular definition." (emphasis added)). For discussion of the Louisiana Civil Code of 1870, see generally A.N. Yiannopoulos, *Two Critical Years in the Life of the Louisiana Civil Code: 1870 and 1913,* 53 LA. L. REV. 5 (1992), and for a discussion of specific revisions to the Louisiana Civil Code of 1870, see generally A.N. Yiannopoulos, *The Civil Codes of Louisiana*, 1 CIV. L. COMMENT. 1, 14–18 (2008).

242. *See Frost-Johnson*, 91 So. at 211 ("It cannot be said with reason that the owner of a tract of land . . . has that right by which the oil or gas . . . belongs in some one in particular [the owner of the land] to the exclusion of all other persons." (alteration in original)). *But see id.* at 224 (Monroe, C.J., dissenting) (arguing against the majority by noting that a surface owner, as owner of the land with the exclusive right to produce oil, has the right to exclude others from his land and that right "carries with it an admission of the oil itself being owned, since the oil forms part of the thing, as to which the right of exclusion exists").

243. *Frost-Johnson*, 91 So. 207 (La. 1920).

244. *See id.* at 212–13 (holding the severance of minerals creates a right to explore and produce such minerals because minerals beneath the surface are not subject to ownership separate from the actual land).

conveyed or reserved.[245] The court also held that the mineral servitude reserved had been extinguished because it had gone unused for ten years.[246] By adopting the mineral servitude doctrine, the court confirmed that liberative prescription would apply thereafter.

Before the Louisiana Mineral Code was enacted, article 789 of the Louisiana Civil Code stated that servitudes were terminated after ten years of nonuse.[247] Article 3457 was still in effect at the time that the Louisiana Supreme Court decided *Frost-Johnson* and during the time when much of the jurisprudence regarding servitudes was developing.[248] Thus, many of the cases dealing with termination of servitudes by nonuse refer to liberative prescription.[249]

In 1936, a decade after the *Frost-Johnson* decision, Louisiana created a commission to study mineral law.[250] The commission was charged with recommending whether Louisiana should enact a mineral code.[251] This push failed, and the commission was dissolved.[252] Efforts to establish a mineral code continued, however, with the next push emerging from the Mineral Law Section of the Louisiana State Bar Association in 1948.[253] A mineral code was adopted in 1974 and took effect on January 1, 1975.[254] For the most part, it represented a codification of oil and gas law, which was created by the judiciary, and retained liberative prescription with mineral servitudes.[255]

245. *See id.* at 216 (holding the reservation of the mineral interest created a servitude in favor of the grantors of the surface estate to enter the land to explore and produce oil and gas).

246. *Id.* (first citing LA. CIV. CODE art. 789 (1870) (amended and reenacted 1977); then citing LA. CIV. CODE art. 3529 (1870) (re-designated 1982); and then citing LA. CIV. CODE art. 3546 (1870) (re-designated 1982)).

247. Sample v. Whitaker, 135 So. 38, 40 (La. 1931) ("[A]rticle 789, reads: 'A right to servitude is extinguished by the nonusage of the same during ten years.'" (quoting LA. CIV. CODE art. 789 (1870) (amended and re-enacted 1977)).

248. *See* Patrick S. Ottinger, *From the Courts to the Code: The Origin and Development of the Law of Louisiana on Mineral Rights*, 1 LSU J. ENERGY L. & RESOURCES 5, 22–23 (2012) (noting the *Frost-Johnson* court used articles of Louisiana's Civil Code to reach its decision).

249. *See, e.g.*, Haynes v. King, 52 So. 2d 531, 532 (La. 1950) (framing the cause of action as the mineral rights being extinguished by liberative prescription).

250. *See* Ottinger, *supra* note 248, at 32 (discussing the Louisiana Legislature's decision to adopt a joint resolution creating a commission to draft a code regulating minerals).

251. *Id.*

252. *See id.* at 33–34 (reporting that the commission's efforts were "continued at a later date," and eventually, the work "of the various commissions . . . came to fruition in 1974").

253. For a discussion on the long-running efforts to obtain a mineral code enacted in Louisiana, see generally Patrick H. Martin, *The Development of Mineral Law in Louisiana*, *in* LOUISIANA MINERAL LAW TREATISE 26 (Claitor's Publishing Division, 2012).

254. *Id.* at 53–54.

255. *See* Michael J. Thompson, Jr., *A Time to Protect: Revising Mineral Code Article 122 to Protect Coastal*

Under the new mineral code in Louisiana, the mineral servitude and the mineral royalty (for freestanding royalties) are subject to prescription *liberandi causa* after ten years of nonuse by the owner of the mineral servitude or its lessee.[256] Mineral servitude prescription is codified by articles 28 to 61 of the Mineral Code, and mineral royalty prescription is codified by articles 86 to 100.[257] Article 27 of the Mineral Code provides that a mineral servitude is terminated by prescription after ten years of nonuse,[258] and article 85 of the mineral code provides that a mineral royalty is terminated by prescription after ten years of nonuse.[259]

The Mineral Code provisions are very similar for mineral servitudes and royalties. For example, each prescription "commences from the date on which it is created."[260] Using property principles, drafters of the Mineral Code indicated that the ten-year limitation promoted the free use of property.[261] Commentators have also suggested that liberative prescription promotes the production and development of property resources.[262]

In 1982, the Civil Code underwent a revision, which took effect January 1, 1983.[263] The revised Civil Code recognized three types of prescription:[264] (1) acquisitive prescription;[265] (2) liberative

Restoration Projects, 56 LOY. L. REV. 413, 425 (2010) ("The overarching goal of the Mineral Code was to codify the mineral law jurisprudence that had developed in Louisiana up until that time." (citation omitted)).

256. *See* LA. STAT. ANN. §§ 31:27(1), :85 (2016) (codifying mineral servitude and mineral royalty prescription upon ten years of nonuse); *see also* Union Oil & Gas Corp. of La. V. Broussard, 112 So. 2d 96, 99 (La. 1958) ("The reservation of a royalty right to the oil, gas, and other minerals in a tract of land imposes upon the property a real obligation and is a species of real right running with the land, subject to the prescription of [ten] years liberandi causa." (citing Vincent v. Bullock, 187 So. 2d 35, 41 (La. 1939))).

257. *See generally* LA. STAT. ANN. §§ 31:28–61 (codifying oil and gas law applicable to mineral servitude prescription); *id.* §§ 31:86–100 (setting forth provisions governing mineral royalty prescription).

258. *Id.* § 31:27(1).

259. *Id.* § 31:85.

260. *Compare id.* § 31:28 (regarding prescription for a mineral servitude), *with id.* § 31:86 (regarding prescription for a mineral royalty).

261. *See* Martin & Yeates, *supra* note 231, at 806 ("Servitudes which tend to affect the free use of property . . . ." (quoting LA. CIV. CODE art. 753 (1870) (amended and reenacted 1977))).

262. *Id.* at 806 ("[T]he rule tends to promote the more rapid development of the resources of the land, and it avoids the problems of trying to determine the abandonment of property rights, . . . over a long period of time." (citations omitted)).

263. Ottinger, *supra* note 248, at 34.

264. The three types of prescription are reflected in article 3445 of the civil code and are specifically defined in articles 3446 to 3448. LA. CIV. CODE ANN. arts. 3445–48 (2016).

265. *Id.* art. 3446.

prescription;[266] and (3) prescription of nonuse.[267] This resulted in a change in the terminology that was somewhat reflected in the Mineral Code, which referred to "prescription of nonuse" in several articles (e.g., Mineral Code articles 28, 29, 86, and 107).[268]

B. *Interruption of Prescription for Mineral Interests, Royalty Interests, and Executive Rights*

According to articles 36 and 87 of the Mineral Code, production of any mineral interrupts the prescription of nonuse against a mineral servitude or royalty and restarts the ten-year clock.[269] The interruption occurs "on the date on which actual production begins."[270] The prescription of nonuse clock begins running anew on the day actual production ceases.[271] This production requirement is fulfilled when production occurs that is actually saved—production in paying quantities is unnecessary.[272]

The interruption of prescription operates similar to a pugh clause in an oil and gas lease: production from a unit including all or a portion of a tract burdened by a mineral servitude or royalty will interrupt prescription, "but if the unit well is on" a tract other than the one burdened by the mineral servitude or royalty, the interruption of the prescription of nonuse extends only to that part of the captioned tract encompassed in the spacing unit.[273] Codifying case law, the Mineral Code provides that prescription against a mineral servitude or royalty can be interrupted by constructive production if a well capable of paying production is shut in.[274]

266. *Id.* art. 3447 (defining liberative prescription as "a mode of barring actions as a result of inaction for a period of time").

267. *Id.* art. 3448.

268. LA. STAT. ANN. §§ 31:28–29, :86, :107 (2016). Although several of the leading Louisiana cases refer to "liberative prescription"—or "*liberandi causa*" if the court chooses to use Latin—the current and correct terminology is "prescription of nonuse." *See* LA. CIV. CODE art. 3445 (referring to "three types of prescription: acquisitive prescription, liberative prescription, and prescription of nonuse"); *id.* art. 3448 (defining prescription of nonuse as the "extinction of a real right other than ownership as a result of failure to exercise the right for a period of time."); *see also, e.g.*, Heirs of Primeaux v. Erath Sugar Co., Ltd., 484 So.2d 717, 720 (using the term liberative prescription).

269. LA. STAT. §§ 31:36, :87.

270. *Id.* §§ 31:36, :87.

271. *Id.*

272. *Id.* §§ 31:38, :88.

273. *Id.* §§ 31:37, :89.

274. *Id.* §§ 31:34, :90; *see also* Delatte v. Woods, 94 So. 2d 281, 287 (La. 1957) ("The rule is too well established in our jurisprudence to require citation that the drilling and production of oil from a unitized area constitutes an exercise and user of the mineral rights throughout the entire unit"); LeBlanc v. Haynesville Mercantile Co., 88 So.2d 377, 380 (La. 1956) (citation omitted) (recognizing constructive production).

A shut-in well, if "proved through testing by surface production" to be capable of producing [hydrocarbons] in paying quantities" on a tract with a mineral servitude or mineral royalty, will interrupt prescription "on the date production is obtained by such testing."[275] In addition, if the burdened tract is located partly in a unit that includes a non-tract shut-in well, that too will interrupt prescription, but only as to the part of the tract included in the unit.[276] If all or a portion of the captioned land burdened by a mineral servitude or royalty is included within a unit upon which there is a non-tract shut-in well capable of producing in paying quantities, which was completed and shut in prior to the formation of the unit, prescription is interrupted on the captioned tract.[277] The prescription time period begins running at "the effective date of the order or act creating the unit."[278]

"[G]ood faith operations for the discovery and production of minerals" are enough to interrupt the running of the prescription period of a mineral servitude.[279] This definition of "operations" is distinguishable from the "production" required in article 87 of the Mineral Code for the interruption of prescription of a mineral royalty.[280] The uses of the servitude that will interrupt the running of the ten-year period have been articulated through extensive case law and are now set out in detail in the mineral code.

Even if a qualifying use is absent, liberative prescription can be interrupted if a landowner acknowledges a mineral owner's rights.[281] "Such acknowledgment, however, must be made with the [landowner's] intent of interrupting the prescriptive period."[282] Therefore, a mere "reference to a

275. LA. STAT. §§ 31:34, :90.

276. *Id.*

277. *Id.* §§ 31:35, :91.

278. *Id.*

279. *Id.* § 31:29. "Good-faith operations" mean that the activities shall be:

> (1) commenced with reasonable expectation of discovering and producing minerals in paying quantities at a particular point or depth[;] (2) continued at the site chosen to that point or depth[;] and (3) conducted in such a manner that they constitute a single operation, [even] if actual drilling or mining is not conducted at all times.

Id.

280. *Compare id.* ("The prescription of nonuse running against a mineral servitude is interrupted by good faith operations for the discovery and production of minerals."), *with id.* § 31:87 ("Prescription of nonuse running against a mineral royalty is interrupted by the production of any mineral covered by the act creating the royalty.").

281. LOWE ET AL., *supra* note 224, at 167; LA. STAT. § 31:54. To be effective, the "acknowledgment must to be in writing." LA. STAT. § 31:54.

282. LOWE ET AL., *supra* note 224, at 167; LA. STAT. § 31:55. In addition, the acknowledgment must "clearly identify the party making it and the mineral servitude or servitudes acknowledged." LA. STAT. § 31:55.

mineral servitude that is inserted in a deed to protect the grantor against a claim for breach of warranty should not have the effect of interrupting prescription of the servitude."[283]

Interruption of prescription begins on the day actual drilling operations are begun, as distinguished from the date when preparatory operations (e.g., road building, staking a site) commence.[284] The prescription countdown restarts on the last day when actual drilling activities are conducted.[285] Prescription can be interrupted multiple times by the continuance of operations to either complete a well or begin production if such activities are conducted in good faith.[286]

As encountered above, sticky evidentiary issues can arise regarding whether refusing to grant a lease can be a breach of the executive's duty to non-executives.[287] In Louisiana, "prescription of nonuse of an *executive right*"[288] "is interrupted by an act" (good-faith operations or production) that would interrupt prescription for a mineral servitude.[289] In addition, an executive who grants a lease must act in good faith and "as a reasonably prudent landowner" who owns his own mineral rights would act, but the executive does not have any duty to grant a lease.[290] Louisiana permits an executive to refuse to grant a lease, reasoning that the executive right will terminate if ten years pass without operations or production.[291] On the other hand, in Louisiana, if the executive grants a lease in violation of the good faith/prudence obligation, the lease is still valid, but the executive is subject to a damages action.[292] Regarding self-development, an executive

283. LOWE ET AL., *supra* note 224, at 167 (citing LA. STAT. §§ 31:54–56); *see also id.* (referring to various sources for "discussions of the requirements for acknowledgment and the liberative prescription doctrine generally" such as McCollam, *supra* note 23, at 797).

284. *See* LA. STAT. § 31:30 (noting preparatory activities, "such as geological or geophysical exploration, surveying, clearing of a site, and the hauling and erection of materials and structures necessary to conduct operations[,]" are insufficient to interrupt prescription).

285. *Id.*

286. *Id.* § 31:32.

287. *See supra* Section II.A (discussing *Lesley*).

288. *See id.* § 31:106 (defining an executive right as a mineral right); *see also id.* § 31:108 (defining an executive interest as "a mineral interest that includes an executive right"). The executive right gives "the exclusive right to grant" a lease. *Id.* § 31:105.

289. *Id.* § 31:107; *see also id.* § 31:29 ("The prescription of nonuse running against a mineral servitude is interrupted by good faith operations for the discovery and production of minerals.").

290. *Id.* § 31:109.

291. *See id.* (specifying an executive interest owner has no duty to grant a lease); *see also id.* § 31:27(1) (providing for the extinction of a mineral servitude by way of prescription after ten years of nonuse)

292. *See id.* § 31:110 (providing the holder of the non-executive interest a right to recover damages).

in Louisiana cannot self-develop unless he also owns a servitude or owns land that is not burdened by servitudes for 100% of the minerals.[293]

C. *Suspension of Prescription*

A mere suspension of the prescription of nonuse is different from an interruption (and reset) of prescription and is covered in articles 58 through 61 and 89 through 99 of the Mineral Code.[294] Should the running of the prescription time period be interrupted, the running is halted, and should the prescription period begin again, it is reset to ten years from the date of the resumption.[295] In contrast, if the running of the prescription of nonuse time period is merely suspended, the prescription resumes running once the reason for suspension is lifted *without* resetting the ten-year period.[296] For example, if there were seven years of nonuse before suspension, three years would remain "on the clock" once the suspension was lifted, not ten years as in the case of an interruption.

Actual production is necessary to interrupt prescription of a freestanding *mineral royalty*,[297] whereas good faith operations are enough to interrupt prescription of a *mineral servitude*.[298] Therefore, suspending prescription of

293. *See id.* § 31:8 (providing a landowner the right to "use and enjoy his property in the most unlimited manner for the purpose of discovering and producing minerals," which includes the right to "reduce to possession and ownership all the minerals that can be obtained by operations on or beneath his land"); *id.* § 31:23 (noting a mineral servitude owner can operate in the same manner as a landowner); *id.* § 31:24 (permitting the creation of a mineral servitude "only by a landowner who owns" the right to develop at the time the servitude is created); *id.* § 31:106 (noting the executive right "may be part of another form of mineral right, such as a mineral servitude").

294. Articles 58 through 61 deal with suspension of the prescription of nonuse as to a mineral servitude. *Id.* §§ 31:58–61. Articles 98 through 100 deal with suspension of the prescription of nonuse as to a mineral royalty. *Id.* §§ 31:98–100. On the other hand, articles 36 and 87 provide that "production of any mineral" *interrupts* the prescription of nonuse from running against a mineral servitude or mineral royalty. *Id.* §§ 31:36, :87.

295. *Id.*

296. *Id.* §§ 31:59–60, :98–100. If the mineral owner is prevented from exploring for or developing the minerals by an "obstacle" that it "can neither prevent nor remove," the prescription time period "does not run [so] long as the obstacle remains" in place. *Id.* § 31:59; *see also id.* § 31:98 (indicating such an occurrence "suspends the prescription of nonuse running against the royalty until the obstacle is removed"). An obstacle as to *any* particular mineral is an obstacle with regard to the running of prescription for *all* minerals covered by the instrument creating the servitude. *Id.* § 31:60; *see also id.* § 31:100 (enunciating the same rule but in the context of mineral royalty interests). Compulsory unitization, as to a mineral servitude, does not constitute an obstacle. *Id.* § 31:61(A).

297. *Id.* § 31:87.

298. *Id.* § 31:29. Article 36 of the Mineral Code states, however, that as to a mineral servitude, "interruption occurs on the date on which *actual production* begins and prescription commences anew from the date of cessation of actual production." *Id.* § 31:36 (emphasis added); *see also* David L. Pratt II, *Severance v. Servitude: Understanding the Differences Between Texas and Louisiana Law Regarding Mineral Rights*, 16 TEX. WESLEYAN L. REV. 71, 75 (2009).

a mineral royalty requires an obstacle to actual production, as opposed to an obstacle by which "the owner of a mineral servitude is [merely] prevented from using it."[299] Prescription would not be suspended for a mineral royalty by an obstacle that prevented drilling or reworking operations.[300] Such an obstacle would be sufficient, however, to suspend prescription of a mineral servitude.[301]

D. *Louisiana Courts' Application of the Mineral Code*

Despite being a civil law jurisdiction, Louisiana courts often consult prior jurisprudence in conjunction with applying the mineral code. In *Ultramar Oil & Gas v. Fournet*,[302] the Third Circuit Court of Appeal of Louisiana faced the issue of royalty interests that contained a tract of land divided by a canal.[303] The tract at issue in *Ultramar* was a 518.30-acre tract of land that a canal divided into northern and southern tracts.[304]

Several royalty deeds were created, but the instruments did not disclose the presence of a canal.[305] Production was commenced within one year from three wells on the northern tract—within the ten-year prescription period.[306] On the other hand, production on the southern tract did not commence until more than sixteen years after the execution of the royalty deed.[307]

The trial court concluded that two separate royalty interests had been created, as well as two separate mineral servitudes.[308] Because production had been commenced within ten years on the northern tract, prescription was interrupted, and royalty proceeds were rendered.[309] Mineral royalties could not be awarded on the southern tract, however, because there had been no production on the southern tract within ten years.[310]

The Louisiana Third Circuit Court of Appeal affirmed the ruling of the

299. LA. STAT. §§ 31:59, :98.

300. *See id.* § 31:98 cmt. ("It is expressly stated in Article 98 that the obstacle must be one to 'actual production,' and it would not be sufficient if the obstacle were to drilling or reworking operations . . . .").

301. *See id.* § 31:59 (nothing that if a mineral servitude owner is prevented by an obstacle, "the prescription of nonuse does not run as long as the obstacle remains").

302. Ultramar Oil & Gas Ltd. v. Fournet, 598 So. 2d 645 (La. Ct. App. 1992).

303. *Id.* at 646.

304. *Id.*

305. *Id.*

306. *Id.*

307. *Id.*

308. *Id.*

309. *Id.*

310. *Id.*

trial court.[311] The court noted the land was completely bisected by the canal and the north side and south side of the canal were noncontiguous—citing articles 64 and 73 as governing.[312] Consequently, drilling activity on the northern tract did not interrupt prescription on the southern tract, even though both tracts were granted in one instrument.[313]

A mineral servitude may be composed of other minerals, such as lignite, in addition to oil and gas.[314] For example, in *Continental Group, Inc. v. Allison*,[315] a case involving application of pre-mineral code law, the Louisiana Supreme Court "held that the production of oil and gas would not interrupt liberative prescription with respect to the right to strip-mine for lignite."[316] The Mineral Code, effective January 1, 1975, changed the application of this rule.[317] "Under Article 40, acts that interrupt prescription as to one mineral included in a servitude will interrupt the prescriptive period as to all other minerals and all modes of use.[318]

E. *Liberative Prescription Public Policy*

The métier of the jurisprudential strategy motivating the doctrine of liberative prescription is demonstrated by the following observation by a Louisiana court of appeals:

> In the early period of judicial development of Louisiana's mineral laws, the efforts by the landowners to extend the life of the mineral servitude were by means of direct stipulations in the instrument. The first of these was an agreement between the landowner and the mineral owner that the minerals were reserved for a period in excess of ten years. Such provisions, being contrary to our public policy, were declared a nullity on the ground that prescription could not be renounced before it accrued.
>
> . . . .

311. *Id.* at 648.

312. *Id.* at 647 (first citing LA. STAT. ANN. § 31:64 (2016); and then citing LA. STAT. § 31:73 (2016)). Article 64 states that "[a]n act creating mineral servitudes on noncontiguous tracts of land creates as many mineral servitudes as there are tracts unless the act provides for more." LA. STAT. § 31:64. Likewise, article 73 states "[a] single mineral servitude may not be created on two or more noncontiguous tracts of land." *Id.* § 31:73.

313. *Ultramar*, 598 So. 2d at 647.

314. LOWE ET AL., *supra* note 224, at 166.

315. Cont'l Group, Inc. v. Allison, 404 So. 2d 428 (La. 1981).

316. LOWE ET AL., *supra* note 224, at 166; *Allison*, 404 So. 2d at 433 (citation omitted).

317. LOWE ET AL., *supra* note 224, at 166–67.

318. *Id.* (citing LA. STAT. § 31:40).

> Since it became increasingly clear that no direct contractual efforts to circumvent our public policy relating to prescription of mineral servitudes would be allowed, a resort was made to indirect attempts, carefully concealed in instruments which were valid on their face, but the underlying purpose being to defeat such public policy.
>
> It was maintained that the reservation of a royalty rather than a mineral interest would not fall within the legal category of "servitude" subject to the prescriptive period. The [s]upreme [c]ourt, however, . . . held that the interest reserved prescribed in ten years, it being immaterial what term was used in characterizing the interest.
>
> Another effort was made by classifying the mineral owner as an agent, thus creating a mandate coupled with an interest, which effort was unsuccessful.
>
> A device was also used whereby undivided interests in outstanding minerals were conveyed to minors in the hope of suspending the running of the prescriptive period. The court again upheld the public policy of the state by holding that any conveyance to a minor for the purpose of suspending prescription would not be recognized.
>
> . . . .
>
> Almost every device conceivable has been employed in an attempt to circumvent our law on this question. In every instance where the Supreme Court has found such an intent it has zealously protected the [s]tate's public policy. This vigilance of the Supreme Court has curtailed the attempts of those who seek to withhold mineral rights from commerce beyond the prescriptive period.[319]

Several public policies undergird the Louisiana prescription of nonuse doctrine. Of course, the doctrine has the effect of clearing title, because the mineral interests terminate in favor of the surface estate.[320] In Texas, for example, a nonproducing mineral interest may become effectively "lost": the owner has forgotten about it, or his heirs have, and the owner or owners can no longer be located, requiring the time- and money-consuming appointment of an attorney *ad litem* from whom a lease can be issued and

319. Chi. Mill & Lumber Co. v. Ayer Timber Co., 131 So. 2d 635, 639–40 (La. Ct. App. 1961) (citations omitted).

320. Horton v. Mobley, 578 So. 2d 977, 988 (La. Ct. App. 1991) (clarifying that upon extinguishment, the mineral interest "merge[s] with the title held by the landowners at the time prescription occurs"); *see also* LA. STAT. § 31:27(1) (providing for the extinction of a mineral servitude by "prescription resulting from nonuse for ten years"); *cf.* KAN. STAT. ANN. § 55-1602 (2016) (providing for the reversion of ownership back to the surface owner after nonuse and the failure to file a statement of claim).

providing that lease proceeds will be paid into a court-directed account.[321] On the other hand, if this problem arises in Louisiana, it is quite unlikely to continue for any significant period of time.

The Mineral Code generally discourages long-term speculation in minerals and encourages relatively quick development, since the owner of a mineral servitude must either drill within ten years or run the risk of losing his interest.[322] Attempts to interrupt the prescriptive period with operations conjured simply to maintain the mineral estate are discouraged.[323] "The operations that will interrupt the prescriptive period must be in 'good faith,' but for good faith to be established, a 'reasonable expectation of production' must be shown."[324] In one sense, the mineral servitude owner or his lessee must act—"drilling operations [only] interrupt the prescriptive period at the [instant] the well is *actually* spudded in, rather than at the time preparatory acts" begin.[325] "The period is interrupted by

321. Section 64.091 of the Civil Practice and Remedies Code permits a court to appoint a receiver for a lost mineral interest, and states:

> In the following actions, a district court may appoint a receiver for the mineral interest or leasehold interest under a mineral lease owned by a nonresident or absent defendant: (1) an action that is brought by a person claiming or owning an undivided mineral interest in land in this state or an undivided leasehold interest under a mineral lease of land in the state and that has one or more defendants who have, claim, or own an undivided mineral interest in that property; or (2) an action that is brought by a person claiming or owning an undivided leasehold interest under a mineral lease of land in this state and that has one or more defendants who have, claim, or own an undivided leasehold interest under a mineral least of the same property.

TEX. CIV. PRAC. & REM. CODE § 64.091(b) (West 2016); *see also id.* § 64.092(a) (permitting the appointment of a receiver "[o]n the application of a person who has a vested, contingent, or possible interest in land or an estate subject to a contingent future interest"); *id.* § 64.093(a) (permitting the appointment of a receiver "for the royalty interest owned by a nonresident or absent defendant in an action that (1) is brought by a person claiming or owning an undivided mineral interest in land in this state or an undivided leasehold interest under a mineral lease of land in the state; and (2)" there are "one or more defendants who have, claim, or own an undivided royalty interest in that property"). *See generally What are Fragmented or Severed Mineral Rights*, COURTHOUSEDIRECT.COM BLOG (Sep. 6, 2013), http://info.courthousedirect.com/blog/bid/319631/What-are-Fragmented-or-Severed-Mineral-Rights (noting ownership of mineral interests, once severed, become "problematic" because "[a]s the rights are sold, inherited, or otherwise passed around, the knowledge of ownership can be lost.").

322. *See* LA. STAT. § 31:27(1) (dictating a mineral servitude extinguishes by "prescription resulting from nonuse for ten years").

323. *See id.* § 31:30 (noting preparatory activities for "the commencement of actual drilling or mining operations" are insufficient to interrupt prescription).

324. LOWE ET AL., *supra* note 224, at 166; LA. STAT. § 31:29 (defining "good faith" as it pertains to interruption of nonuse); *see also* LA. STAT. § 31:29 cmt. ("Operations must be in 'good faith,' but 'good faith' is proven only if the operations meet evidentiary standards requiring that there be a 'reasonable' expectation of production, an objective standard.").

325. LOWE ET AL., *supra* note 224, at 166 (emphasis added) (citation omitted); *see* LA. STAT. § 31:30 (defining an "interruption" as beginning "on the date actual drilling or mining operations are

actual production even though it is not in paying quantities."[326] "A shut-in well also satisfies the production requirement, although in that situation, the well must have been tested and shown capable of production in paying quantities."[327]

V. TEXAS EXECUTIVE RIGHTS LIBERATIVE PRESCRIPTION—SOURCE OF THE IDEA

Given the perpetual nature of the executive right, separated executive rights will continue to ricochet down history in title chains until this right possibly finds itself owned by a party that does not desire to owe anybody such a fiduciary-like duty and finds unwelcome the kind of scrutiny to which executives are sometimes subjected by non-executive parties. At this point, the likely historic reason for creating the separated executive right—either to facilitate development by combining the leasing power of multiple cotenants in one party's hands or to retain control over leasing by a mineral owner assigning all or part of his mineral interest—is probably attenuated by time, circumstances, or both. What was once seen as a benefit is now a burden.

While the unwanted executive right in such a case may be assigned via agreement, it is conceivable that the party or parties due to receive it will not accept it. In the alternative, the party or parties due to receive may not be locatable. Further, many of the executive conflicts described above or in the articles cited occurred after one or more extended periods of non-mineral development, during which the severed executive right might have returned to the non-executive fee mineral owner if a liberative prescriptive–type mechanism had been in place, thus possibly avoiding the litigation altogether.

Many of the benefits that Louisiana enjoys under its scheme of the prescription of nonuse of mineral servitudes could be realized in Texas if such a mechanism that covered severed executive rights were implemented. If the executive right were lost (e.g., owned by a party unaware of this right), it would return to parties that actually would recoup lessor's royalty if the minerals were leased. Such a mechanism might also help prevent the

commenced" and excepting preparatory activities, such as geological or geophysical exploration).

326. LOWE ET AL., *supra* note 224, at 166 (emphasis added) (citation omitted); LA. STAT. §§ 31:30, :38. Article 38 requires that the minerals must "actually be produced in good faith with the intent of saving" or used for some other beneficial purpose. LA. STAT. § 31:38; *see also* Mays v. Hansboro, 64 So. 2d 232, 234 (La. 1953) ("We know of no authority and none has been cited where a lease automatically becomes extinguished when gas is produced in less than paying quantities.").

327. LOWE ET AL., *supra* note 224, at 166 (citation omitted); LA. STAT. § 31:34.

executive right from finding its way into the hands of a party that had no interest in leasing or, as in *Lesley*, had a motivation to *not* lease or self-develop and to prevent successors from doing so.[328]

Holders of the executive right, noting the fiduciary lite duty owed to possibly rapacious non-executive mineral owners,[329] might be relieved to see the executive right return to the non-executives. In that way, parties with no experience in leasing or knowledge of what is the current market for lessor's royalty would not have to worry about leasing at a rate the non-executive found unacceptable, then facing expensive and lengthy litigation.

Liberative prescription and dormant mineral acts have been criticized.[330] Critics contend that such laws are designed merely "to take valuable rights from mineral owners and give them to surface owners."[331] With prescription of severed executive rights, however, the concern that someone may be losing valuable minerals rights is diminished. After all, a severed executive right in Texas has none of the features of the mineral estate that directly lead to income—lessor's royalty, rentals, or bonus.[332] In addition, it comes burdened with a duty to the non-executive(s) that could entail liability and litigation.[333] Therefore, losing a severed executive right to prescription probably would not result in a loss of a valuable right and might actually spare the owner costs associated with the executive's duty.

328. *See* Lesley v. Veterans Land Bd., 352 S.W.3d 479, 491 (Tex. 2011) (holding the executive breached its executive duty by refusing to lease and imposing restrictive covenants to limit the right of future leasing).

329. Kulander, *supra* note 29, at 550 ("[T]exas courts continue to apply this fiduciary lite to executive rights cases by not requiring the executive to always subordinate its interest to that of the non-executive(s), as might be applicable in the case of a trustee, agent, or more traditional fiduciary." (first citing *In re* Bass, 113 S.W.3d 735, 745 (Tex. 2003); then citing Hlavinka v. Hancock, 116 S.W.3d 412, 419 (Tex. App.—Corpus Christi 2003, pet. denied), *disapproved by Lesley*, 352 S.W.3d at 491 n.1; and then citing RICHARD HEMINGWAY, OIL AND GAS LAW AND TAXATION § 2.2(C) (4th ed. 2004))).

330. *See* Benjamin West Janke, *The Failure of Louisiana's Bifurcated Liberative Prescription Regime*, 54 LOY. L. REV. 620, 623 (2008) (referring to Louisiana's prescriptive regime as "antiquated" and in need of reform).

331. LOWE ET AL., *supra* note 224, at 174; *see* KAN. STAT. ANN. § 55-1602 (2016) (providing for the reversion of a mineral interest back to the *surface owner* if the mineral interest goes unused for a period of twenty-years).

332. *Compare* Day & Co., Inc. v. Texland Petr., Inc., 786 S.W.2d 667, 669 (Tex. 1990) (holding the executive right is a property right, "an incident and part of the mineral estate like the other attributes such as bonus, royalty[,] and delay rentals"), *with* LA. STAT. § 31:105 ("Unless restricted by contract [the executive right] includes the right to retain bonuses and rentals.").

333. *See* KCM Fin. LLC v. Bradshaw, 457 S.W.3d 70, 74 (Tex. 2015) (reiterating "the duty of utmost good faith and fair dealing" the executive owes the non-executive).

A. *Use of the Executive Right*

Critics of liberative prescription or dormant mineral acts note that such laws "do not achieve an automatic clearing of title and often create new factual disputes such as whether a mineral interest has been 'used' during the statutory period."[334] What constitutes "use of" or "exercising" the executive right?

Obvious examples include proactive acts, such as actual leasing or self-development. Texas has made clear that the executive right can be exercised by choosing *not* to lease or develop.[335] Texas considers giving up the executive right as giving up the right of self-development.[336] In *Lesley*, non-executives were accusing the executives of exercising the executive right through documentable refusals to lease, placement of anti-drilling covenants in deeds, pamphlets advertising that no drilling would ever take place on land being offered for sale.[337] Such lack of action, however, may be perfectly reasonable and prudent from an objective standpoint.

Therefore, the idea of applying the prescription of nonuse to the executive right in Texas as if it were ownership of a mineral servitude in Louisiana involves a conceptual wrinkle in its application: Whereas the prescription of nonuse is applied in Louisiana if the owner of the mineral servitude *does not* act, purposeful inaction on the part of the executive right owner has been deemed use of or exercising the executive right in Texas.[338] If deciding *not* to lease (if presented a commercially acceptable lease), or to self-develop, is considered exercising the executive right, then the threshold for exercising the ownership right can reside in the mind of the executive

334. LOWE ET AL., *supra* note 224, at 174; *cf.* Robert W. Scheffy, Jr., Warren A. Fleet, & Trey W. Cloud, *Selected Title Issues in the Haynesville Shale Play and Other Shale Plays*, BRAPL Fall Seminar, Sep. 28, 2012, at 1, 7, 11, http://brapl.com/Images/View/617 (mentioning that the ten-year prescription rule in Louisiana has "resulted in the presentation of less than complete mineral histories (and sometimes title materials) produced in connection with the delivery of [an] initial abstract"); *see also* Pratt II, *supra* note 298, at 77 (discussing the extension of the mineral servitude by drilling operations and noting "disputes over the line between good-faith efforts and non-good-faith drilling operations are sure to persist as the demand for and price of minerals begins to increase") .

335. *See, e.g.*, Lesley v. Veterans Land Bd., 352 S.W.3d 479, 491 (Tex. 2011) (concluding the executive did not only refuse to lease but "exercised its executive right to limit future leasing by imposing restrictive covenants on the subdivision").

336. *See id.* at 492 ("[T]he right to develop is a correlative right and passes with the executive right." (quoting French v. Chevron U.S.A., Inc., 896 S.W.2d 795, 797 n.1 (Tex. 1995))).

337. *See* Kulander, *supra* note 29, at 557–67 (containing extended factual background of *Lesley*).

338. *Compare* LA. STAT. ANN. § 31:109 (2016) ("The owner of an executive interest is not obligated to grant a mineral least, but in doing so, he must act in good faith and in the same manner as a reasonably prudent landowner or mineral servitude owner whose interest is not burdened by a nonexecutive interest."), *with Lesley*, 352 S.W.3d at 491 (failing to lease and imposing restrictive covenants to restrict future leasing constituted an exercise of the executive right).

right owner—no overt act is necessary. This, of course, would make it easy for the owner of the executive right to keep the right under a prescription of nonuse scheme. Unlike retaining the ownership of the mineral servitude, which requires action, retaining the executive right under a liberative prescriptive scheme could be accomplished without lifting a finger.

A potential solution would be to adopt the same rule as Louisiana uses for what will interrupt prescription of nonuse for an executive right. In Louisiana, an executive right owner faces prescription unless the prescription of nonuse is interrupted by actual production or good-faith operations for production.[339] Such a definition would seem to open the door to executive high jinks, however, as factual problems exist with deciding what constitutes use of an executive right.[340] Could an executive exercise the executive right by collusively granting a lease with a two-day primary term to a buddy who never intends to conduct operations on the lease? Even without such collusion, all an executive has to do is document his declining leasing opportunities or his failure to self-develop, and these inactions will be seen as exercising the executive right.[341] If the offers to lease are commercially reasonable, the executive may have violated his fiduciary duty to any non-executive dependent upon the executive for revenue, but the executive would seem to have at least exercised his right in a way sufficient to interrupt the prescription period given a similar scheme

339. LA. STAT. § 31:107. For purposes of whether prescription is interrupted, the definition of "use" can be found in articles 29 through 41 of the Louisiana Mineral Code. *See generally id.* §§ 31:29–41 (defining "use" within multiple contexts of the Mineral Code).

340. Of course, in Louisiana, if the non-executive is a servitude owner or a royalty owner, and prescription is also running on the non-executive's interest, the executive may be able to run out the clock by refusing to grant a lease. But the drafters of the mineral code seemed to think that this is simply part of the way things work when mineral rights are subject to prescription and that a non-executive should not be required to act against his own interest if he wants to see prescription run on some servitude or royalty. *See id.* § 31:109 cmt. ("[T]he executive should not be bound to bargain selflessly as a fiduciary but should be free to consider his own economic position in determining which way to structure the lease transaction.").

341. Self-development is included here because courts in Texas have, in this author's view, erroneously held that a mineral owner that conveys the executive right has also conveyed the right of self-development. *See Lesley*, 352 S.W.3d at 487 ("We have stated that 'the right to develop is a correlative right and passes with executive rights.'" (quoting *Chevron U.S.A. Inc.*, 896 S.W.2d at 797 n.1)). This flawed view conflates separate sticks of the fee mineral estate despite the language of the conveyance/reservations that should control whether the right of self-development is conveyed/reserved, thereby ignoring the intention of the drafter. Such jurisprudence is based on an incorrect application of footnotes in multiple cases. *See generally* Kulander, *supra* note 29, at 572–75 (discussing a chain of Texas Supreme Court opinions that that resulted in "combin[ing] the executive right and the self-development sticks of the mineral estate" (first citing Altman v. Blake, 712 S.W.2d 117, 118 (Tex. 1986); then citing Day & Co., Inc. v. Texland Petr., Inc., 786 S.W.2d 667, 669 n.1 (Tex. 1990); and then citing *Chevron U.S.A., Inc.*, 896 S.W.2d at 797 n.1)).

of application of prescription as in Louisiana. Since such affirmative, documented inactivity on the part of the executive may be all that is needed to keep the right, if an executive is bent on keeping the executive right, it is easy to envision the chicanery he could concoct to keep the right—perhaps in the form of invited offers to lease that he then turned down.

Self-development is easier to conceptualize than leasing (or choosing *not* to lease) but more difficult to define precisely. Drilling a well is, of course, the ultimate goal of a producer.[342] Other activities, however, such as conducting seismic surveying, surficial geologic mapping, road building, staking sites, and rigging up are also typically included in the definition of activities that constitute development.[343] This issue is commonly litigated in Texas and Louisiana in the context of whether or not activities necessary to perpetuate a lease had begun before the expiration of the lease.[344]

When considering such questions in the context of possible lease expiration, however, the terms of the lease are examined first;[345] self-development involves no leases. In Louisiana, activities such as building a board road have been found to perpetuate leases into the secondary term.[346] In Texas, entering a leasehold with a bulldozer to clear a pad has sufficed.[347] Any executive liberative scheme would have to define exactly what activities constitute the commencement of self-development that would interrupt prescription of the executive right. Even then, disputes

342. *Cf.* 33 C.F.R. § 140.10 (2015) ("Development [is done] . . . for the purpose of ultimately producing the minerals discovered.")

343. In Texas, for example, the rule is that "commencement of operations for drilling is considered to be some activity on the land that is related to or preparatory to drilling if it is conducted in good faith and diligently pursued until the well has completed." SHADE & BLACKWELL, *supra* note 26, at 35. In Louisiana, the rule appears to be that preliminary actions, such as hauling lumber, erection of derricks, moving machinery, providing a water supply, will constitute drilling operations when performed "with the bona fide intention to proceed thereafter with diligence toward the completion of the well." Allen v. Cont'l Oil Co., 255 So. 2d 842, 854 (La. Ct. App. 1971).

344. *See* McCallister v. Tex. Co., 223 S.W. 859, 861 (Tex. Civ. App—Forth Worth 1920, writ ref'd) (placing timbers for an oil derrick and establishing water supply sufficiently established drilling operations); Terry v. Tex. Co., 228 S.W. 1019, 1019–20 (Tex. Civ. App.—Fort Worth 1920, no writ) (placing timbers for an oil derrick established drilling operations); Cason v. Chesapeake Operating, Inc., 92 So. 3d 436, 442–43 (La. Ct. App. 2012) (concluding preparatory acts, such as staking the site, felling trees, and gathering topographic data were sufficient to satisfy operations prior to end of the primary term).

345. *See* Petersen v. Robinson Oil & Gas Co., 356 S.W.2d 217, 218–19 (Tex. Civ. App.—Houston 1926, no writ) (listing the terms of the lease before asking whether drilling operations commenced).

346. Breaux v. Apache Oil Corp., 240 So. 2d 589, 591 (La. Ct. App. 1970) (building road and turn-around to well location constituted commencement of drilling operations).

347. Whelan v. R. Lacy, Inc. 251 S.W.2d 175, 176–77 (Tex. Civ. App.—Texarkana 1952, writ ref'd n.r.e) (clearing the area for a well was sufficient to establish drilling operations).

would arise.[348] Commencement of operations case law, however, would provide direction in such cases.

Since use of the executive right can include inaction by the executive, keeping the executive right under a prescription scheme would seem to be a matter of simply answering a quiet title action[349] by producing evidence of a refusal to lease or of self-development. It seems likely that a prescription scheme would be most useful when applied retroactively. A quiet title action to seek judicial recognition of retroactive executive prescription without the opportunity to cure could be presented to the severed executive owner as a *fait accompli*.[350] This would have the effect of prescribing the severed executive rights of those who did not know of their ownership of said right until the quiet title action was served on them.

B. *Suspension of the Executive Prescription Period*

Is the prescription of nonuse concept of suspension needed for executive liberative prescription? In Louisiana, the prescription time period is suspended for so long as an irremovable obstacle remains in place that prevents the mineral servitude owner from exploring for or developing minerals.[351] The executive can lease (if a lease is offered) or self-develop at anytime. Suspension of an executive prescription period could then be a factor if either activity were prevented. Presumably, mere economic or geologic reasons that prevented a lease from being offered would not count as a reason to trigger suspension of executive prescription, as this possibility would be in the hands of a potential lessee. If no lease was ever offered, how could the executive right ever have been used unless the executive himself had done something that prevented leases from being offered? Such an executive activity that dampened interest in leasing could then trigger fiduciary liability.

Self-development could also have a role in the suspension of the executive liberative prescription period. For example, consider the severed

348. All of which could be avoided if the Supreme Court of Texas corrects misapplied case law culminating to *Lesley* wherein the Court erroneously provides that the executive right owner also is given the right of self-development, a holding contrary to the settled idea that self-development and the executive right are each real property and separate, divisible portions of the mineral estate. Lesley v. Veterans Land Bd., 352 S.W.3d 479, 487 (Tex. 2011)

349. The quiet title action would presumably be brought by either a nonexecutive mineral owner or his potential lessee.

350. *Fait accompli* meaning "a thing accomplished and presumably irreversible." *Fait accompli,* MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/fait%20accompli (last visited Apr. 9, 2017).

351. LA. STAT. ANN § 31:59 (2016).

executive right owner who desires to self-develop but cannot for some reason, such as a fracking moratorium (which exists in New York)[352] or a massive landslide caused by heavy rains which prevents access (a force majeure event).[353] Such occurrences should suspend executive prescription so long as their effects endure. On the other hand, the need to obtain development permits or to answer queries from a regulatory agency should not result in a suspension of the prescription of the severed executive right.[354]

Here, a parallel can be drawn to the implied covenants to drill an initial well and, possibly, to develop.[355] The test for application of the implied covenant of further development is conducted by asking, would a reasonably prudent operator, mindful of the prevailing regional conditions and prices, have developed the lease?[356] This is typically an objective standard and is applied as if the lease in question were the only leasehold owned by the lessee against whom the implied covenant is being applied.[357]

352. *See* N.Y. DEP'T OF ENVTL. CONSERVATION, FINDINGS STATEMENT: FINAL SUPPLEMENTAL GENERIC ENVIRONMENTAL IMPACT STATEMENT ON THE OIL, GAS AND SOLUTION MINING REGULATORY PROGRAM: REGULATORY PROGRAM FOR HORIZONTAL DRILLING AND HIGH-VOLUME HYDRAULIC FRACTURING TO DEVELOP THE MARCELLUS SHALE AND OTHER LOW-PERMEABILITY GAS RESERVOIRS (June 2015), http://www.dec.ny.gov/docs/materials_minerals_pdf/findingstatehvhf62015.pdf ("The [d]epartment's chosen alternative to prohibit high-volume hydraulic fracturing is the best alternative based on the balance between protection of the environment and public health and economic and social considerations."); *see also* Aukema v. Chesapeake Appalachia, LLC, 904 F. Supp. 2d 199, 201 (N.D.N.Y. 2012) (discussing New York's suspension on the processing of high volume hydraulic fracturing permits); Beardslee v. Inflection Energy, LLC, 904 F. Supp. 2d 213, 217 (N.D.N.Y. 2012) ("[N]o permit applications to drill horizontal wells utilizing HVHF in the Marcellus Shale are being processed pending completion of the SGEIS or preparation of site-specific EIS.").

353. *See* Perlman v. Pioneer Ltd. P'ship, 918 F.2d 1244, 1248 n.5 (5th Cir. 1990) ("Force majeure is a phrase coined primarily for the convenience of contracting parties wishing to describe the facts that create a contractual impossibility due to an 'Act of God.'").

354. *See, e.g.*, *id.* at 1249 (holding a state agency's requirement that lessee conduct studies regarding the use, quantity, drainage, and quality of water employed in lessee's drilling operations was not an act of force majeure under the lease and lessee failed to make a reasonable effort to mitigate and remove the purported force majeure event).

355. *See* SHADE & BLACKWELL, *supra* note 26, at 47 (defining the implied covenant to reasonably develop—sometimes referred to as the covenant to drill—as "requir[ing] the [l]essee to drill as many wells to develop the property as would a reasonable prudent operator").

356. *See, e.g.*, Superior Oil Co. v. Devon Corp. 604 F.2d 1063, 1068 (8th Cir. 1979) (framing the standard as the "lessee [must] act with reasonable diligence in developing the lease" as "a reasonable and prudent operator" would under a similar situation and must demonstrate a reasonable expectation of profit). Note that "the scope of the duty" of reasonable development may be further defined by the language in the lease. SHADE & BLACKWELL, *supra* note 26, at 48.

357. *See* JOHN LOWE, OIL AND GAS LAW IN A NUTSHELL § 11.C (6th ed. 2014) ("What is reasonable development is a question of fact that depends on particular circumstances. The concept is that an economically motivated prudent operator will fully develop resources under its control within

If the owner of a severed executive right that is facing prescription has not self-developed but is claiming that suspension of the executive liberative prescription period should have occurred because he *would* have self-developed if not for a cited reason, that reason could be measured against the reasonably prudent operator standard: Would a reasonably prudent operator have developed in the same circumstance? If not, the executive liberative prescription period would be suspended for as long as the condition(s) cited for preventing development existed.[358] The prescription period would not be interrupted and reset, merely suspended.

C. *Factors Influencing the Effectiveness of Executive Liberative Prescription*

When will such an executive liberative prescription scheme be most probably effective in eliminating severed executive rights? A convergence of three factors seems necessary: (1) The owner of the executive right does not know of its ownership interest in the executive right; (2) no requirement exists to inform such a severed executive owner of impending prescription; and (3) the executive right, by action of law, reverts to the non-executive mineral estate from which it was separated without the need for judicial action.

As for the first point, in areas where mineral production has not recently advanced, or in places where production has never occurred, ownership of a severed executive right might lie in the hands of a party that has never exercised the executive right no matter how loosely the term "exercise" is defined. Indeed, the instrument that severs the executive right often does not include the word "executive" at all, but instead uses cryptic phrases like "grantors herein are not to participate in any oil lease or rental bonuses that may be paid on any lease"[359] or announces that the grantee will have the right to lease the mineral interest retained by the grantor.[360] The fact that such nebulous code words have been used to reserve or convey the executive right and have been subsequently litigated suggests that confusion exists as to the language surrounding conveying and owning the executive right. Further, it shows that some parties simply do not know they own the executive right, which in turn suggests that there exist many severed

a reasonable time.").

358. *See* LA. STAT. ANN § 31:59 (2016) (restricting the liberative prescription period so long as "the owner of [the] mineral servitude is prevented from using it by an obstacle that he can neither prevent nor remove").

359. Klein v. Humble Oil & Ref. Co., 86 S.W.2d 1077, 1078 (Tex. 1935).

360. *See, e.g.*, Watkins v. Slaughter, 189 S.W.2d 699, 699 (Tex. 1945) ("[G]rantee, his heirs or assigns, shall have the authority to lease said land . . . .").

executive right estates that have been, and will remain, quiescent for some time.

As for the second point, many states have enacted "statutes designed to reunite severed mineral interests with the surface estate."[361] Typically, these statutes are referred to as either "Dormant Mineral Interest Acts" or "Mineral Lapse Acts."[362] While the statutes vary in detail and effect, they can be generally categorized in two ways: "(1) statutes designed primarily to terminate mineral interests and reunite them with the interest from which they were carved—typically the surface estate; and (2) statutes whose apparent but elusive aim is to identify and locate mineral owners."[363] The Kansas Mineral Lapse Act, for example, lacks the self-executing feature that Indiana's Act entails.[364] Nonuse under the Kansas Act requires the surface owner to serve notice on the mineral owner that a lapse has occurred.[365] Nonuse under the Indiana Act provides that the mineral interest is "extinguished and the ownership reverts to the owner of the interest out of which the interest in coal, oil and gas, and other minerals was carved" but permits a statement of claim to be filed to halt the reversion.[366] If a dormant mineral act or liberative prescription law requires that the potential successor of the interest first give notice to the present owner, and then the present owner is given a chance to interrupt the prescription period with a claim before the transfer, one may presume that few present owners will fail to keep their interest.

It is human nature to hold onto the things one has, particularly real property, unless one is paid some form of compensation. Requirements of notice and a chance to reaffirm ownership, as present in Kansas, before prescription can occur mean that real property subject to prescription is less

361. LOWE ET AL., *supra* note 280, at 167; *see, e.g.*, IND. CODE ANN. §§ 32-23-10-1–8 (2016) (comprising the Indiana Dormant Mineral Interest Act); KAN. STAT. ANN. §§ 55-1601–7 (2016) (representing the Kansas Mineral Lapse Act).

362. LOWE ET AL., *supra* note 280, at 167; *see* Texaco, Inc. v. Short, 454 U.S. 516, 516 (1982) ("The Indiana Dormant Mineral Interest Act, more commonly known as Mineral Lapse Act, ...").

363. LOWE ET AL., *supra* note 280, at 167. The Indiana Dormant Mineral Interests Act falls into the first category, IND. CODE §§ 32-23-10-1–8, and the Kansas Mineral Lapse Act is an example of the second category. KAN. STAT. §§ 55-1601–7.

364. LOWE ET AL., *supra* note 280, at 172.

365. *See id.* § 55-1605; *see also id.* § 55-1602 (reverting ownership back to surface owner after a twenty-year period of nonuse and the failure to file a statement of claim).

366. IND. CODE § 32-23-10-2; *see id.* § 32-23-10-4 (detailing the requirements of a proper statement of claim—one requirement being the statement of claim must be filed "before the end of the twenty (20) year [prescriptive] period"); *see also id.* § 32-23-10-5 (providing for a detailed exception to reversion in cases where the owner of the lapsed mineral interest fails to timely file a statement of claim).

likely to change hands than it is in states, such as Louisiana, where it passes without notice.[367] Therefore, it stands to reason that any prospective executive rights prescription scheme in Texas would transfer more severed executive rights back to non-executive mineral owners if no notice were necessary before reversion.

Lack of notice heightens due process concerns.[368] Liberative prescription and dormant mineral acts have been challenged on constitutional grounds.[369] At the highest level, "[t]he United States Supreme Court, in a 5–4 decision, upheld the constitutionality of the" Indiana Dormant Mineral Interests Act in *Texaco, Inc. v. Short*[370] and provided in the process some guidance for a possible Texas executive liberative prescription scheme.[371]

The Indiana Act at issue in *Short* "provide[d] for termination of a 'mineral interest' if [the interest] ha[d] not been 'used' for a period of [twenty] years."[372] Additionally, the Indiana law, from its effective date, "established a two-year grace period in which existing mineral owners could take action to preserve their unused mineral interests by filing a statement of claim."[373] "Indiana's two-year grace period expired on September 2, 1973."[374] In *Short*, the owners of the mineral interest "had not engaged in one of the statutorily-defined 'uses' during the preceding twenty years [n]or filed a statement of claim within the two-year grace period."[375] "Accordingly, their mineral interests were automatically extinguished, and title passed to" the surface owner.[376] The due process claim sprang from the feature of the

367. *Compare id.* § 32-23-10-6 (specifying a permissive notice requirement for the "person who succeeds to the ownership of a mineral interest"), *and* KAN. STAT. § 55-1605 (imposing a mandatory notice requirement upon the successor of the lapsed mineral interest), *with* LA. STAT. ANN. § 31:27(1) (2016) (providing for the extinction of mineral servitude rights without a requirement of notice).

368. *See, e.g.*, Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) ("An elementary and fundamental requirement of due process in any proceeding . . . is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.").

369. For example, Indiana's Dormant Mineral Interest Act was challenged in the early 1980s on three grounds: (1) the Act violated the Fourteenth Amendment because the lack of notice from the lapse deprived individuals of their procedural due process rights; (2) the Act effectuated a taking without just compensation; and (3) the exception in the Act regarding a filing of a statement to avoid extinction of a mineral interest violated the Equal Protection Clause. Texaco, Inc. v. Short, 454 U.S. 516, 516 (1982).

370. *Texaco*, 454 U.S. 516 (1982).

371. LOWE ET AL., *supra* note 280, at 168.

372. *Id.*; *Texaco*, 454 U.S. at 519 (citations omitted).

373. LOWE ET AL., *supra* note 280, at 168; *Texaco*, 454 U.S. at 519 (citation omitted).

374. LOWE ET AL., *supra* note 280, at 168; *Texaco*, 454 U.S. at 521.

375. LOWE ET AL., *supra* note 280, at 168; *Texaco*, 454 U.S. at 521.

376. LOWE ET AL., *supra* note 280, at 168; *see Texaco*, 454 U.S. at 522, 529–30, 531, 538, 540

law that allowed—but did not *require*—"the surface owner to give notice of lapse to the mineral owners."[377] When the surface owner did so, the mineral owners responded by filing statements of claim—but too late, according to the Indiana law.[378]

The United States Supreme Court noted that "[t]he statute does not require any specific notice be given to a mineral owner prior to a statutory lapse of a mineral estate."[379] Nonetheless, the Court upheld the Indiana Act as constitutional, stating, "We have no doubt that, just as a State may create a property interest that is entitled to constitutional protection, the State has the power to condition permanent retention of that property right on the performance of reasonable conditions that indicate a present intention to retain the interest."[380] "The Court rejected the mineral owners' due process argument," holding instead "that the enactment of the law with the two-year grace period provided mineral owners with adequate notice and opportunity to preserve their interests by filing a statement of claim."[381] Although the mineral owners in *Short* "stipulated they had not used their mineral interests for over twenty years, the Court noted that if they had contested their nonuse, they would have been able to present their case in a subsequent quiet title action."[382] The Court clarified:

> [I]t is essential to recognize the difference between the self-executing feature of the statute and a subsequent judicial determination that a particular lapse did in fact occur. As noted by appellants, no specific notice need be given of an impending lapse. If there has been a statutory use of the interest during the preceding [twenty-year] period, however, by definition there is no lapse—whether or not the surface owner, or any other party, is aware of that use. Thus, no mineral estate that has been protected by any of the means set forth in the statute may be lost through lack of notice. It is undisputed that, before judgment could be entered in a quiet title action that would determine conclusively that a mineral interest has reverted to the surface owner, the full procedural protections of the Due Process Clause—including notice reasonably calculated to reach all interested parties and a prior opportunity to

(concluding the statute to be constitutional, and therefore, the mineral interests in question lapsed and reverted).

377. LOWE ET AL., *supra* note 280, at 168; *Texaco*, 454 U.S. at 522.

378. LOWE ET AL., *supra* note 280, at 168; *Texaco*, 454 U.S. at 522.

379. *Texaco*, 454 U.S. at 520.

380. *Id.* at 526.

381. LOWE ET AL., *supra* note 280, at 168*; Texaco*, 454 U.S. at 529.

382. LOWE ET AL., *supra* note 280, at 168; *see Texaco*, 454 U.S. at 533–34 (recognizing property use would preclude a question of notice, giving rise to action for quiet title if ownership was disputed).

be heard—must be provided.[383]

The third point, like the second above, again makes sure the transfer occurs without input from a severed executive rights owner that has let the interest lapse. In Louisiana, the transfer occurs by action of law, and this transferral, inevitably, has been contested on constitutional grounds.[384] Such challenges have uniformly been cast down with a leaden knell:

> If there is anything that seems to be well established in our jurisprudence, it is that any instrument which attempts to extend a mineral servitude beyond the prescriptive period set forth in our codal articles will be declared a nullity by our courts, if such fact is properly presented and established.[385]

D. *Reunification of the Executive and Mineral Fee After Prescription*

When the executive right is severed and prescription is applied, what right is it recombined with when the other sticks of the mineral estate are not held by just one owner? For example, in Texas, if Owen owns 100% of the executive rights, Ernest owns 100% of the right to collect royalty, and John owns 100% of the right to bonus and rental, to whom does the executive right return upon prescription? Both Ernest and John own portions of the mineral estate along with Owen. Although such a division of rights is rare, this and other such splits are possible, dependent on how a jurisdiction divides mineral rights. But determining which of the non-executive rights is the "bigger" right to which the executive right might return upon prescription is a difficult question.[386]

The problem of determining the "biggest" mineral right—or of even applying liberative prescription to the severed executive right in the first place—is complicated by the strange holding of the Texas Supreme Court in *Lesley*, wherein it was held that the right of self-development passes with the executive right.[387] Applying this rule from *Lesley* to the above example, Owen, as the owner of the severed executive right, also owns 100% of the right of self-development as long as he owns the executive rights.

383. *Id.*

384. For example, in *Chicago Mill*, one issue was whether the evidence was sufficient to establish that the defendant had attempted to extend a mineral servitude in contravention of Louisiana's public policy. Chi. Mill & Lumber Co. v. Ayer Timber Co., 131 So. 2d 635, 639 (La. Ct. App. 1961).

385. *Id.*

386. *See, e.g.*, McSweyn v. Musselshell Cty., Mont., 632 P.2d 1095, 1099 (Mont. 1981) (considering whether a mineral fee interest was more valuable than a mineral royalty interest, and expressing neither to be inherently more valuable).

387. Lesley v. Veterans Land Bd., 352 S.W.3d 479, 492 (Tex. 2011).

Technically, then, he would own *two* rights over the mineral estate according to the case law established by the Texas Supreme Court in *Lesley*;[388] therefore, his executive right is not technically a severed or separated executive right. For liberative prescription to be effective at removing severed executive rights, either it must be recognized that the executive right *does not* automatically include the right of self-development, unless the severancing instrument says otherwise,[389] or, at the least, courts must allow prescription of an executive right that is severed except for the right of self-development.

Prescription of the severed executive right eliminates any benefit that was originally gained by creating the severed executive right in the first place.[390] However, such a gain in ease of leasing—and the possible increase in the mineral property value caused by any increase in the ease of leasing—may be lost as ownership circumstances change over succeeding decades. In other words, the reason or reasons why the executive right was originally separated can attenuate with time, and so can the enhanced value associated with the separated executive right. If, for example, the executive right over 100% of Blackacre was bequeathed in 1916 to one child of five—all of whom got equal, undivided shares—for the sake of easing the leasing logistics and negotiations of the five, 1/5th, undivided mineral portions, that benefit probably is not a concern in 2016. One hundred years later, the owners are different and probably more numerous; yet the severed executive right may endure, complicating deals, burdening some parties with fiduciary duties to others, and sparking litigation. The benefits of the severed executive right may have vanished, but the burden remains.

Executive liberative prescription would affect non-executive mineral interests only. Commonly, however, mineral interests are much more fractionalized today compared with fifty to one hundred years ago, when the executive right may have been originally separated from all or a portion of the mineral estate.[391] For example, suppose that an owner of 100% of the mineral estate constituting Blackacre conveyed in 1916 an equal, undivided share in the minerals to four parties: A, B, C, and D. Since A was the most experienced in the leasing of minerals, the grantor conveyed to

388. *See id.* (indicating grantor passed the right to self-development when grantor conveyed executive right to grantee).

389. This is the preferred method in this author's point of view.

390. Kulander, *supra* note 29, at 532–33 (citations omitted).

391. *Compare* Manges v. Guerra, 673 S.W.2d 180, 181 (Tex. 1984) (stating percentiles of 53.4 and 46.6 ownership by the parties), *with* Whelan v. R. Lacy, Inc., 251 S.W.2d 175, 177 (Tex. Civ. App.—Texarkana 1952, writ denied) (pointing to a mineral lease where one party owned the west one-half, and another owned the east one-half).

him all the executive rights, leaving each of B, C, and D a one-quarter, non-executive, undivided interest in the minerals. By 2017, A, B, C, and D are long dead, and each of their interests is now held by at least a dozen non-executive mineral interest successors-in-interest—a very common fractionalization scenario. If an executive liberative prescription scenario were triggered now, who would get what interest?

In *Day & Co. v. Texland Petroleum*,[392] the Texas Supreme Court not only categorized the executive right as a distinct property right whose transfer is governed by the laws of real property but also considered how the executive right is passed.[393] *Day* involved the question of whether the executive right to an undivided 3/4th mineral interest was passed through a conveyance in which the grantor reserved only an undivided 1/4th mineral interest but made no mention of reserving the executive right.[394] The court held that 3/4th of the executive right had passed because it was not expressly reserved in the grant and that only 1/4th of the executive rights stayed with the grantor along with the minerals.[395] The court opined, "When an undivided mineral interest is conveyed, reserved or excepted, it is presumed that all attributes remain with the mineral interest unless a contrary intent is expressed."[396]

With regard to the passage of the executive right, *Day* provides not only that when minerals are passed or reserved, without further words of conveyance or reservation to the contrary, the executive right associated with those minerals is conveyed or reserved as well,[397] but also that, when not mentioned in the conveyance or reservation, severed executive rights are passed.[398] Applied to executive liberative prescription, this suggests that prescribed severed executive rights that cover multiple undivided non-executive mineral estates will return to and reunify with those non-executive mineral estates on a one-to-one percentage basis, leaving no portion of the executive right severed.

Of course, executive liberative prescription would not affect NPRIs and other non-executive minerals. NPRIs, being carved out of the right to royalty found encompassed in the larger mineral estate,[399] are, by definition,

392. Day & Co., Inc. v. Texland Petr., Inc., 786 S.W.2d 667 (Tex. 1990).
393. *Id.* at 669.
394. *Id.* at 668.
395. *Id.* at 669–70.
396. *Id.* at 669 n.1.
397. *Id.* at 669.
398. *Id.*
399. SHADE & BLACKWELL, *supra* note 26, at 20.

always non-executive interests,[400] and thus there is no non-executive mineral interest to which the executive right can return upon prescription. Therefore, NPRI owners and other similar non-executive interest owners would not be in the class of mineral interest owners concerned with executive liberative prescription; those would only be the non-executive mineral owners. The existence of NPRIs, especially those that are perpetual in nature, yield royalty, not the right to lease.[401] Because of the money NPRIs yield, it would be impossible to do away with NPRIs in the same way as is being suggested for severed executive rights. Despite coming freighted with their own unique fiduciary obligations that an executive may want to be rid of, NPRIs lie outside the remedy for severed executive rights suggested above.

What is the right to lease worth? If a severed executive right is to be subject to reunification with the non-executive minerals from whence it came, the owner of the severed executive right *is* losing a real property right. In the case of an executive right not being exercised for decades—and remembering that choosing *not* to develop or lease is exercising the right[402]— the right may be long forgotten and without value. And if an executive liberative prescription scheme is to falter on constitutional grounds, it will likely be for lack of notice. Adding a notice provision like that found in Kansas,[403] however, may defeat the purpose of an executive liberative prescription scheme—that of quietly eliminating decades-old severed executive rights that merely serve to occlude title opinion requirement clearance, hinder development, and spurn litigation.

How long should the prescriptive period be? It certainly does not have to be just ten years, nor should it be. Consider the following example: In 1996, Frank buys the surface and one-half of the mineral estate to 130 acres, allowing the seller to retain a one-half, non-executive interest in the fee mineral estate. Frank sees importance in controlling potential use of his land, as he is contemplating a home, barns, and horses. Assuming the mineral interest was perpetual and the executive right was subject to ten years prescription, Frank would lose the executive rights over the seller's half of the minerals in 2006 if no one sought to lease the land from 1996 to

400. Kulander, *supra* note 29, at 544.

401. *See* SHADE & BLACKWELL, *supra* note 26, at 19 ("A royalty interest is a share of production which is free of the cost of production. [It] is a non-possessory interest with no operating rights.").

402. Lesley v. Veterans Land Bd., 352 S.W.3d 479, 491 (Tex. 2011) (failing to lease and imposing restrictive covenants to restrict future leasing constituted an exercise of the executive right).

403. KAN. STAT. ANN. § 55-1605 (2016) (imposing a notice requirement upon the successor of the lapsed mineral interest).

2006. This might diminish the value of Frank's land as a home site or subdivision, provided an oil company would want to lease only one-half of the minerals.[404] To alleviate this, extending the prescription period to, say for example, forty years might push the prescription out to a point where loss of the severed executive right is not such an immediate problem.

Ultimately, an executive prescription scheme should not take away a severed executive right for which someone presumably paid value without first allowing an extended period to pass. When a severed executive right was conveyed or reserved ten years ago, the parties that executed that conveyance or reservation are much more likely to still be around and interested in maintaining the executive status quo ten years hence rather than, say for example, fifty years hence. A balance should be found that protects desired property rights from prescription while alleviating the problems that perpetual severed executive rights cause many decades after all the parties involved in the conveyance or reservation are gone.

VI. AFTERMATH AND CONCLUSIONS

By ruling "that she has a jury case to present against the mineral owner that converted a portion of her royalty to cash by calling it lease bonus," the holding partially vindicates the lessor, said Dan Bates, a Fort Worth, Texas, attorney who counseled Bradshaw.[405] "That the mineral owner, leasing minerals in a manner abusive of royalty owners, may have to face a jury hopefully will deter such conduct."[406] On the other hand, Bates lamented that Ms. Bradshaw was "disappointed . . . at the court's holding that an oil-and-gas operator cannot be liable even though it leases minerals under terms the operator knows violates the duty of utmost good faith [that] the mineral owner/lessor owes to a royalty owner like Bradshaw."[407]

Range praised the decision in a public statement, focusing on its status as an arm's length lessee:

> We are pleased that the [Texas] Supreme Court ruling validates the position we've taken all along: that it was improper for the plaintiffs to attempt to impose the duty of the executive rights holder on Range as the lessee, and an

404. The author thanks Professor Emeritus of Law Patrick Martin of Louisiana State University for raising this example.

405. Angela Neville, *High Court Finds Executive in O&G Lease Negotiations Met Good Faith Duty*, TEX. LAW. (Mar. 11, 2015), http://www.texaslawyer.com/id=1202720272729/High-Court-Finds-Executive-in-OampG-Lease-Negotiations-Met-Good-Faith-Duty#ixzz3UJLezQP5.

406. *Id.*

407. *Id.*

arm's length third party entitled to act in its own best interest.[408]

This author, considering the court of appeal's opinion in *Bradshaw*, has noted:

> Now that bonus is firmly ensconced as a prime vector of profit for lessees, [*Bradshaw*] may signal a coming wave of suits by NPRI owners who feel that the leases they are dependent on for revenue from their royalty interests are not reflective of the regional leasing trend and perhaps represent a violation of the duty owed them by the executive. Executives would do well to ensure their royalty and bonus fractions and amounts in leases they execute are not noticeably out of line with regional leasing terms, particularly if the leasehold is burdened with NPRI interests and especially if those NPRI interests are fractions of whatever royalty the executive negotiates.[409]

The ruling of the Texas Supreme Court buttresses this prediction.[410] The court remanded to the trial court the question of whether the lease in this particular case was so incongruous with the local leasing environment that no reasonably prudent operator mindful of the duty an executive had to a non-executive interest would have signed it.[411] Since the question of the executive's potential liability to a NPRI owner, such as Bradshaw, for accepting uncommercial leases has only rarely been considered by the Texas Supreme Court, the potential damage calculation methodology to be used is difficult to predict.

The executive's lessee apparently escaped the shadow of liability, as no evidence of collusion was present to suggest that the executive and the lessee had rigged the lease to harm the return to the non-executive.[412] Even though Range has a land department and thus presumably had done the title work necessary to learn of the existence of the NPRI interest, and even

408. Lance Duroni, *Range Resources Off Hook in Royalty Feud: Texas High Court*, LAW360 (Mar. 6, 2015), https://www.law360.com/articles/628612/range-resources-off-hook-in-royalty-feud-texas-high-court.

409. Kulander, *supra* note 29, at 613.

410. *See* KCM Fin. LLC v. Bradshaw, 457 S.W.3d 70, 74 (Tex. 2015) (opining market-rate royalties are relevant but not a dispositive factor in determining whether the executive breached the duty owed to lessees).

411. *See id.* at 83–85 (concluding "there [wa]s some evidence in the summary-judgment record to create a fact issue on Bradshaw's claims that the one-eighth royalty Steadfast negotiated was artificially low, the bonus Steadfast received was unusually high, and Steadfast intended to minimize the benefit shared with Bradshaw").

412. *See id.* at 85–86 (finding Bradshaw did not produce evidence to contravene anything more than an arm's length transaction between Range and Steadfast to support Bradshaw's claims of conspiracy and aiding and abetting).

though it has a lease department that would have known what the prevailing lessor's royalty and bonus in the region were at the time of lease execution, the lessee ostensibly just got a good deal.[413]

KCM Financial continues the long train of cases that scrutinize the actions—or the inaction—of the executive and the lessee.[414] An executive that stands to gain no financial benefit from leasing may not want to concern himself with the liability arising from the fiduciary lite duty that the executive right comes freighted with and may welcome some manner of executive prescription. In addition, even though *KCM Financial* provides comfort to lessees able, in a particular circumstance, to fend off a non-executive accusing them of collusion between a lessee and an executive to harm the non-executive's recovery from leasing, such accusations may not even arise after an executive liberative prescription mechanism is established.

More broadly, the benefits that Louisiana enjoys from the prescription of nonuse could be similarly derived from an executive liberative prescription scheme in Texas without actually taking away anybody's fee mineral interests. The constitutionality of liberative prescription and dormant mineral acts has long been established for laws that transfer fee mineral interests. Thus, the constitutionality of a Texas act that would merely transfer the severed executive right, provided that it was drafted with care and concerns about notice were tamped down without eliminating the effectiveness of the statute, would seem likely. Actual use of the executive right, per the discussion above, is broadly defined and includes (presumably documented) affirmative decisions *not* to lease. This author predicts that, under the proposed executive liberative prescription scheme, executives set on retaining that right would likely do so. Overall, however, such a mechanism could stifle lawsuits before they happened by quietly eliminating unknown or unwanted separated executive rights through the action of law and the passage of time.

413. *See id.* at 86 ("The evidence shows nothing more than a typical business transaction in which the parties reached a meeting of the minds as to terms mutually acceptable to both sides.").

414. *See* Dearing, Inc. v. Spiller, 824 S.W.2d 728, 731, 733–34 (Tex. App.—Fort Worth 1992, writ denied) (examining whether the executive breached his duty to the non-executives in light of the fact that nearby leases had obtained significantly more favorable terms); *see also* Manges v. Guerra, 673 S.W.2d 180, 184–85 (Tex. 1984) (granting exemplary damages for NPRI owners when executive rights owner failed to negotiate leases with third parties and otherwise "willfully, wantonly, maliciously, and unconscionably breached his fiduciary duty").