



January 1977

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Recommended Citation

Michael D. Salim, Comment, *Implied Covenants between Assignors and Assignees of Oil and Gas Leases: Policy and Precedent*, 31 Sw L.J. 905 (1977)
<https://scholar.smu.edu/smulr/vol31/iss4/7>

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IMPLIED COVENANTS BETWEEN ASSIGNORS AND ASSIGNEES OF OIL AND GAS LEASES: POLICY AND PRECEDENT

by Michael D. Salim

Implied covenants between lessors and lessees of oil and gas leases have been institutionalized through statute and through precedent. In comparison, however, these same covenants have not widely been found implicit between assignors and assignees of oil and gas leases. This Comment, while emphasizing Texas common law in part II, has as its purposes the general exposition of implied covenants and the explanation of why these covenants should not be implied between assignors and assignees of oil and gas leases.

I. JUDICIAL DEVELOPMENT OF IMPLIED COVENANTS

The law of oil and gas has had a practical and problematical evolution.¹ In the early stages, oil and gas ownership was a mutable concept: courts often formulated their judgments without clearly understanding the physical properties of the minerals.² Two principal theories of ownership, qualified and absolute, emerged.³ As the migratory propensity of the oil and gas became more evident, the earliest possessor stood to gain the most.⁴ The landowner, however, was often of limited resources, or if he had the capital to finance drilling and production, he was likely to lack the requisite geological or engineering talents. These individual inadequacies, coupled with the overarching speculativeness of discovery, led to many innovations in oil and gas law designed to minimize the risks of production and to shift expenses to others.⁵

1. See generally 5 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW § 801 (1975); Summers, *Legal Rights Against Drainage of Oil and Gas*, 18 TEXAS L. REV. 27 (1939); Comment, *Liability in Texas for Wrongful Drainage of Oil and Gas*, 27 TEXAS L. REV. 349, 350-52 (1949); 43 TEX. JUR. 2d Oil & Gas § 418 (1963).

2. See Summers, *supra* note 1.

3. See Walker, *Property Rights in Oil and Gas and Their Effect upon Police Regulation of Production*, 16 TEXAS L. REV. 370, 371-73 (1938). Under the qualified ownership model, all landowners over the mineral reservoir have co-extensive ownership and possessory rights to the oil and gas mined; collective rights are provided for because of the migratory nature of the minerals. See also *Ohio Oil Co. v. Indiana*, 177 U.S. 190 (1900); *Bell Corp. v. Bell View Oil Syndicate*, 24 Cal. App. 2d 587, 76 P.2d 167 (1938). Texas adheres to the absolute theory whereby a surface landowner owns individually all the oil and gas to be found below his land. See also *Stephens County v. Mid-Kansas Oil & Gas Co.*, 113 Tex. 160, 254 S.W. 290 (1923); *Texas Co. v. Daugherty*, 107 Tex. 226, 176 S.W. 717 (1915).

4. See *Thompson v. Consolidated Gas Utils. Corp.*, 300 U.S. 55 (1937); *Champlin Ref. Co. v. Corporation Comm'n*, 286 U.S. 210 (1932).

Borrowing on the rule of capture of wild animals, the courts applied a similar theory to the subsurface minerals. See Hardwicke, *The Rule of Capture and Its Implications as Applied to Oil and Gas*, 13 TEXAS L. REV. 391 (1935). The drainage from other land which often accompanied the capture was not early guarded against, by producers or by courts. See *Kelly v. Ohio Oil Co.*, 57 Ohio St. 317, 49 N.E. 399 (1897); *Barnard v. Monongahela Natural Gas Co.*, 216 Pa. 362, 65 A. 801 (1907).

5. See 43 TEX. JUR. 2d Oil & Gas § 418 (1963); Jackson, *Federal Income Tax Problems Involved in Typical Oil and Gas Transactions in Texas*, 25 TEXAS L. REV. 343 (1947).

A practice particularly attractive to the landowner in fund raising or in acquiring expertise was to sever the surface and mineral interests through the execution of a lease.⁶ The instrument's terms generally would authorize an exclusive right of exploitation of the oil and gas for the lessee and would retain for the lessor a royalty⁷ to be paid in the event that oil or gas was discovered and produced.⁸ Beyond the general provisions for the lessor's compensation and for the lessee's rights of production, the lease terms were usually more procedural than substantive.⁹ In essence, the lessee in drafting the lease for the landowner's signature possessed a decided advantage¹⁰ under the express duties of the agreement.¹¹

A. Policy Evoking Implication

Although lease agreements normally contain specific provisions for the payment of oil royalties or gas well rentals, covenants to perform those acts necessarily antecedent to the creation of the legal obligation to pay the royalty are not always expressly enumerated. The financial interests which undergird the lessor's royalty compensation, that is, the development and marketing of a profitable oil or gas well, would appear to be those of the lessee as well. A more searching analysis, however, compels the conclusion that prompt capture may not always be the lessee's primary economic objective. Frequently,¹² the lessor has arranged to obtain the major portion of his remuneration through the royalty on the produced oil and gas; as a result, "anxious" understates the landowner's anticipation of exploration, development, operation, and marketing stages of the producing process. The lessee, on the other hand, pursues a more guarded advancement. Through a lease, the lessee, an expert in comparison to the surface owner, has assumed the risk of frustration. When viewed in these terms, the lessee

6. See generally M. MERRILL, COVENANTS IMPLIED IN OIL AND GAS LEASES § 1 (2d ed. 1940); H. WILLIAMS, R. MAXWELL & C. MEYERS, THE LAW OF OIL AND GAS 139-297 (2d ed. 1964); 1 H. WILLIAMS & C. MEYERS, *supra* note 1, § 202.

7. "The term 'royalty' in the strict sense is held to mean a share of the product or the proceeds therefrom, reserved to the owner for permitting another to use the property." H. WILLIAMS, R. MAXWELL & C. MEYERS, *supra* note 6, at 406. In applying the principle of "royalty" to oil and gas, however, commentators narrow its scope: a royalty is "that portion of the oil produced for which the lessee must account to the lessor under the terms of the lease, exclusive of oil payments but inclusive of excess or overriding landowner's royalty." *Id.* See also 1 E. BROWN, THE LAW OF OIL AND GAS LEASES § 6.00 (2d ed. 1973); 3 A. W. SUMMERS, THE LAW OF OIL AND GAS §§ 571-572, 583, 590 (perm. ed. 1958).

8. See M. MERRILL, *supra* note 6, § 1, at 16.

9. *Id.* § 5.

10. See note 24 *infra* and accompanying text.

11. Though the immediate concern here is with the implication of lease rights and duties, the express covenants have an indirectly relevant effect on the implied terms. In *Carper v. United Fuel Gas Co.*, 78 W. Va. 433, 89 S.E. 12 (1916), this basic rule was handed down: "An implication cannot stand against an express agreement. In so far as it is inconsistent with the terms of the agreement, it [the implication] must yield." Care, however, should be utilized in not reading this principle too broadly. In the narrowest sense, the court held only that an implied covenant is precluded only where an express term, dealing with the same subject matter, has been asserted. For a discussion of the assimilation and evolution of the express oil and gas lease provisions see Veasey, *The Law of Oil and Gas* (pts. 2-4), 18 MICH. L. REV. 652, 652-72, 749, 749-73 (1920), 19 MICH. L. REV. 161 (1920), and Walker, *The Nature of the Property Interests Created by an Oil and Gas Lease in Texas*, 7 TEXAS L. REV. 1, 10-49 (1928).

12. The exception may be the situation in which the landowner has contracted to receive large delay rentals, paid by the lessee, the operator of the working interest, for the privilege of preventing the lease from lapsing or of shielding himself from breach. See M. MERRILL, *supra* note 6, §§ 22-28.

may prefer to sit on his lease interest, using it instead for speculation or as a reserve for postponed exploitation.¹³ Even if the field is a proven producer, the lessee may find his interests best served by the exercise of discretion before plunging headlong into full-scale production, despite the lessor's preferences. By waiting, the chance of an enhanced price may reflect a more profitable investment.

Given these conjectural, though practical conflicts of interest, the adherence of the courts to the policy of avoiding the insertion of contractual terms upon which the parties have not agreed,¹⁴ *i.e.*, the implication of covenants, is difficult to explain. Dilatoriness is not an impasse, however, and the justifications for implication of additional duties impelled action.¹⁵ As the law developed, courts, seeking to justify their own intrusions into the realm of implied covenants,¹⁶ and commentators, giving impetus to their arguments,¹⁷ could claim a common law recognition of rights and duties beyond those expressly recorded in the oil and gas lease.

Slow in its coming,¹⁸ the discovery of the "evident" truth of the implied oil and gas lease covenant was not without policy underpinnings.¹⁹ First, land ownership in the late nineteenth and early twentieth centuries was that of an agricultural society²⁰ in which land titles were generally of small acreage.²¹ Moreover, these title holders were often deficient in finances,

13. *Id.* § 1, at 17

14. 3 A. CORBIN, CONTRACTS § 561, at 279-80 (1960).

15. The doctrine of implied covenants did not receive its official upstart until the Supreme Court of Pennsylvania, in a case involving an express clause to develop, asserted through dictum that in the absence of the specific development provision "there would of course have arisen an implication that the property should be developed reasonably, and evidence of a custom of reasonable development by boring a given number of wells in a certain space of time would have been competent and perhaps controlling." *Stoddard v. Emery*, 128 Pa. 436, 18 A. 339, 339 (1889). See also M. MERRILL, *supra* note 6, § 10, at 40-41, where he finds the legal groundwork for the *Stoddard* decision laid in two earlier Pennsylvania cases, *Bradford Oil Co. v. Blair*, 113 Pa. 83, 4 A. 218 (1886), and *Brown v. Vandergrift*, 80 Pa. 142 (1875).

The leading case in the evolution of the lessor-lessee implied covenant principle is, however, *Brewster v. Lanyon Zinc Co.*, 140 F. 801 (8th Cir. 1905). There, Judge Van Devanter found an implied obligation on the lessee's part to drill a test well. His reasoning was in terms of contract law: "Whatever is implied in a contract is as effectual as what is expressed. Implication is but another name for intention, and if it arises from the language of the contract when considered in its entirety, and is not gathered from the mere expectations of one or both of the parties, it is controlling." *Id.* at 809. The import of *Brewster* was not solely confined to a specific holding for the implication of a lessor-lessee covenant; the test for determining whether the duty has been breached was also enunciated: the exercise of "reasonable diligence for the common benefit of the parties." *Id.* at 810.

16. See *Hall v. South Penn Oil Co.*, 71 W. Va. 82, 76 S.E. 124 (1912). The forerunner Texas decision is that of *Emery v. League*, 72 S.W. 603 (Tex. Civ. App. 1903, writ ref'd) (implied covenant to use reasonable diligence in exploration and development).

17. For a discussion of the innovation of the implied covenant doctrine in other jurisdictions see M. MERRILL, *supra* note 6, §§ 11-13, at 44-47; 5 H. WILLIAMS & C. MEYERS, *supra* note 1, § 801, at 1-3.

18. Even under the most generous of calculations, the time interval between the first oil discovery near Titusville, Pennsylvania, in 1859 and that state's announcement of the doctrine of implied covenants, see note 15 *supra*, reflects either recalcitrance or obscurity.

19. See generally M. MERRILL, *supra* note 6, § 221; 5 H. WILLIAMS & C. MEYERS, *supra* note 1, § 801, at 1-2, §§ 802.1-803.

20. See A. DAVIS & H. WOODMAN, CONFLICT AND CONSENSUS IN MODERN AMERICAN HISTORY 47-49 (3d ed. 1972); 2 A. DECONDE, A. RAPPAPORT & W. STECKEL, PATTERNS IN AMERICAN HISTORY 1 (3d ed. 1973); Diamond, *The Impact of Industrialization on American Society*, in 2 MAIN PROBLEMS IN AMERICAN HISTORY 27-28 (3d ed. 1972).

21. See Diamond, *supra* note 20, at 28.

sophistication, and expertise.²² Consequently, the market was ripe for the taking.²³ The would-be lessors, when approached by oil producers offering rich returns on investments without daily backbreaking labor, were prompt in accession. In all fairness, however, the ordinary landowner was equipped with faculties sufficient to look after his own general interests: most were farsighted enough to bargain for a royalty. Nonetheless, irrespective of whether the lessee, drafting the lease instrument or filling in the blanks on prepared forms, considered possible omissions, the lessor was usually not educated in the peculiarities of oil and gas, nor in the law relating to the lessee's liabilities.²⁴ As a result, the lessor, needing exploration and production in order to realize the benefit of his contract, could rely only on the good faith of the lessee since the express covenants were restrictive of his legal recourse.

The second policy argument advanced, though correlative to the unequal bargaining notion, does not depend upon subjective aspects to the same extent as the first. The very nature of the oil and gas lease does not easily lend itself to expressly denominated terms.²⁵ The lessee must be given latitude to pursue profitable production; as owner of the working interest, he cannot be tied down to minute detail owing to the shifted risk and to the speculativeness of the industry.²⁶ At best providing a legal framework, the lease could contain only generalizations which a court might be called upon to interpret. By recognizing implied covenants rather than by interpreting ambiguities, the need for litigation may not be diminished, but at least the lessor's protection under the implication principle will not depend solely upon the construction of vague contractual provisions, if so found.²⁷ Consequently, notwithstanding similar transactions in other businesses, the oil and gas lease cannot be intended to stabilize expectations.

A final policy rationale, of limited utility in the broader analysis, for implied lessor-lessee covenants is attributed to that legalistic "kitchen sink," the public interest in the outcome of the controversy. Commentators have averred that some controversies should also be subject to circumstances surrounding the immediate leasing transaction and the relationship which it creates.²⁸ In an era of tension between conservation regulations and critical demand, the further tension between the lessor and lessee of the oil and gas lease is counterproductive. Thus, the public interest in oil and gas should be included in the balancing formula before such major covenants as those of exploration, development, and operation are implied.²⁹

22. See notes 5-9 *supra* and accompanying text.

23. See M. MERRILL, *supra* note 6, § 221, at 466-67; 5 H. WILLIAMS & C. MEYERS, *supra* note 1, § 801, at 2.

24. See M. MERRILL, *supra* note 6, § 221, at 466.

25. See 5 H. WILLIAMS & C. MEYERS, *supra* note 1, § 801, at 2.

26. *Id.* at 11.

27. See generally 3 A. CORBIN, *supra* note 14, §§ 561-562. For recognition of the relationship between basic contract principles and oil and gas rules see 5 H. WILLIAMS & C. MEYERS, *supra* note 1, § 802.1, at 8.

28. See 5 H. WILLIAMS & C. MEYERS, *supra* note 1, § 802.2, at 12.

29. This balancing of the public interest parallels the treatment given to other scarce resources. *Id.* at 13.

B. Classification of Implied Covenants

To this point, only an occasional mention has been made as to the kinds of covenants which have been implied. The reason for this is to emphasize the implied covenants' policy bases, not to stress their nomenclature or to create an artificial suspense in the reader's mind. Legal labels from their incipency are arbitrary unless supported by jurisdictional consensus. Such unanimity is not to be found in either the federal or the state systems, much less among the commentators who have pondered and argued the courts' judgments.³⁰ That the categories of implied covenants have grown out of specific factual arrangements is a product of organizational convenience and workability.³¹ Care should, however, be exercised so as to avoid immersion in the technicalities of description, and thereby to relinquish a hold on the more comprehensive theory which underlies the implied covenants: all claims of improper operation should be measured against the requirement that the lessee conduct his operations in an ordinary, reasonable, and prudent manner which effectuates the purposes of the lease.³²

Within this standard of reasonableness, Professors Howard Williams and Charles Meyers³³ classify their six implied covenants.³⁴ The first implied term is that of drilling an initial exploratory well. For the most part, however, the occasions for implication of the test-well covenant are diminishing since leases generally provide for it expressly. Secondly, a covenant is implied that the lessee protect the leasehold from drainage by drilling offset

30. In perhaps the leading composite exposition of the law of implied covenants Professor Maurice Merrill classifies as follows:

- I. The implied covenant to drill an exploratory well.
- II. The implied covenant to drill additional wells.
- III. The implied covenant for diligent and proper operation of the wells and for marketing the product, if oil and gas is discovered in paying quantities.
- IV. The implied covenant to protect the leased premises against drainage by wells on adjoining land.

M. MERRILL, *supra* note 6, § 4, at 23.

An equally knowledgeable authority, Professor A.W. Walker, Jr., likewise categorized by four:

- (1) the covenant to develop the premises with reasonable diligence;
- (2) the covenant to protect the premises against drainage by using reasonable diligence in drilling offset wells;
- (3) the covenant to use reasonable diligence in producing the oil and in marketing or utilizing the gas; and
- (4) the covenant to use reasonable care in conducting all operations affecting the lessor's royalty interest.

Walker, *The Nature of the Property Interests Created by an Oil and Gas Lease in Texas*, 11 TEXAS L. REV. 399, 401 (1933). In contrast to Professor Merrill, Professor Walker abandoned the duty to drill an exploratory well; he stressed the reasonable diligence standard more, and he divided the operation and marketing covenant.

Compare also the different implied covenants found in 2 E. BROWN, *supra* note 7, § 16.02; R. HEMINGWAY, THE LAW OF OIL AND GAS 365 (1971); 2 W. SUMMERS, *supra* note 7, § 395 (perm. ed. 1959).

31. See 5 H. WILLIAMS & C. MEYERS, *supra* note 1, § 804, at 21.

32. *Id.* at 21-22. For a consideration of the prudent-operator theory see note 15 *supra*. Significance should also be attached to the fact that the broad language of the prudent-operator standard would easily embrace the implication of additional lease covenants.

33. It is not the design here to adopt one classification scheme over any other. The categories of Williams and Meyers were more readily used in illustration because of the late date of their publication and of the treatise's national outlook. Compare classification schemes of sources cited in note 30 *supra* with those of note 34 *infra* and the accompanying text.

34. The textual analysis accorded the six covenants is paraphrastic. For a verbatim treatment see 5 H. WILLIAMS & C. MEYERS, *supra* note 1, § 804, at 26-27.

wells, where such wells would be drilled by a prudent operator, *i.e.*, would return a profit to the lessee over the drilling, equipping, and producing expenses.³⁵ Once a producing formation is discovered, the next covenant to be implied is that of reasonable development. The purpose of this "additional wells" covenant is to assure a reasonable production rate and the mining of all recoverable subsurface minerals.³⁶ The authors then advise implication of a covenant to explore further, the object here being distinct from that of the reasonable development covenant in that the drilling contemplated is done in areas which contain potentially productive, rather than producing, formations.³⁷ The fifth classification is one of marketing. Most of the controversy regarding this covenant centers not on its existence, but on the standard to be applied in measuring the lessee's conformity.³⁸ The covenant to perform with reasonable care and due diligence all operations on the leasehold that affect the lessor's royalty interest comprises the final category. This implied provision overlaps those of drilling, producing, and marketing, and its breach may give rise to causes of action in contract or tort.

C. *Methods of Implication*

Courts have fashioned two primary approaches for the implication of covenants. Certain jurisdictions have borrowed from solid-mineral law, while others, more realistically, have extended the implied-in-fact or implied-in-law remedial concepts.

Solid-Mineral Law. The law of the United States dealing with solid minerals like coal and the metal ores was first codified, so far as it had then developed, at about the time that oil and gas production was gathering impetus.³⁹ As with oil and gas landowners,⁴⁰ the surface owners of land studded with deposits of solid minerals early discovered the lease agreement to be an effective means of extraction and sale at a price vastly in excess of

35. See, *e.g.*, *Brimmer v. Union Oil Co.*, 81 F.2d 457 (10th Cir.), *cert. denied*, 298 U.S. 668 (1936); *Denker v. Mid-Continent Petroleum Corp.*, 56 F.2d 725 (10th Cir. 1932); *Indian Territory Illuminating Oil Co. v. Rosamond*, 190 Okla. 46, 120 P.2d 349 (1941). See also *Annot.*, 138 A.L.R. 246 (1942); *Annot.*, 105 A.L.R. 454 (1936); *Annot.*, 84 A.L.R. 756 (1933).

36. See note 30 *supra*.

37. The implied covenant to drill additional wells is unique to Professors Williams and Meyers. See sources cited in note 30 *supra*. The courts have hesitated in implying such a covenant because of the potentially disastrous effect it would have on the petroleum industry. For example, the implied covenant to drill additional wells would allow lessors to designate depths or locations of drilling which were beyond the scope of negotiations between the lease parties. See, *e.g.*, *Clifton v. Koontz*, 160 Tex. 82, 325 S.W.2d 684 (1959); *Felmont Oil Corp. v. Pan American Petroleum Corp.*, 334 S.W.2d 449 (Tex. Civ. App.—El Paso 1960, writ *ref'd n.r.e.*). *Contra*, *Sinclair Oil & Gas Co. v. Masterson*, 271 F.2d 310 (5th Cir. 1959), *recognized as overruled*, *Weymouth v. Colorado Interstate Gas Co.*, 367 F.2d 84, 102 n.57 (5th Cir. 1966).

38. See, *e.g.*, *Matzen v. Hugoton Prod. Co.*, 182 Kan. 456, 321 P.2d 576 (1958); *McVicker v. Horn, Robinson & Nathan*, 322 P.2d 410 (Okla. 1958); *Cole Petroleum Co. v. United States Gas & Oil Co.*, 121 Tex. 59, 41 S.W.2d 414 (1931). See also *Annot.*, 71 A.L.R.2d 1219 (1960); *Annot.*, 86 A.L.R. 725 (1933).

39. A section of the Mining Law of 1866 officially declared that "the mineral lands of the public domain, both surveyed and unsurveyed, are hereby . . . free and open to exploration and occupation. . . ." 14 Stat. 251 (1866). For a discussion of mining laws in America and their evolution see 1 THE ROCKY MOUNTAIN MINERAL LAW FOUNDATION, THE AMERICAN LAW OF MINING §§ 1.1-.47 (1976).

40. See notes 1-5 *supra* and accompanying text.

that to be derived from conveyance of the fee simple.⁴¹ Also in keeping with the landowner's oil and gas counterpart,⁴² the solid mineral lessor demonstrated a proclivity for the retained royalty.⁴³ Furthermore, the courts have in cases involving solid minerals been inclined to find added duties owing from the lessee to the royalty owner.⁴⁴ The policy reasons underlying the implication of contractual terms in solid mineral leases do not, however, parallel those surrounding oil and gas leases. Though the inequality of bargaining power⁴⁵ for the lessor of the solid mineral lease is arguably as great as that for the oil and gas landowner, even-handedness for that same coal, metal ore surface owner is enhanced by the fact that speculation is diminished. Although the deposit's existence is more readily ascertainable than that of the oil or gas reservoir, the empirically predicted profitability of extraction may, however, be equivalent to oil and gas. Moreover, the locational stability of solid minerals, as opposed to the migratory nature of oil and gas, weighs against the issue of first-possessor protection from drainage. In fact, tort liability in trespass or conversion, with proof more easily made, may afford just as good protection for the solid mineral landowner as any remedy for breach of an implied condition.

The Implied-in-Fact, Implied-in-Law Distinction. Courts have not been content to confine themselves to the letter of the particular lease in cases dealing with solid minerals,⁴⁶ but have instead spoken in terms of reasonable inferences and of the parties' intentions.⁴⁷ Thus, if an amplification upon the solid mineral doctrine of implied covenants has, in fact, carried those principles into the concurrently developing oil and gas law, the methodology common to each has been the interpretation of the lease contracts.⁴⁸ This exact methodology, whether the lease involves oil, gas, or solid minerals, has generated pithy academic controversy.

For purposes of determining the legal reasoning at the foundation of a court's decision to imply a covenant, two analyses have gained pre-eminence: the implied-in-fact approach and the implied-in-law scheme.⁴⁹ The

41. 3 THE ROCKY MOUNTAIN MINERAL LAW FOUNDATION, *supra* note 39, § 16.1.

42. See notes 7, 8 *supra* and accompanying text.

43. See 3 THE ROCKY MOUNTAIN MINERAL LAW FOUNDATION, *supra* note 39, § 16.57.

44. See, e.g., *Mendota Coal & Coke Co. v. Eastern Ry. & Lumber Co.*, 53 F.2d 77 (9th Cir. 1931) (implied covenant to develop coal mine); *Pritchard v. McLeod*, 205 F. 24 (9th Cir. 1913) (implied duty to work and develop gold mine); *Freeport Sulphur Co. v. American Sulphur Royalty Co.*, 117 Tex. 439, 6 S.W.2d 1039 (1928) (implied covenants of diligent and reasonable development and operation of sulphur mines); *Benavides v. Hunt*, 79 Tex. 383, 15 S.W. 396 (1891) (implied covenant to operate coal mine); *Union Sulphur Co. v. Texas Gulf Sulphur Co.*, 42 S.W.2d 182 (Tex. Civ. App.—Austin 1931, writ ref'd) (implied covenants of exploration, development, and production of sulphur mine); *Lassig v. Cahill*, 41 S.W.2d 469 (Tex. Civ. App.—Austin 1931, writ ref'd) (implied covenant reasonably to develop stone quarry). See generally 2 W. SUMMERS, *supra* note 7, § 395 (perm. ed. 1959); 58 C.J.S. *Mines & Minerals* § 183 (1948).

45. See notes 23-24 *supra* and accompanying text.

46. See notes 38-44 *supra* and accompanying text.

47. See cases cited in note 44 *supra*.

48. Since the policy reasons for implying covenants in oil and gas leases and in solid mineral leases do not closely coincide, any justification for an at-law implication of covenants is tenuous.

49. See M. MERRILL, *supra* note 6, § 220, at 460-64; 5 H. WILLIAMS & C. MEYERS, *supra* note 1, § 803, at 16-18; Walker, *The Nature of the Property Interests Created by an Oil and Gas Lease in Texas*, 11 TEXAS L. REV. 399 (1933).

scope and nature of the methods have not been as carefully chronicled as have the polemics. Generally, however, a covenant is said to be implied in fact if it derives existence from the written agreement and circumstances surrounding its execution.⁵⁰ On the other hand, implied-in-law provisions are the consequences of a court's interest in promoting fairness, justice, and equity.⁵¹

Professor Merrill, arguing for the implied-in-law faction,⁵² cites language of the Supreme Court of the United States as supportive of the contention that covenants are implied from the relation of the parties and the object of the lease.⁵³ Merrill next turns for support to an Eighth Circuit opinion, which contained language to the effect that the implication of oil and gas covenants was not dependent solely upon the terms of the contract, but arose at common law.⁵⁴ Substantially on the basis of these opinions, Merrill concludes that no court had implied a covenant by reason of its having been assented to by the contracting parties or contemplated by them during negotiations.⁵⁵

In 1940, Professor Merrill's conclusion, though misleading, was by no means inexact. On the other hand, when Professor Walker was published in 1933,⁵⁶ in anticipation of the line of authority which would be developed after Merrill's first printing in 1940, he had only the solid mineral cases⁵⁷ from which to draw. Nonetheless, his analysis proved persuasive for the Supreme Court of Texas.⁵⁸ That court, in an oil and gas context, found the implied-in-law, fair-and-just approach unconvincing.⁵⁹ Instead, the Texas Supreme Court adopted the implied-in-fact basis for the implication of covenants and, in so doing, emphasized the controlling importance of the parties' intentions as discerned from the circumstances surrounding the negotiations.⁶⁰

Neither theory is, however, without its difficulties. Foremost among the problems for the implied-in-law approach is the time-hallowed catch-phrase, "the court can not make the contract for the parties."⁶¹ Prime among the

50. See Walker, *supra* note 49, at 404.

51. See 5 H. WILLIAMS & C. MEYERS, *supra* note 1, § 803, at 14.5.

52. See M. MERRILL, *supra* note 6, § 220, at 461-62.

53. See *Sauder v. Mid-Continent Petroleum Corp.*, 292 U.S. 272, 279 (1934).

54. See *Hamilton v. Empire Gas & Fuel Co.*, 297 F. 422 (8th Cir.), *cert. denied*, 266 U.S. 607 (1924).

55. See M. MERRILL, *supra* note 6, § 220, at 463-64. See also *Millette v. Phillips Petroleum Co.*, 209 Miss. 687, 48 So. 2d 344 (1950) (the court found a fundamental principle based in equity and in policy that the lessor is protected against unreasonable loss of his mineral resources).

56. See Walker, *supra* note 49, at 404.

57. See note 44 *supra*.

58. See *Danciger Oil & Ref. Co. v. Powell*, 137 Tex. 484, 154 S.W.2d 632 (1941).

59. *Id.* at 490, 154 S.W.2d at 635.

60. The Supreme Court of Texas couched its holding in these terms:

It is not enough to say that an implied covenant is necessary in order to make the contract fair, or that without such a covenant it would be improvident or unwise, or that the contract would operate unjustly [C]ovenants will be implied in fact when necessary to give effect to the actual intention of the parties as reflected by the contract or conveyance as construed in its entirety in the light of the circumstances under which it was made and the purposes sought to be accomplished thereby.

Id. (emphasis added).

61. See note 14 *supra* and accompanying text.

insufficiencies of the implied-in-fact perspective is its assumption that the parties actually intended the covenants to be part of the lease.⁶² The precedential value of the respective implied-in-fact or implied-in-law analyses thus lapses outside their respective jurisdictions.⁶³ The argument may be advanced that by restricting the court to the alleged intention of the parties the chance of misconstruction is reduced.⁶⁴ A more functional approach is suggested by commentators who have found leeway under both the equity and the party-intention formulas: a restrictive reading, irrespective of jurisdiction, is made by the court whenever an implied covenant is not desirable; a more expansive construction awaits the popular covenant.⁶⁵

II. IMPLIED COVENANTS ENFORCEABLE BETWEEN ASSIGNORS AND ASSIGNEES

To this point, attention has focused upon the development of implied covenants between the lessor and lessee of an oil and gas lease. The continued vitality of these common law rights and duties in the face of conservation schemes of restricted production has been the subject of varied analyses.⁶⁶ The policy objectives have been compelling.⁶⁷ The competing forces of conservation and demand have come to terms on a schedule of coexistence.⁶⁸ Discussion now turns to the additional problems presented to the courts and affected parties by assignment of oil and gas leases.⁶⁹

The implication of covenants of exploration, development, marketing, or protection has attended the development of the legal principles associated with oil and gas lease assignments. The difficult questions inherent in implied promises generally are magnified by the peculiarities of oil and gas law. The comparatively recent common law formulations with respect to implied covenants enforceable between the assignor and the assignee of an

62. See M. MERRILL, *supra* note 6, § 220, at 463.

63. See *Millette v. Phillips Petroleum Co.*, 209 Miss. 687, 48 So. 2d 344 (1950) (implied in law); *Danciger Oil & Ref. Co. v. Powell*, 137 Tex. 484, 154 S.W.2d 632 (1941) (implied in fact). For a discussion of these cases and their theories see notes 49-62 *supra* and accompanying text.

64. See 5 H. WILLIAMS & C. MEYERS, *supra* note 1, § 803, at 16.

65. *Id.* at 18. The point, here, is not to condone such an analysis of what the courts are, in fact, doing; rather, the commentators' approach is offered only as a possible resolution of an irreconcilable problem.

66. See, e.g., Eberhardt, *Effect of Conservation Laws, Rules and Regulations on the Rights of Lessors, Lessees and Owners of Unleased Mineral Interests*, SOUTHWESTERN LEGAL FOUNDATION, FIFTH ANNUAL INSTITUTE ON OIL AND GAS LAW AND TAXATION 125 (1954).

67. See notes 19-29 *supra* and accompanying text.

68. See *Temple v. Continental Oil Co.*, 182 Kan. 213, 320 P.2d 1039, *aff'd on rehearing*, 183 Kan. 471, 328 P.2d 358 (1958), where the court rejected the argument that the implied covenant of development should be abandoned owing to the passage of conservation laws; rather, the court preferred to balance the interests of the lessor and lessee within the conservation framework.

69. See generally M. MERRILL, *supra* note 6, §§ 186-91, at 412-19; 2 H. WILLIAMS & C. MEYERS, *supra* note 1, §§ 419-22 (1975 & Supp. 1976); Brooks, *Liability of an Oil and Gas Lessee for Causing Drainage: A Standard for Texas*, 51 TEXAS L. REV. 546 (1973); Collins, *The Rights of the Overriding Royalty Owner*, 39 J. KAN. B.A. 235 (1970); Martz & Hames, *Implied Rights of Royalty Owners*, 30 ROCKY MTN. L. REV. 1 (1957); Merrill, *Implied Covenants Between Others than Lessors and Lessees*, 27 WASH. U.L.Q. 155 (1941); Walker, *supra* note 49, at 450-54; Comment, *Liability in Texas for Wrongful Drainage of Oil and Gas*, 27 TEXAS L. REV. 349 (1949); Note, *Oil and Gas—Lease Assignments—Assignee's Duty to Protect the Override*, 12 SW. L.J. 235 (1958); Note, *Protection of Assignor's Reserved Overriding Royalty—Contractual Extension of Overriding Royalty Beyond Term of Lease*, 28 TUL. L. REV. 408 (1954); Recent Cases, *Oil and Gas*, 16 TEXAS L. REV. 594 (1938).

oil and gas lease⁷⁰ have been sporadic and conflicting.⁷¹ An illustrative framework is provided by considering the legal evolution of the assignor-assignee implied covenants in Texas. Policy reasons, if sound, will support similar adoption in jurisdictions which have not yet ruled on the issue.

A. Precedent

Texas conformed early to the position taken in other jurisdictions by implying in *Emery v. League*⁷² the covenant to use reasonable diligence in exploration and development. Until recently, however, Texas recognized that the assignor-assignee relationship is fundamentally different from the lessor-lessee situation.⁷³

The seminal case in Texas concerning the rights and duties of assignees of oil and gas leases is *Greenwood & Tyrrell v. Helm*.⁷⁴ In *Helm* the original lessee of the oil and gas lease assigned to Helm all his rights, title, and interest. Helm subsequently contracted to assign the lease to defendants in consideration of \$16,000 paid on transfer and \$3,200 "to be paid out of the first oil produced from said lease over and above the royalty reserved to the original lessors."⁷⁵ The terms of the original lease obligated the holder of the working interest "to make as many attempts, if and as lessee shall desire, to find oil or gas in paying quantities . . ."⁷⁶ Defendant drilled no producing wells, and Helm, an assignor with a reserved production payment, sued for the \$3,200.

The narrow holding of the court of civil appeals in *Helm* was that the defendant-assignees had not expressly obligated themselves to drill additional wells, the proceeds from which the assignor's reserved production payment would be satisfied.⁷⁷ The court, however, did not confine its ruling to the facts. Broadly, the court stated that had no express covenants existed,

70. The difficulties surrounding the procurement of oil and gas—for example, speculative-ness and investment overhead—have compelled adoption of various risk-shifting techniques. See notes 4-11 *supra* and accompanying text. Leases of mineral rights emerged. Courts fashioned implied covenants to consummate the parties' intentions and to effect equity. Assignment of the lease furnished resource mobility. See note 69 *supra*. But the implied covenant doctrine, existing in the lessor-lessee context since *Stoddard v. Emery*, 128 Pa. 436, 18 A. 339 (1889), has not been generally recognized. See note 73 *infra*. In-depth jurisdictional analysis is not here undertaken. General citations to treatises would be at best cumulative since interstate and federal court decisions on the precise issue of covenants implied in law enforceable between the assignor and assignee are nonexistent.

71. The only cases specifically recognizing implied-in-law covenants (other than good faith—see notes 120-27 *infra*) between assignors and assignees are *Phillips Petroleum Co. v. Taylor*, 115 F.2d 726 (5th Cir. 1940), *modified on denial of rehearing*, 116 F.2d 994 (5th Cir.), *cert. denied*, 313 U.S. 565 (1941); *Humphreys Oil Co. v. Tatum*, 26 F.2d 882 (5th Cir.), *cert. denied*, 278 U.S. 633 (1928); *Bolton v. Coats*, 533 S.W.2d 914 (Tex. 1975).

The only other jurisdiction which has been confronted with the issue has rejected it on two occasions: *McNeill v. Peaker*, 253 Ark. 747, 488 S.W.2d 706 (1973); *Henderson Co. v. Murphy*, 189 Ark. 87, 70 S.W.2d 1036 (1934).

72. 72 S.W. 603 (Tex. Civ. App. 1903, writ ref'd).

73. Two commentators have written: "Clearly it has not been established that the owner of an overriding royalty or oil payment is entitled to the benefit of covenants similar to all of the covenants normally implied in an oil and gas lease." 2 H. WILLIAMS & C. MEYERS, *supra* note 1, § 420.1, at 350.

74. 264 S.W. 221 (Tex. Civ. App.—San Antonio 1924, writ ref'd).

75. *Id.* at 222.

76. *Id.* at 221.

77. *Id.* at 223.

such obligations would have been implied.⁷⁸ Unanswered by this sweeping language was the issue of which party, assignor or lessor, was entitled to enforce the covenants in the event they should be implied. The method by which the covenant would be implied was then treated. The court chose to determine the parties' intentions from such circumstances as the nature and hazards of the undertaking, the justness and reasonableness of the obligation to be implied, and the consideration paid for the assignment.⁷⁹ This speculation opened the door for inquiry into the policy justification for implied covenants between parties other than lessors and lessees. In dictum the court asserted that an assignor is presumed to know that his assignee, in the absence of an express agreement, would not have intended to be required to develop an unproductive territory.⁸⁰ The court, in attributing expertise to the assignor, laid the groundwork for an absolute rejection of implied covenants enforceable by an assignor against an assignee who has reserved a nonoperating interest.⁸¹

The next case to build upon *Helm* was *Simms Oil Co. v. Colquitt*.⁸² The lessee-plaintiff, in consideration of \$7,000 cash and a reserved production payment for an equal amount, assigned all his rights under two leases to the defendant-oil company.⁸³ Under the original leases, an option rested with the operator either to drill a well within eight months or to make certain deferred rental payments.⁸⁴ The assignee elected to pay the delay rentals,⁸⁵ and the assignor sued to recover the production payment for breach of implied covenants of drilling and development.

In *Simms Oil Co. v. Colquitt* the court of civil appeals had decided that covenants to drill and to develop should be implied from the assignment provisions.⁸⁶ The commission of appeals, in its first consideration of the issue, rejected the argument that any covenant could have been implied from the terms of the assignment contract.⁸⁷ In approving of the decision in *Helm*,⁸⁸ the court resolved an issue left open in the earlier case, namely, that the intention of the parties will control the determination of implicit promises.⁸⁹ The commission of appeals reasoned that had the parties to the assignment intended the assignee's right either to drill or to make delay

78. *Id.* at 222.

79. *Id.* at 223.

80. *Id.*

81. *Accord*, *McNeill v. Peaker*, 253 Ark. 747, 748, 488 S.W.2d 706, 707 (1973). After finding no difference between reservation of an oil payment and an overriding royalty, the Arkansas Supreme Court wrote: "In assignments . . . the assignor and assignee are usually experienced in the oil business and knowledgeable [*sic*] enough to make certain any uncertainty by inserting provisions which protect the assignor's interests if he deems it necessary." *Id.*

82. 296 S.W. 491 (Tex. Comm'n App., jdgmt adopted), *set for rehearing*, 298 S.W. 892 (Tex. Comm'n App. 1927), *aff'd on rehearing*, 2 S.W.2d 421 (Tex. Comm'n App. 1928, jdgmt adopted).

83. *Simms Oil Co. v. Colquitt*, 296 S.W. 491, 492 (Tex. Comm'n App. 1927, jdgmt adopted).

84. *Id.*

85. *Id.* at 494.

86. *Simms Oil Co. v. Colquitt*, 289 S.W. 98, 100 (Tex. Civ. App.—Dallas 1926).

87. *Simms Oil Co. v. Colquitt*, 296 S.W. 491, 492 (Tex. Comm'n App. 1927, jdgmt adopted).

88. *See* notes 77-80 *supra* and accompanying text.

89. *Simms Oil Co. v. Colquitt*, 296 S.W. 491, 492 (Tex. Comm'n App. 1927, jdgmt adopted).

rental payments be superseded by a covenant to drill they could easily have expressly provided for such a covenant.⁹⁰ In light of the consideration paid and the relative bargaining powers of both parties, the commission of appeals refused to imply the covenant to drill between the assignor and assignee.

Ebberts v. Carpenter Production Co.,⁹¹ last in the line of cases developing the dicta of *Helm*, resolved on its facts the issue of who is entitled to enforce implied covenants in an assignment context. Lessee-assignor, with lessors intervening,⁹² brought suit to rescind two assignments of oil and gas leases. The assignees, in consideration of the assigned interests, paid \$13,300 and agreed to make \$5,000 production payments on each of the two leases.⁹³ At least one of the assignor's theories for obtaining the equitable remedy of rescission was the failure of the assignee to develop the leases further and to protect them from drainage.⁹⁴

In *Ebberts* Judge Walker, the proponent of the implied-in-fact theory which had been adopted previously by the Texas Supreme Court,⁹⁵ understood plaintiff's argument to be not that the assignees expressly promised to develop the leasehold and to protect it from drainage, but that the obligations were implied under the terms of the original lease.⁹⁶ Squarely considering the issue of whether covenants should be implied, the court concluded that the implied obligations under the lease would run only to the lessors, and would *not* run to the lessee-assignor.⁹⁷ Moreover, the court of civil appeals held that in the absence of an express provision that the assignee would be liable to the assignor for breach of the implied covenants under the original lease, the assignor could only himself enforce implied covenants where he remained liable under the original lease.⁹⁸ Since the landowners in *Ebberts*, however, did not attempt to enforce the implied obligations against either the original lessee or the assignee,⁹⁹ no reason existed for allowing the assignor to recover for the assignee's breach of an implied covenant. The inevitable conclusion was, therefore, to deny enforceability by the assignor of the implied covenants to develop and to offset.¹⁰⁰

90. *Id.* at 493. The subsequent affirmation in *Simms Oil Co. v. Colquitt*, 2 S.W.2d 421 (Tex. Comm'n App. 1928, jdgm't adopted), evidenced a partial retreat from the principles expressed in the first opinion. The commission of appeals held that no cause of action had "matured." *Id.* at 422. The viability of such a decree is questionable: the issue had been whether the express option precluded any implication of a covenant to drill; the commission, in requiring that oil be produced before a claim for relief could mature, effectively circumvented the question.

91. 256 S.W.2d 601 (Tex. Civ. App.—Beaumont 1953, writ ref'd n.r.e.).

92. *Id.* at 604.

93. *Id.* at 606. Other transfers not pertinent to this discussion were also made by the parties.

94. *Id.* at 613.

95. See *Danciger Oil & Ref. Co. v. Powell*, 137 Tex. 484, 154 S.W.2d 632 (1941). See also notes 56-60 *supra* and accompanying text.

96. *Ebberts v. Carpenter Prod. Co.*, 256 S.W.2d 601, 613 (Tex. Civ. App.—Beaumont 1953, writ ref'd n.r.e.).

97. *Id.* at 613-14.

98. *Id.*

99. *Id.* at 614.

100. *Id.*

Thus, the status of Texas common law, as it existed prior to *Bolton v. Coats*,¹⁰¹ was far short of implied covenants running between assignors and assignees of oil and gas leases. In fact, the legal formula was an amalgam: (1) express provisions in assignment contracts preclude implication of obligations;¹⁰² (2) in the event that express terms are not controlling and covenants must be implied, the intent of the parties, restricted to the reasonable inferences from the language of the assignment contract, governs;¹⁰³ and (3) where the lessor has not sought to enforce implied covenants against the lessee-assignor who has reserved a nonoperating interest, such implied covenants are not enforceable by the lessee against his assignee.¹⁰⁴

In 1975 the Texas Supreme Court, in *Bolton v. Coats*,¹⁰⁵ abandoned this line of precedent and blazed a new trail in oil and gas law. In *Bolton* the plaintiff-lessee reserved an overriding royalty on an assigned gas lease. Defendant-assignee paid to the assignor \$12,500 in addition to the promised override payments. Affidavits filed by plaintiff and a geophysical engineer averred that defendant was exploiting oil for which the assignor was not receiving royalty payments. Defendant contended in its affidavits that the Texas Railroad Commission's classification of the wells as gas-producing precluded collateral attack, and that if oil were being produced, an express covenant to develop proscribed implication of all other covenants.¹⁰⁶ Summary judgment was entered for the defendant, and the court of civil appeals affirmed.¹⁰⁷ The supreme court, however, reversed,¹⁰⁸ holding first that the suit was not a collateral attack on the Texas Railroad Commission's order categorizing the wells as gas producing.¹⁰⁹ The order had only established that oil in excess of one barrel per 100,000 cubic feet of gas should not have been produced, not that a greater amount was in fact extracted.¹¹⁰ Then, on an issue cursorily treated in the parties' briefs, the court held that "[u]nless the assignment provides to the contrary, the assignee of an oil and gas lease

101. 533 S.W.2d 914 (Tex. 1975).

102. *Simms Oil Co. v. Colquitt*, 296 S.W. 491 (Tex. Comm'n App., jdgmt adopted), *set for rehearing*, 298 S.W. 892 (Tex. Comm'n App. 1927), *aff'd on rehearing*, 2 S.W.2d 421 (Tex. Comm'n App. 1928, jdgmt adopted); *Greenwood & Tyrrell v. Helm*, 264 S.W. 221 (Tex. Civ. App.—San Antonio 1924, writ ref'd).

103. *Simms Oil Co. v. Colquitt*, 296 S.W. 491 (Tex. Comm'n App., jdgmt adopted), *set for rehearing*, 298 S.W. 892 (Tex. Comm'n App. 1927), *aff'd on rehearing*, 2 S.W.2d 421 (Tex. Comm'n App. 1928, jdgmt adopted); *Ebberts v. Carpenter Prod. Co.*, 256 S.W.2d 601 (Tex. Civ. App.—Beaumont 1953, writ ref'd n.r.e.). No valid explanation is conceivable for implying covenants in law in the assignee-assignor context, as was done in *Bolton v. Coats*, 533 S.W.2d 914, 915 (Tex. 1975), and for adhering to an implied-in-fact theory where the lessee and lessor are concerned, as in *Danciger Oil & Ref. Co. v. Powell*, 137 Tex. 484, 154 S.W.2d 632 (1941). Such contract terms as deferred rentals and cash closing payments are instrumental in determining the parties' intent.

104. *Ebberts v. Carpenter Prod. Co.*, 256 S.W.2d 601, 613-14 (Tex. Civ. App.—Beaumont 1953, writ ref'd n.r.e.). The fact that oil payments and not overriding royalties are reserved should only be significant in terms of the parties' intent. *See* notes 130-33 *infra*.

105. 533 S.W.2d 914 (Tex. 1975).

106. *See, e.g., Kile v. Amerada Petroleum Corp.*, 118 Okla. 176, 247 P. 681 (1926); *Middle States Petroleum Corp. v. Messenger*, 368 S.W.2d 645 (Tex. Civ. App.—Dallas 1963, writ ref'd n.r.e.).

107. *Bolton v. Coats*, 514 S.W.2d 482 (Tex. Civ. App.—Tyler 1974).

108. *Bolton v. Coats*, 533 S.W.2d 914 (Tex. 1975).

109. *Id.* at 916.

110. *Id.*

impliedly covenants to protect the premises against drainage when the assignor reserves an overriding royalty."¹¹¹

Logical methods, drawing from equity principles,¹¹² from basic property and contract tenets,¹¹³ and from fundamental landlord-tenant concepts,¹¹⁴ might have been employed as justification for the implication of the covenant against drainage enforceable against the assignee. Instead, the court chose to rely upon a Fifth Circuit case,¹¹⁵ an analogy to a Texas case,¹¹⁶ and a citation to secondary authority.¹¹⁷ Since the court opted in favor of a stare decisis approach, the only precedents of value on matters of local law are Texas decisions.¹¹⁸ Careful consideration of the relevant authorities, however, should have led to a contrary conclusion.

With respect to the equitable theory of fiduciary relationships, several jurisdictions have implied a duty of fair dealing in situations where an assignor, upon assignment, has reserved a nonoperating interest in the leasehold.¹¹⁹ The objective of this good-faith, fair-dealing covenant is to restrain the assignee from extinguishing the assignor's retained interest by allowing the lease to lapse or by re-leasing from the landowner. The significance of these cases is, however, limited primarily to the good-faith covenant itself because of the factual issues involved. Moreover, the relevance of this line of precedent does not extend to the more important implied covenants of exploration, development, marketing, protection, etc., except insofar as all are part of the encompassing prudent-operator standard.¹²⁰ The eagerness of a court sitting in equity to rectify injustice in the absence of an adequate remedy at law underpins the analyses in all these cases. Whether the lease involves government property,¹²¹ dual interest,¹²² or joint venture,¹²³ the key phrases have been "trust and confidence" or "fiduciary relationship." Importantly, such a fiduciary relationship does not arise solely upon assignment of the working interest and reservation of a nonoperating interest.¹²⁴ Specific fact patterns evoking the good-faith

111. *Id.*

112. See notes 119-25 *infra* and accompanying text.

113. See notes 126-34 *infra* and accompanying text.

114. See notes 135-43 *infra* and accompanying text.

115. The court rested its holding on *Phillips Petroleum Co. v. Taylor*, 115 F.2d 726 (5th Cir. 1940), *modified on denial of rehearing*, 116 F.2d 994 (5th Cir.), *cert. denied*, 313 U.S. 565 (1941). *Bolton v. Coats*, 533 S.W.2d 914, 916 (Tex. 1975).

116. The analogy is to *Cole Petroleum Co. v. United States Gas & Oil Co.*, 121 Tex. 59, 41 S.W.2d 414 (1931). *Bolton v. Coats*, 533 S.W.2d 914, 916 (Tex. 1975).

117. The sources referenced were *M. MERRILL*, *supra* note 6, § 188, at 416-18; 3 *W. SUMMERS*, *supra* note 7, § 554, at 652-59. *Bolton v. Coats*, 533 S.W.2d 914, 916-17 (Tex. 1975).

118. See *Wichita Royalty Co. v. City Nat'l Bank*, 306 U.S. 103, 109 (1939); *Galveston H. & S.A. Ry. v. Wells*, 121 Tex. 310, 324, 50 S.W.2d 247, 252 (1932).

119. See, e.g., *Phillips Petroleum Co. v. McCormick*, 211 F.2d 361, 364 (10th Cir. 1954) (the court ruled that "[q]uite apart from any stipulations in the lease, the law implies a duty on the part of the assignee to exercise good faith with respect to the assignor's retained interest in the lease"). See also *La Laguna Ranch Co. v. Dodge*, 18 Cal. 2d 132, 114 P.2d 351 (1941); *Matthews v. Ramsey-Lloyd Oil Co.*, 121 Kan. 75, 245 P. 1064 (1926); *Whitten v. Daws*, 226 Miss. 96, 83 So. 2d 744 (1955); *Rees v. Briscoe*, 315 P.2d 758 (Okla. 1957); *Probst v. Hughes*, 143 Okla. 11, 286 P. 875 (1930).

120. See note 32 *supra* and accompanying text.

121. *Phillips Petroleum Co. v. McCormick*, 211 F.2d 361 (10th Cir. 1954).

122. *Matthews v. Ramsey-Lloyd Oil Co.*, 121 Kan. 75, 245 P. 1064 (1926).

123. *Rees v. Briscoe*, 315 P.2d 758 (Okla. 1957).

124. See Note, *Oil and Gas—Lease Assignments—Assignee's Duty to Protect the Override*, 12 Sw. L.J. 235, 236 (1958).

covenant are not discernible. In particular, Texas, though not discounting the possibility of imposing a constructive trust on a renewal lease, has been slow to find the appropriate fact situation.¹²⁵

Landlord-tenant notions of privity constitute the second alternative theory for implication of assignor-assignee covenants. In the negotiated lease situation, two kinds of privity exist between the lessee and lessor: privity of estate and privity of contract. Assignment of the lease by the tenant severs the privity of estate since the right of possession is essential to its existence; once the right to possess vests in the assignee, however, privity of estate originates between the assignee and the lessor. Absent an express or implied novation, the assignor, because of privity of contract, remains liable to the lessor on the lease covenants. Unless the assignee assumes these contractual obligations, he is legally bound to perform only the covenants which run with the land. As a general rule, a covenant runs with the land if it touches and concerns the land. For breach of any express or touching-and-concerning covenant, the assignee in possession is primarily liable to the lessor; to the extent that he must pay, the assignor, who is secondarily responsible, has a right of contribution or indemnification against the assignee.¹²⁶ Though real property principles have not been adopted wholesale into oil and gas law, influence has been inevitable.¹²⁷ The lessor, whether for reasons of privity of estate or independence of contract, has been held entitled to recover damages from the assignee following the latter's breach of an express or implied covenant.¹²⁸ The enforcement of covenants in an oil and gas lease by the assignor, however, has typically depended solely upon the terms of the assignment contract.¹²⁹ A valid argument may be made that the assignor who reserves an overriding royalty or oil payment should be able to enforce covenants running with the land owing to a facsimile privity of estate. The phrase "overriding royalty" has generally referred to a fixed percentage of gross production carved from the working interest, but not diminished by operating expenses.¹³⁰ An oil payment, like the overriding royalty, is carved from the lessee's share of the oil,

125. See *Sunac Petroleum Corp. v. Parkes*, 416 S.W.2d 798 (Tex. 1967) (court denied reinstatement of overriding royalty where lessee took new lease after expiration of first); *Wagner v. Sheets & Walton Drilling Co.*, 359 S.W.2d 543 (Tex. Civ. App.—Eastland 1962, writ ref'd n.r.e.) (no fiduciary relationship found where lease had expired before assignee renewed it). See also *Gordon v. Empire Gas & Fuel Co.*, 63 F.2d 487 (5th Cir.), cert. denied, 289 U.S. 751 (1933) (no trust relation prevents assignee from acquiring independent rights after lease expires).

126. For a general treatment of the preceding points see L. JONES, A TREATISE ON THE LAW OF LANDLORD AND TENANT §§ 455-456, 462 (1906); 3A G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY §§ 1215-1216, 1224 (1959).

127. See generally 5 H. WILLIAMS & C. MEYERS, *supra* note 1, § 842.3, at 271, § 845.6, at 348; Walker, *supra* note 49, at 450-54; Warren, *Transfer of the Oil and Gas Lessee's Interest*, 34 TEXAS L. REV. 386, 392 (1956).

128. See, e.g., *Phillips Petroleum Co. v. Taylor*, 115 F.2d 726 (5th Cir. 1940), modified on denial of rehearing, 116 F.2d 994 (5th Cir.), cert. denied, 313 U.S. 565 (1941) (implied covenant against drainage); *Dixon v. Anadarko Prod. Co.*, 505 P.2d 1394 (Okla. 1973) (implied covenant against drainage); *W.T. Waggoner Estate v. Sigler Oil Co.*, 118 Tex. 509, 19 S.W.2d 27 (1929) (implied covenant to develop); *Reeves v. Republic Prod. Co.*, 177 S.W.2d 1011 (Tex. Civ. App.—Galveston 1944, writ ref'd w.o.m.) (implied covenant to develop).

129. See *Owens v. O'Donohoe*, 280 S.W. 842 (Tex. Civ. App.—Fort Worth 1926, no writ); *Greenwood & Tyrrell v. Helm*, 264 S.W. 221 (Tex. Civ. App.—San Antonio 1924, writ ref'd).

130. See *MacDonald v. Follett*, 142 Tex. 616, 180 S.W.2d 334 (1944); *Tennant v. Dunn*, 130 Tex. 285, 110 S.W.2d 53 (1937).

the working interest; it differs, however, from the overriding royalty in that it expires whenever the payee receives the agreed amount for his interest.¹³¹ Oil and gas in place have been characterized as real property, subject to absolute ownership in Texas.¹³² Overriding royalties and oil payments have also been deemed interests in land.¹³³ Thus, by reserving a part of the oil and gas in place, the lessee has retained an interest in real property which would, in theory, give rise to a right to enforce against the assignee covenants other than those linked to the assignment contract. In practice, none of the courts implying covenants between assignors and assignees has so concluded.¹³⁴

Property concepts of sublease and partial assignment furnish the third possible theory for implying covenants in assigned leases.¹³⁵ At one time, it was thought that the peculiarities of Texas oil and gas law precluded a distinction between subleases and assignments: "A mineral lease is the conveyance of a determinable fee interest in land."¹³⁶ An oil and gas "lease" was, therefore, a category in itself.¹³⁷ Nevertheless, authority recognizing the sublease-assignment distinction does exist in Texas. In *Hamblen v. Placid Oil Co.*¹³⁸ the court of appeals ruled that the assignor's reservation of an overriding royalty technically created a sublease and not an assignment.¹³⁹ The effect of this finding is to destroy any basis for privity of estate between the assignee and the original lessor.¹⁴⁰ Thus, if a covenant running with the land is to be enforced, the assignor must do so, or the right is lost.

A second repercussion of the sublease classification involves privity of contract and the implied-in-law, implied-in-fact distinction.¹⁴¹ Commentators have asserted that the assignor of a lease will remain liable for covenants implied in fact, *i.e.*, those intended by the parties to be a part of the agreement, because of contract privity.¹⁴² With respect to the implied-in-fact, equitable covenant, however, the assignor, upon assignment, is discharged from responsibility to the lessor because neither privity of estate nor of contract exists. Since the assignor will not be accountable to the original lessor for the assignee's breach of a covenant implied in law, justice is not served by implying a covenant enforceable between the assignor and the assignee. Texas, an implied-in-fact jurisdiction,¹⁴³ should on policy

131. See *Standard Oil Co. v. Marshall*, 265 F.2d 46 (5th Cir.), *cert. denied*, 361 U.S. 915 (1959). See also 43 TEX. JUR. 2d *Oil & Gas* § 383 (1963).

132. See 42 TEX. JUR. 2d *Oil & Gas* § 5 (1963).

133. See *Pich v. Lankford*, 157 Tex. 335, 302 S.W.2d 645 (1957); *Eternal Cemetery Corp. v. Tammen*, 324 S.W.2d 562 (Tex. Civ. App.—Fort Worth 1959, writ ref'd n.r.e.).

134. See note 71 *supra*.

135. See generally E. BROWN, *THE LAW OF OIL AND GAS LEASES* § 11.04 (1958); R. HEMINGWAY, *supra* note 30, at 455; M. MERRILL, *supra* note 6, § 182, at 401-05; 2 H. WILLIAMS & C. MEYERS, *supra* note 1, §§ 409-410, at 282-303; Merrill, *The Partial Assignee—Done in Oil*, 20 TEXAS L. REV. 298 (1942).

136. *Parker v. Standard Oil Co.*, 250 S.W.2d 671, 680 (Tex. Civ. App.—Galveston 1952, writ ref'd n.r.e.) (emphasis added).

137. See *Shell Oil Co. v. Howth*, 138 Tex. 357, 367, 159 S.W.2d 483, 490 (1942).

138. 279 S.W.2d 127 (Tex. Civ. App.—Waco 1955), *rev'd on other grounds sub nom. Mecom v. Hamblen*, 155 Tex. 406, 289 S.W.2d 553 (1956).

139. 279 S.W.2d at 131.

140. See, *e.g.*, *Davis v. Vidal*, 105 Tex. 444, 151 S.W. 290 (1912); *Gray v. Taylor*, 138 S.W.2d 891 (Tex. Civ. App.—Fort Worth 1940, writ dism'd jdgmt cor.).

141. See text accompanying notes 49-65 *supra*.

142. See *Walker*, *supra* note 49, at 402; *Warren*, *supra* note 129, at 400.

143. See *Danciger Oil & Ref. Co. v. Powell*, 137 Tex. 484, 490, 154 S.W.2d 632, 635 (1941).

grounds, in the absence of fraud, adhere to the assignment agreement's terms. The assignor who continues to be liable to the lessor on the implied contractual terms is not without remedy, particularly in instances where an express term of the assignment requires the assignee's indemnification or contribution. The sublessee, on the other hand, is responsible only to the sublessor, since only between them do the privities of both estate and contract exist. The response to this theory is the same as that for the above interest-in-hand argument. The cases implying covenants between the assignor and the assignee have not turned on a sublease-assignment distinction, even assuming such a distinction is recognized in Texas.

The supreme court in *Bolton*, however, settled upon a stare decisis approach for the implication of covenants enforceable between assignors and assignees. The primary precedent upon which the supreme court relied was *Phillips Petroleum Co. v. Taylor*.¹⁴⁴ In *Taylor* the lessee, who owned an overriding royalty interest, joined with the lessor in suing the assignee of an oil and gas lease for breach of the implied covenant to offset. The Fifth Circuit, in its opinion on rehearing, correctly acknowledged that Texas law was controlling.¹⁴⁵ The court, however, erred in its conclusion as to the then status of implied covenants in Texas enforceable between the assignor and the assignee and cited no Texas authority as a basis for the holding.¹⁴⁶ Conceding the existence of the offset covenant between the original lessor and the assignee, the court applied "the same principle to the assignor and assignee" because "it seems entirely reasonable to impose a similar duty."¹⁴⁷ The court further assumed that the decision to imply the offset covenant, enforceable between the assignor and assignee, could prejudice no one.¹⁴⁸ The Fifth Circuit justified this conclusion of no-prejudice on two bases. First, the court reasoned that the burden of offsetting implied under the original lease *in favor of the lessor* would not be increased by making the implied covenant to protect against drainage enforceable between the assignor and assignee.¹⁴⁹ Secondly, the court claimed that the reserved royalty under the assignment would be radically devalued if the assignor were deprived of his only enforcement privilege, that of a damages action against the assignee for breach of the implied covenant to offset.¹⁵⁰

The Fifth Circuit, however, was incomplete in its analysis. Someone, the assignee, was prejudiced. For example, since the duty to offset exists only where the owner of the working interest may do so at a reasonable profit, the assignee need only offset in instances where he could realize a profit after all operating expenses and all royalties, as increased by the assignor's reserved overriding royalty, had been paid.¹⁵¹ Therefore, before having implied the covenant against drainage, the courts in *Taylor* and *Bolton*

144. 115 F.2d 726 (5th Cir. 1940), *modified on denial of rehearing*, 116 F.2d 994 (5th Cir.), *cert. denied*, 313 U.S. 565 (1941).

145. 116 F.2d at 995.

146. *Id.*

147. *Id.* at 996.

148. *Id.*

149. *Id.*

150. *Id.*

151. See 2 H. WILLIAMS & C. MEYERS, *supra* note 1, § 420.1, at 350-51.

should have considered the effect that the additional overriding royalty would have had upon the profitability of offsetting.

Finally, the argument that the Texas Supreme Court is bound by the Fifth Circuit's interpretation of state law is without merit.¹⁵² It might just as well be contended that the Arkansas decisions of *McNeill v. Peaker*¹⁵³ and of *Henderson Co. v. Murphy*¹⁵⁴ were controlling. Furthermore, the very language of the *Taylor* opinion refutes applicability to *Bolton*. For example, the Fifth Circuit first found that the implied covenant against drainage extended to the lessor *who had joined in the suit*.¹⁵⁵ Second, the assignee in *Bolton* had, in addition to the overriding royalty, agreed to pay \$12,500,¹⁵⁶ whereas in *Taylor* the sole consideration which the assignee had obligated himself to pay was the overriding royalty.¹⁵⁷

The second decision upon which the supreme court in *Bolton* based the implication of the covenant to offset was that of *Cole Petroleum Co. v. United States Gas & Oil Co.*¹⁵⁸ In *Cole*, a trespass to try title suit between assignees of a common assignor, the plaintiff was permitted to enforce an express assignment clause that reasonable diligence be employed in marketing the gas produced. For failure to perform any assignment covenant, plaintiff's agreement with the assignor-lessee required forfeiture.¹⁵⁹ The supreme court held that plaintiff had breached the express marketing provision and that forfeiture was in order.¹⁶⁰ By way of dictum, however, the court concluded that, even if the assignment terms had not expressly required the assignee to use reasonable diligence in marketing the gas produced from the wells, such a covenant would nonetheless have been implied.¹⁶¹ The reason for the implication, however, was not merely equity, but rather was limited by the contractual terms as they evidenced the parties' intent.¹⁶² Reliance upon *Cole* should therefore have compelled the supreme court in *Bolton* to consider the intent of both the assignor and the assignee before concluding that an enforceable covenant to protect against drainage should be implied.

With *Taylor* inapplicable under principles of federalism,¹⁶³ and with *Cole* distinguishable on facts and dictum,¹⁶⁴ the supreme court's implied-in-law covenant to protect against drainage can only be considered as founded upon secondary authority.¹⁶⁵ The court accurately labeled Professor Mer-

152. See *Wichita Royalty Co. v. City Nat'l Bank*, 306 U.S. 103, 109 (1939); *Galveston H. & S.A. Ry. v. Wells*, 121 Tex. 310, 324, 50 S.W.2d 247, 252 (1932).

153. 253 Ark. 747, 488 S.W.2d 706 (1973).

154. 189 Ark. 87, 70 S.W.2d 1036 (1934).

155. 115 F.2d at 727-28.

156. 533 S.W.2d at 915.

157. 115 F.2d at 727.

158. 121 Tex. 59, 41 S.W.2d 414 (1931).

159. *Id.* at 61, 41 S.W.2d at 415.

160. *Id.* at 66, 41 S.W.2d at 417.

161. *Id.* at 64, 41 S.W.2d at 416.

162. *Id.* at 66, 41 S.W.2d at 417.

163. See note 152 *supra* and accompanying text.

164. See notes 161, 162 *supra* and accompanying text.

165. See *Bolton v. Coats*, 533 S.W.2d 914, 916-17 (Tex. 1975). The secondary authorities cited include M. MERRILL, *supra* note 6, § 188, at 416-18; 3 W. SUMMERS, *supra* note 7, § 554, at 652-59.

rill's volume as supportive of the proposition that an assignor who reserves an overriding royalty interest in an oil and gas lease should be capable of enforcing implied covenants against the assignee.¹⁶⁶ The supreme court's citation to Professor Summers' treatise is, however, misplaced since it contains no language supportive of the same proposition.¹⁶⁷

The historical evolution of Texas common law as demonstrated by *Greenwood & Tyrrell v. Helm*,¹⁶⁸ *Simms Oil Co. v. Colquitt*,¹⁶⁹ *Cole Petroleum Co. v. United States Gas & Oil Co.*,¹⁷⁰ and *Ebberts v. Carpenter Production Co.*,¹⁷¹ aligned Texas with jurisdictions which had adopted the implied-in-fact method.¹⁷² This method, however, stops far short of implying covenants enforceable between assignors and assignees of oil and gas leases.¹⁷³ Moreover, in terms of the precedent relied upon by the court in reaching its result,¹⁷⁴ the proper analysis in *Bolton* would have been to consider profitability, the lessor's having joined in the suit to enforce the implied covenants against the assignee, the overriding royalty serving as the *sole* consideration of the assignment, and the assignor's alternative means of enforcement.¹⁷⁵ None of these factual and legal analyses were, however, undertaken in *Bolton*.¹⁷⁶ In the face of precedent, *Bolton* is therefore an aberration. It extended the law of oil and gas two steps beyond its then-existing status; first, in its implied-in-law theory of implication; secondly, in its conjuring of covenants, from a source other than the assignment contract and the reasonable inferences therefrom, enforceable between an assignor and assignee. If, therefore, *Bolton* is to have any vitality, it must originate in policy.

B. Policy

Although it has been written that the reservation of a nonoperating interest alone gives rise to the need to imply covenants,¹⁷⁷ other considerations must underlie the implication of conditions.¹⁷⁸ Commentators have disagreed as to whether the same policy reasons justify the principle of implied covenants in both the lessor-lessee and the assignor-assignee contexts.¹⁷⁹ Careful scrutiny does not, however, confirm this thesis. The argument that implied terms are necessary to evoke relative equality of bargaining power between the lessor and lessee¹⁸⁰ loses impetus once it is applied to the parties

166. See M. MERRILL, *supra* note 6, § 188, at 416-18.

167. See 3 W. SUMMERS, *supra* note 7, § 554, at 652-59.

168. 264 S.W. 221 (Tex. Civ. App.—San Antonio 1924, writ ref'd).

169. 296 S.W. 491 (Tex. Comm'n App., jdgmt adopted), *set for rehearing*, 298 S.W. 892 (Tex. Comm'n App. 1927), *aff'd on rehearing*, 2 S.W.2d 421 (Tex. Comm'n App. 1928, jdgmt adopted).

170. 121 Tex. 59, 41 S.W.2d 414 (1931).

171. 256 S.W.2d 601 (Tex. Civ. App.—Beaumont 1953, writ ref'd n.r.e.).

172. See notes 49-65 *supra* and accompanying text.

173. See note 71 *supra*.

174. The court relied primarily upon *Phillips Petroleum Co. v. Taylor*, 115 F.2d 726 (5th Cir. 1940), *modified on denial of rehearing*, 116 F.2d 994 (5th Cir.), *cert. denied*, 313 U.S. 565 (1941).

175. See notes 144-57 *supra* and accompanying text.

176. 533 S.W.2d 914, 915-16 (Tex. 1975).

177. "[W]here the sole compensation to the landlord is a share of what is produced, there is always an implied covenant for diligent search and operation." *Huggins v. Daley*, 99 F. 606, 609 (4th Cir. 1900).

178. See 5 H. WILLIAMS & C. MEYERS, *supra* note 1, § 801, at 1-2.

179. See generally M. MERRILL, *supra* note 6, § 179, at 396-98; 3 W. SUMMERS, *supra* note 7, § 554; Merrill, *Implied Covenants Between Others Than Lessors and Lessees*, 27 WASH. U.L.Q. 155, 162-65 (1942); Walker, *supra* note 49, at 450-54; 43 TEX. JUR. 2d *Oil & Gas* § 418 (1963).

180. See notes 20-24 *supra* and accompanying text.

of an assignment agreement. Assignors and assignees of oil and gas leases are presumed¹⁸¹ to have acquired a degree of sophistication alien to the traditional surface owner's aptitude.¹⁸² Another policy objective generally at odds with the implication of oil and gas covenants through the operation of the law is peculiar to Texas.¹⁸³ Integral to this state's legal system is the conceit that controversy is best resolved by a panel of peers. Categorically implying additional obligations, however, circumscribes the right of an oil and gas assignment, or lease, litigant to have a significant issue submitted to the jury.¹⁸⁴

Finally, an alternative rationale for the evolution of implied lease covenants has been to give effect to the express terms of the agreement. For example, recognizing the peculiar properties of oil and gas, the courts have undertaken to impose a flexible framework, the implied covenant doctrine, within which the parties may operate.¹⁸⁵ In *Bolton*, however, the court generated an assignee's dilemma.¹⁸⁶ By requiring the implication of the offset covenant in favor of an assignor who reserves an overriding royalty, unless the assignment provides otherwise,¹⁸⁷ the court has effectively commanded the assignee to account for every contingency. The resultant explicitness militates against operating flexibility, indispensable under the original lease, evanescent in assignment. The equality of bargaining power thought to distinguish the assignor-assignee relationship is consequently displaced in the assignor's favor.

The cursory treatment that the Texas Supreme Court afforded the complicated issue of implied covenants between assignors and assignees is unfortunate, given the active function of precedent in a common-law system. *Bolton v. Coats*, aberrant in precedent and policy, has expanded the scope of an assignee's duties beyond those of the lessee into whose shoes he is said to have stepped.¹⁸⁸ If a higher standard is to be imposed upon the assignee in instances where a nonoperating interest has been reserved by an assignor, more than mere lip-service should be given to the reasonableness, a jury issue, of the assignee's conduct.¹⁸⁹ Irrespective of whether the right or duty analysis came first,¹⁹⁰ the creation of a legal remedy for the assignor of an oil and gas lease would more equitably and reasonably depend upon the availability of alternative methods of redress.¹⁹¹ Since, however, the assign-

181. See notes 80, 89 *supra* and accompanying text.

182. See notes 20-24, 80, 89 *supra* and accompanying text.

183. The court in *Bolton v. Coats*, 533 S.W.2d 914 (Tex. 1975), considered only whether the assignor's affidavits had created a genuine issue as to any material fact. Since no law actually existed to entitle either party to the summary judgments sought, the court was explicitly compelled to hold as a matter of law that covenants could and should be implied between assignors and assignees of oil and gas leases.

184. See *Owens v. O'Donohoe*, 280 S.W. 842 (Tex. Civ. App.—Fort Worth 1926, no writ).

185. See notes 25-27 *supra* and accompanying text.

186. See *Bolton v. Coats*, 533 S.W.2d 914, 915 (Tex. 1975).

187. *Id.* In *Bolton* no provision was made for an offset covenant.

188. See *Greenwood & Tyrrell v. Helm*, 264 S.W. 221, 222 (Tex. Civ. App.—San Antonio 1924, writ ref'd).

189. The covenant to protect against drainage will only be implied in instances where a reasonable profit would be returned over the drilling, equipping, and producing expenses; these costs of production include both the lessor's and the assignor's royalties. See 2 H. WILLIAMS & C. MEYERS, *supra* note 69, § 420.1, at 350-51.

190. See W. HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS* 35-64 (1964).

191. See note 150 *supra* and accompanying text.

or, subject to an additional burden of proving profitability inclusive of the royalty rights of the original lessor, usually receives the benefit of explicit and implicit covenants between the assignee and the lessor, no pervasive need exists to make these same covenants enforceable between the assignor and assignee. To the extent that the lessor's covenants motivate action on the assignee's part, no further impetus is furnished by enabling the assignor to kindle performance or to recover for damages. It is submitted, therefore, that the assignor of an oil and gas lease should be allowed to enforce an implied covenant only where the lessor has joined as a plaintiff in an action against the breaching assignee or where the lessor has assigned his cause of action to the assignor. Adjudication of that right will depend upon case-by-case factual analysis, not on across-the-board remedial access.

III. CONCLUSION

The development of oil and gas law has attended, for the most part, the correlative progression in the sciences and techniques of the minerals' production. Legal principles have emerged when the need was recognized. In general, such rules of law were the product of reasoned evolution, not of thoughtless exigency. Irony is not a concept confined to the ephemeral. Its applicability cuts across the metaphysical to the pragmatic, across the literary to the legalistic: for among the products of reasoned evolution is the doctrine of implied lessor-lessee covenants, and among those of thoughtless exigency rests the premise of conjured assignor-assignee conditions.

