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PREFERENTIAL RIGHT PROVISIONS AND THEIR APPLICABILITY TO OIL AND GAS INSTRUMENTS

by Harlan Abright

An important, yet often overlooked, provision commonly included in oil and gas instruments, particularly joint operating agreements,1 farm-out agreements,2 and unit operating agreements,3 is one providing for a preferential right to purchase.4 Known also as a "right of first refusal,"5 a “pre-

1. A joint operating agreement is a contract whereby two or more parties agree to share the costs and benefits of developing a parcel of land for oil or gas production. See, e.g., the preferential right provision in AMERICAN ASS’N OF PETROLEUM LANDMEN, MODEL FORM OPERATING AGREEMENT 12 (Form 610-1977) [hereinafter cited as MODEL FORM OPERATING AGREEMENT].

2. A farm-out agreement is [a] very common form of agreement between operators, whereby the owner of a lease not desirous of drilling at the time agrees to assign the lease, or some portion of it (in common or in severalty) to another operator who is desirous of drilling the tract. The assignor in such a deal may or may not retain an overriding royalty or production payment. The primary characteristic of the farm out is the obligation of the assignee to drill one or more wells on the assigned acreage as a prerequisite to completion of the transfer to him. H. WILLIAMS & C. MEYERS, OIL AND GAS LAW, MANUAL OF TERMS 211 (1977).

3. Unit operating agreements are entered into by parties with interests in land which, by statute, must be developed as a unit in order to increase the ultimate recovery of oil or gas. See, e.g., AMERICAN PETROLEUM INSTITUTE, MODEL FORM OF UNIT OPERATING AGREEMENT FOR STATUTORY UNITIZATION (1974).

4. The following form illustrates a typical preferential right clause in a joint operating agreement:

In the event any party desires to sell all or any part of his or its interest subject to this agreement, the other party or parties hereto shall have a preferential right to purchase the same. In such event, the selling party shall promptly communicate to the other party or parties hereto the offer received by him or it from a prospective purchaser ready, willing and able to purchase the same, together with the name and address of such prospective purchaser, and said party or parties shall thereupon have an option for a period of ten (10) days after the receipt of said notice to purchase such undivided interest for the benefit of such remaining parties hereto as may agree to purchase the same. Any interest so acquired by more than one party hereto, shall be shared by the parties purchasing the same in the proportions that the interest of each party so acquiring bears to the total interest of all parties so acquiring. The limitations of this paragraph shall not apply where any party hereto desires to mortgage his or its interest or to dispose of his or its interest by merger, reorganization, consolidation or sale of all his or its assets, or a sale of his or its interest hereunder to a subsidiary or parent company or subsidiary of a parent company or to any company in which any one party hereto owns a majority of the stock.

In event of a sale by Operator of the interests owned by it which are subject hereto, the holders of a majority interest in the premises subject hereto shall be entitled to select a new operator but unless such selection is made the transferee of the present Operator shall act as operator hereunder.


emptive right,"6 or a "conditional or contingent right,"7 these clauses provide that when the owner of an interest burdened with such right desires to sell the property, the holder of the right must be given the first opportunity to buy on the terms provided in the agreement.8 Usually the terms require that the holder match the best offer received from a prospective third party purchaser. Technically a preferential right provision is materially different from an ordinary option in that a preferential right gives the holder no power to force a sale. Instead, the holder is merely given the right of purchase in the event the owner of the burdened interest decides to sell.9

A preferential right provision may be valuable in an oil and gas instrument for two major reasons. First, the presence of such a provision in an agreement gives the holder of the right a potential opportunity to make valuable future acquisitions. In joint operating agreements, for example, each party naturally believes that the interests owned by the other parties are of some value. The preferential right, therefore, assures each of them an opportunity to purchase those valuable interests should the owner desire to sell. A second purpose for including a preferential right is to provide the holder a measure of control over who will be involved in the operation and development of property in which he has some interest.10 Many difficulties, however, can arise from carelessly accepting a preferential right provision as a boilerplate clause without first recognizing the

8. See generally H. WILLIAMS & C. MEYERS, OIL AND GAS LAW § 428.3 (1977); 51 C.J.S. Landlord and Tenant § 88(2), at 267 (1968); 49 AM. JUR. 2D Landlord and Tenant § 369, at 386 (1970); Annot., 2 A.L.R.3d 701, 703, 710 (1965).

A preemption differs materially from an option. An option creates in the optionee a power to compel the owner of the property to sell it at a stipulated price whether or not he be willing to part with ownership. A preemption does not give the preemptor the power to compel an unwilling owner to sell; it merely requires the owner, when and if he decides to sell, to offer the property first to the person entitled to the preemption, at the stipulated price. Upon receiving such an offer the preemptor may elect whether he will buy. If he elects not to buy, then the owner may sell to anyone.

10. For example, one party to a joint operating agreement might be contemplating the sale of his interest to a third party who could frustrate the development of the entire project or cause it to be directed along paths the others oppose. The preferential right provision, therefore, gives parties a valuable tool with which to prevent frustration of their plans and protect their interests. See Meyer v. Warner, 104 Ariz. 44, 448 P.2d 394 (1968) (purpose of preferential right clause held to be to protect the holder of the right's continuing interest in the burdened property). In other oil and gas instruments, preferential right provisions can also be a valuable part of the consideration for entering the agreement. For example, an integrated producer-refiner might desire such clauses as a device to obtain additional production. A natural gas purchaser might desire such a clause in the gas purchase contract with regard to additional volumes discovered by the seller in order to fill its constant demand for additional supplies. See Reasoner, Preferential Purchase Rights in Oil and Gas Instruments, 46 TEXAS L. REV. 57, 58 (1967).
ramifications which could flow from its inclusion. One such problem is that potential purchasers may not wish to bear the expense of investigating a property for purchase when they know they might be preempted. Further, even if a proper sale is made to a third party, an obstinate preferential right holder may refuse to release the right or acknowledge its waiver, thereby creating a cloud on the title. Also, a preferential right may preclude the owner of the burdened interest from taking advantage of multi-interest transactions or like-kind exchanges by limiting his power of alienation.11

Coventurers should likewise be aware that the presence of a preferential right provision in a joint operating agreement may be evidence in support of an argument that the parties to the agreement contracted away their rights to partition the property. In cases involving co-owners of mineral estates courts have uniformly held that a preferential right provision indicated that the normally absolute right to partition had been contracted away.12 Other provisions, such as nonconsent clauses and co-owner assignment rights prior to abandonment, may be the only avenues available to an owner who does not wish to participate further in the venture.

Care is therefore necessary when considering inclusion of a preferential right. This Comment deals with the following three major areas of concern which have arisen in connection thereto: (1) the question of the basic validity or enforceability of a preferential right provision; (2) the application of valid provisions to various transactions; and (3) the obligations concurrent with a preferential right, and the remedies and defenses relating to a breach thereof.13 The Comment concludes with a checklist of considerations necessary to the drafting of valid and practical preferential right provisions. An appendix follows with a sample provision drafted with these considerations in mind.

I. Validity

If parties specifically desire the inclusion of a preferential right clause in an agreement, a provision must be drafted which is valid and enforceable. On the other hand, if a party bound by a preferential right clause wishes to escape its requirements, he must consider an attack upon its validity. Thus, in both drafting preferential right provisions and litigating disputes


13. Many, if not most, of the cases referred to in this Comment, it should be noted, did not arise out of oil and gas transactions, but rather out of landlord-tenant and other ordinary real property transactions involving preferential right provisions. Since these provisions are nothing more than a contract right, the same basic principles have been applied to oil and gas instruments in the cases that have considered the matter. See generally Sellingsloh, Nature and Purpose of Preferential Purchase Rights, 11 Rocky Mtn. Ann. Min. L. Inst. 35, 37-38 (1965).
that arise thereunder, attention must be given to the basic validity of
the clause. Essentially, the validity of these provisions has hinged on
three grounds: the Statute of Frauds, the Rule Against Restraints on
Alienation, and the Rule Against Perpetuities.

A. The Statute of Frauds

Precedent has clearly established that preferential purchase right
agreements relating to mineral estates must meet the requirements of
the Statute of Frauds. Thus, these provisions may be found invalid
under the Statute because they are contracts to make a future contract
with no specification of terms. Similarly, in preferential purchase
right provisions in which the price is to be determined from a third
party offer, an argument may be made that the provision renders the
contract partly in parol and thereby void under the Statute. Contrary
to this argument, however, is the general rule that the Statute of
Frauds is satisfied if the agreement prescribes a method that will result
in a certain determination of the purchase price. Preferential right
clauses providing that the holder shall have the right to purchase at
the same price set in a bona fide third party offer are held to meet this
standard. Although a very few courts have held that a preferential
right provision implies that the purchase price will be determined
by a third party offer, the provision should always clearly state the
manner of ascertaining the purchase price, or risk being struck
down as merely an agreement to make a future contract.

14. Other grounds upon which the validity of preferential purchase rights have
been unsuccessfully attacked include uncertainty of price, uncertainty of time of
accrual of right to exercise, lack of consideration, and lack of mutuality. See Annot.,

1962, writ ref'd n.r.e.); Noxon v. Cockburn, 147 S.W.2d 872, 874 (Tex. Civ. App.—
Galveston 1941, writ ref'd). See also Watkins v. Arnold, 60 S.W.2d 476, 477 (Tex. Civ.
App.—Texarkana 1933, writ ref'd) (option contracts relating to land are within the
Statute of Frauds).

16. See Stekoll Petroleum Co. v. Hamilton, 152 Tex. 182, 190, 255 S.W.2d 187, 192
(1953) (a contract to apportion an oil and gas lease "in an equitable pattern" is an
agreement to make a future agreement voidable under the Statute of Frauds); Taber v.
Pettus Oil & Ref. Co., 139 Tex. 395, 398, 162 S.W.2d 959, 962 (1942) (agreement to
convey oil and gas leases in future using the "regular Texas Standard Form No. 86"
is void under the Statute of Frauds because the agreement failed to set out essential
terms); Noxon v. Cockburn, 147 S.W.2d 872, 874 (Tex. Civ. App.—Galveston 1941,
 writ ref'd) (agreement to convey oil and gas lease is void under the Statute of
Frauds).

17. See Slaughter v. Mallet Land & Cattle Co., 141 F. 282 (5th Cir.), cert. denied,
201 U.S. 646 (1905); Marske v. Willard, 169 Ill. 276, 48 N.E. 290 (1897).

Horn, 296 S.W.2d 94, 97 (Mo. 1956); Beets v. Tyler, 365 Mo. 895, 897, 290 S.W.2d 76, 78
Div.), cert. denied, 36 N.J. 32, 174 A.2d 658 (1961); Parker v. Murphy, 152 Va. 173, 184, 146 S.E. 254,
258 (1929). See generally 1A A. Corbin, Contracts § 261, at 470 (1950); Annot., 136

19. See R.F. Robinson Co. v. Drew, 83 N.H. 459, 144 A. 67 (1928); Parker v. Murphy,
152 Va. 173, 184, 146 S.E. 254, 258 (1929).

20. See Fogg v. Price, 145 Mass. 513, 515, 14 N.E. 741, 743 (1888); Hardy v. Galloway,
111 N.C. 53, 15 S.E. 890 (1892).
Thus, with proper draftsmanship, a preferential right provision will in most circumstances meet the validity requirements of the Statute of Frauds. A problem may arise, however, if a preferential right clause is held to be applicable to a package-deal situation wherein the owner desires to sell the burdened interest as a part of a larger group of properties. Often no rational basis for allocating any particular portion of the purchase price to the specific burdened property can be made because the value of oil and gas interests as a whole greatly exceeds the sum of their individual values. Hence, when a preferential right provision fails to specify a certain method for determining the price of the covered property in such situations, there is some risk that the provision will be found void for uncertainty under the Statute of Frauds. Therefore, if the parties to an agreement containing a preferential right provision want coverage of package-deal sales, care must be taken to set up some definite formula for determining the price to be paid by the holder in that event.

B. The Rule Against Restraints on Alienation

The Rule Against Restraints on Alienation reflects a policy decision of the courts that they will not look favorably upon agreements which tend to restrict a party’s power to transfer his property freely. Undeniably, preferential right provisions restrict alienability to some extent. For instance, the owner of a burdened interest is deprived of the absolute freedom in selecting the party to whom he will convey his property. Similarly, the applicability of the right to package deals may restrict the owner’s ability to enter into such transactions. The generally accepted view, however, is that restraints of this nature are indirect and ancillary to a legitimate purpose. As stated in the original Restatement of Property, in most preferential right provisions “[t]he interference with alienation . . . is so slight that the major policies furthered by the freedom of alienation are not infringed to a degree which requires invalidation.” Perhaps the most realistic view was expressed by a Florida district court of appeals in the recent case of Watergate Corp. v. Regan: “[A]lienability is not restrained at all,

21. The problems relating to the applicability of preferential right provisions to package deals are discussed in a later section of this Comment. See notes 90-105 infra and accompanying text.
22. See Appendix, note m infra.
23. A court will probably invalidate a preferential right provision under the Rule Against Restraints on Alienation if the restraint itself, and not some reasonable commercial purpose, was the primary reason for the inclusion of the provisions. See, e.g., Kershner v. Hurlburt, 277 S.W.2d 619, 623 (Mo. 1955).
24. RESTATEMENT OF PROPERTY § 413(1), Comment c at 2443 (1944). This proposition has been generally subscribed to by the courts in cases of preferential right provisions which provide that the holder may buy at a price offered by a third party. See Weber v. Texas Co., 83 F.2d 807 (5th Cir.), cert. denied, 299 U.S. 561 (1936); Torrea v. Umphress, 27 Ariz. App. 513, 556 P.2d 814 (1976) (holding that a preferential right provision did not constitute an invalid restraint on alienation); Blair v. Kingsly, 128 So. 2d 889 (Fla. 1951) (option to repurchase); Watergate Corp. v. Regan, 321 So. 2d 133 (Fla. Dist. Ct. App. 1975); Sibley v. Hill, 331 S.W.2d 227 (Tex. Civ. App.—El Paso 1960, no writ); Kames State Bank v. Bourgeois, 14 Utah 2d 188, 380 P.2d 931 (1963) (option to repurchase).
but is in fact enhanced because the seller has two potential buyers instead of one."

On the other hand, a preferential right provision with more restrictive conditions, such as requiring sale at a specified price, which may be far less than market value, or placing restrictions on prospective purchasers, will probably be held void. In addition, the provision may be challenged on the basis that a primary purpose of the Rule is to prevent restrictions which inhibit the development of property. Thus, since burdening a working interest, as opposed to a nonoperating interest, with a preferential right might in some instances inhibit the owner's ability to enter certain transactions, for example, package deals, the preferential right provision may inhibit development and impose an invalid restraint on alienation.

Nevertheless, in Knight v. Chicago Corp. the Texas Supreme Court held that a royalty owner could place restraints on the alienability of a working interest even though it had the effect of diluting the value of the working interest. Similarly, Sibley v. Hill more recently held that working interests held by cotenants can be subject to a preferential purchase right held by the other cotenants. Neither of these cases, however, considered this question in relation to multi-interest package deals, and while the chances for the success of this "restraint" argument appear slight, the proposition has never been specifically tested in court. Under the right circumstances and in the right jurisdiction, a sufficient restraint may be found so as to invalidate a preferential right provision. This possibility should at least be kept in mind when drafting a provision, although, as stated earlier, the trend of most courts today is to validate preferential purchase right clauses notwithstanding the Rule Against Restraints on Alienation as long as the provision does not contain any unreasonable or especially burdensome restrictions.

C. The Rule Against Perpetuities

The final and most persuasive argument respecting the validity of preferential right provisions concerns the applicability of the Rule Against Perpetuities. Practically every state has some form of the Rule. Basically, the Rule requires that an estate or interest, in order to be good, must vest,
if at all, within the period of some life or lives in being at the effective date of the instrument creating the future interest or twenty-one years thereafter. In a preferential right provision in an oil and gas instrument, since the holder is given a conditional right to specific performance, the possible vesting of an estate, if unlimited or merely limited to the duration of an unlimited oil and gas lease, could occur well beyond the period permitted by the Rule.

In Watergate Corp. v. Regan the purchaser of property had a preferential right to buy contiguous property owned by the grantor. The court held that whether the preferential right would necessarily vest within the period required by the Rule would depend on a factual issue: whether the obligation to honor the right is personal to the original owner of the burdened estate. If the obligation is personal, if it applies only if that owner elects to sell, then such preferential right would necessarily vest within the required period. But if the preferential right follows into the hands of the owner's heirs, devisees, or grantees, then the Rule would be violated since vesting would not necessarily occur within the required period.

The court went on to state that deciding whether a preferential right was intended to be personal, in the absence of a dispositive declaration in the clause, requires a determination of the intentions of the parties from extrinsic evidence. In the absence of such evidence, and faced with ambiguity, the court said a construction would be adopted which would uphold the provision rather than one that would invalidate it. On the other hand, preferential right provisions that provide no limit for their application, or that can be construed to be not personal, may be held unenforceable.

Other authorities, however, view the Rule Against Perpetuities as merely another aspect of the policy against restraints on alienation and believe that application should not occur where "practical alienability" of land is

39. See, e.g., Roehmhold v. Jones, 239 F.2d 492 (8th Cir. 1957); Points v. Barnes, 301 So. 2d 102 (Fla. Dist. Ct. App. 1974), cert. denied, 312 So. 2d 751 (Fla. 1975); Campbell v. Campbell, 313 Ky. 249, 230 S.W.2d 918 (1950); Kershner v. Hurlbert, 277 S.W.2d 619 (Mo. 1955).
40. This approach was taken in another recent case, Atchison v. City of Englewood, 170 Colo. 295, 463 P.2d 297 (1970). Here a preemptive right to repurchase was determined to be invalid under the Rule Against Perpetuities since the right to repurchase was specifically retained by the holder's heirs and assigns, and was unlimited as to time.
41. 321 So. 2d at 136; see 61 Am. Jur. 2d Perpetuities § 8 (1972); RESTATEMENT OF PROPERTY § 375 (1944).
42. See, e.g., Roberts v. Jones, 307 Mass. 504, 30 N.E.2d 392 (1940) (preferential right clause held invalid under the Rule Against Perpetuities because the clause fixed no certain time for its operation).
not impaired. Under this pragmatic approach courts should be less willing to strike down for technical reasons provisions which serve commercially reasonable purposes, as do preferential right provisions in many instances. This position has been upheld by a number of courts which held that preferential right provisions do not come within the scope of the Rule Against Perpetuities. The most recent application of this principle was in the case of Foster v. Bullard. With regard to this issue, a Texas court of civil appeals, following several Texas precedents, held:

In general it may be said that a perpetuity is a limitation that takes the subject property out of commerce for a long period of time and works an indirect restraint on alienation.

Under the facts of this case Bullard and his land company were not restrained from free alienation. Foster's [preferential right] was not exclusive to him to buy at a fixed price which he could exercise at some remote time beyond the limit of the rule against perpetuities. Foster had only the right to reject or to buy at such time as Bullard was ready to sell. The contract does not fall within the rule against perpetuities.

Weber v. Texas Co. indicates that the federal courts take a similar stance. Some authorities have flatly stated that even if perpetual in duration, preferential rights are not objectionable under the Rule since free alienation is not really restrained. Likewise, other commentators have said that the Rule Against Perpetuities is not a satisfactory device by which the invalidity of preemptive rights should be determined in implementing public policy. Based on this reasoning, this pragmatic approach appears to be the best analysis for reflecting consideration of commercial realities. Nevertheless, when drafting a preferential right provision, a technical violation of the Rule must be carefully avoided to prevent problems that could occur in a jurisdiction following the Watergate line of cases.

43. See Berg, Long-Term Options and the Rule Against Perpetuities III, 37 CALIF. L. REV. 419, 452 (1949); Reasoner, supra note 10, at 68.
44. The Supreme Court of Texas followed this reasoning in Kelley v. Womack, 153 Tex. 371, 268 S.W.2d 903 (1954).
46. 496 S.W.2d 724 (Tex. Civ. App.—Austin 1973, writ ref'd n.r.e.).
47. Id. at 735.
48. 83 F.2d 807 (5th Cir.), cert. denied, 299 U.S. 561 (1936). This court held that the underlying reason for the Rule is to avoid burdening real property with restrictions which would isolate the property and exclude it from commerce for long periods of time.
49. See 6 AMERICAN LAW OF PROPERTY, supra note 9, § 26.66; L. Simes & A. Smith, supra note 27, § 1154.
50. See, e.g., Schnebly, Restraints Upon the Alienation of Legal Interests: III, 44 YALE L.J. 1380 (1935).
51. See Appendix, notes h, p & q infra for examples of a preferential right provision drafted with this problem in mind.
II. Applicability

A. *What Is a "Sale"?*

Most preferential right provisions are drafted so as to be triggered by a "sale."¹²² Because of the broad range of interpretations that can be derived from that term,¹²³ the determination of which transfers will trigger the preferential right is difficult.¹²⁴ In making this determination, courts have generally placed emphasis on either the presence or absence of arm's length dealing between the owner of the burdened interest and the third party transferee¹²⁵ or upon the effect of the conveyance as placing the property beyond the reach of the holder of the right.¹²⁶

Thus, where circumstances reveal a donative intent in a transfer between relatives, a preferential right may not apply because of the absence of arm's length dealing. For instance, in *Isaacson v. First Security Bank*¹²⁷ the owner of a burdened interest conveyed the interest to his son for one-third of its fair market value. The court determined that the circumstances indicated that the transfer was more in the nature of a gift than a sale. Consequently, the preferential right provision was held inapplicable to the transaction.¹²⁸ Similarly, an absence of arm's length dealing in transactions between commercially related parties is also generally held to preclude the application of preferential right provisions.¹²⁹ Thus, courts have ruled that a triggering sale has not occurred when a burdened property is transferred to the owner's wholly owned corporation or from one corporation to another, both of which are owned and controlled by the owner of the interest.¹³⁰ Following the same reasoning, a federal court held that where a corporation owned the burdened interest, the sale of all the corporation's stock did not constitute a sale that would invoke a preferential right provision.¹³¹ More recently, a New York court in *Torrey Deliv-

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¹²² For example, the preferential right provision in most standard joint operating agreements provides: "In the event any party desires to sell all or part of his or its interest subject to this agreement, the other party or parties hereto shall have a preferential right to purchase the same." H. WILLIAMS, R. MAXWELL & C. MEYERS, supra note 4, at 875 app.

¹²³ See 38 WORDS AND PHRASES Sale 70-214 (1967).


¹²⁹ This lack of arm's length dealing is often specifically mentioned in the standard provisions:

However, there shall be no preferential right to purchase in those cases where any party wishes . . . to dispose of its interests by merger, reorganization, consolidation, or sale of all or substantially all of its assets to a subsidiary or parent company or to a subsidiary of a parent company, or to any company in which any one party owns a majority of the stock.

MODEL FORM OPERATING AGREEMENT, supra note 1, at 12.


ery, Inc. v. Chatauqua Truck Sales & Service, Inc.\(^{62}\) determined that a merger of two corporations did not constitute a triggering sale. The surviving corporation, however, was held to be bound by the preferential right clause. Logically, the same conclusion should hold true for all the transferees in the above described transactions.\(^{63}\) Finally, courts have also held that the granting of an easement on burdened property does not trigger the preferential right provision.\(^{64}\)

Problems have been encountered in determining whether an exchange of the burdened property for consideration other than cash, such as an exchange of properties, is a "sale." For instance, a person or corporation may acquire another unrelated corporation or partnership through merger or purchase by stock swap, resulting in a claim from a third party that it had a preferential right to purchase certain assets of the acquired party. Under such circumstances, if the preferential right is determined to be applicable, the acquiring party may be compelled to disgorge the burdened property or undertake to unravel a consummated merger or purchase.\(^{65}\) A federal court in Panuco Oil Leases, Inc. v. Conroe Drilling Co.\(^{66}\) held that an exchange was not a sale and refused to enforce a preferential right provision contained in a farm-out agreement. In that case a burdened working interest was assigned to a third party in consideration of an agreement to drill. This transaction was held to be an exchange, not a sale, and consequently the preferential right did not apply. The opposite result, however, was reached in the later case of Anderson v. Armour Co.\(^{67}\) A triggering sale was held to have occurred in a transaction involving an exchange of properties. The decision was based on two grounds: a narrow, technical ground and a broader, pragmatic policy ground. Even though the transaction was primarily an exchange, the deed said "bargain, sell and convey," and so was technically a "sale."\(^{68}\) More persuasive was the court's reasoning with regard to the realistic effect of the transaction. As a practical matter, as far as the holder of the right was concerned, the property had effectively been "sold" and placed beyond his reach, regardless of the details of the deal.\(^{69}\) Thus, the right was held to apply in order to protect his interests.

This "beyond the reach of the holder" rationale is the better analysis for determining whether an exchange constitutes a triggering sale. Of course, this analysis again involves the question whether the preferential right provision is personal or runs with the land. If a jurisdiction accepts the the-

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\(^{63}\) Problems may arise in this context, however, with respect to the Rule Against Perpetuities. See the discussion of whether a preferential right is personal, and the consequent ramifications, in notes 37-42 supra and accompanying text.
\(^{65}\) See Appendix, note \(n\) infra and accompanying text.
\(^{68}\) \(Id.\) at 804, 473 P.2d at 89.
\(^{69}\) \(Id.\)
ory that a preferential right can run with the land without violating the Rule, an exchange should not trigger a provision drafted in terms of a “sale.” On the other hand, if a jurisdiction subscribes to the theory that a valid preferential right cannot run with the land, but must be personal, an exchange should constitute a triggering sale because such transaction effectively places the burdened interest beyond the reach of the holder to the complete frustration of the right.

A final problem in this area concerns an exception to the preferential right contained in most standard forms. This provision excepts the preferential right in the event of the owner's disposition of the property by the sale of all his assets. Questions arise concerning the actual scope of this phrase. Does this exception require a sale of all assets, personal and business, no matter how unrelated they may be to the particular agreement? Further, does it require the sale of all assets to a single purchaser, a particularly remote possibility in the case of a large corporation? This ambiguity can be prevented by incorporating the intentions of the parties with respect to this matter into the provision when drafted. Even in transactions that are clearly sales, however, questions can still arise as to the applicability of a preferential right provision.

B. Involuntary Sales

Most authorities consider preferential right provisions to apply only to “voluntary” sales. The context in which the question of the applicability of preferential rights to “involuntary sales” most often arises involves mortgage foreclosure sales. The leading case in this area is Draper v. Gochman, in which the Texas Supreme Court held that a trustee's sale upon a mortgage foreclosure was “involuntary,” and thus not one to which the preferential right was applicable. The purchaser at the foreclosure sale, however, stepped into the shoes of the previous owner, and had to honor the preferential right in any subsequent sale. Once again, the decision was based on both technical and logical grounds. The plaintiff argued that the execution of the deed of trust to the burdened interest was itself a sale. The court responded that this transaction did not pass title to the property; the title remained in the owner, and the holder of the deed.

70. See, e.g., Model Form Operating Agreement, supra note 1, at 12: “However, there shall be no preferential right to purchase in these cases where any party wishes . . . to dispose of its interests by . . . sale of all or substantially all of its assets . . . .”
71. See Sellingsloh, supra note 13, at 41 & n.8.
72. For example, see how this is handled in the Appendix, note p infra and accompanying text.
74. 400 S.W.2d 545 (Tex. 1966).
75. Id. at 547.
merely had a lien. Furthermore, the trustee in the foreclosure sale had no authority to offer the property to anyone except in accordance with the specific provisions of the deed of trust and the statute governing trustee sales. Thus, since the deed of trust made no provision for the recognition of the preferential right, the trustee was not at liberty to offer the property to the holder of the right in preference over any other foreclosure bidder.

Embracing a broader reasoning, however, the court also said that the preferential right clause was inapplicable because the sale was involuntary in that the owner was not an actor in the transaction. When the owner mortgaged the burdened interest, he had a desire to borrow money rather than to sell the property; he contemplated repaying the loan. The court stated: "There is no evidence here that [the] loan transaction with its attendant mortgage or deed of trust was intended as a subterfuge or device to sell the property so as to defeat [the] first right of refusal." The opposite result was reached in Price v. Town of Ruston. In Price a Louisiana court placed weight on the fact that the owner voluntarily made the deed of trust, knowing that it would result in a foreclosure sale. Consequently, the court found a "transferred intent" in the foreclosure transaction, making the sale by the trustee the "voluntary" act of the owner. Hence, the preferential right provision was held applicable.

Similar conflicts appear in decisions involving other types of involuntary sales. The sale of burdened property by the administrator of a deceased owner's estate has been held to be both a triggering sale and an inapplicable involuntary transfer. Likewise, "judicial sales" of an estate including a burdened interest have been found to be both triggering and nontriggering. Other "involuntary" sales have been considered and disposed of without present conflict. Thus, a condemnation sale to a county government has been held to be so involuntary as not to invoke a preferen-

76. This could be different in a jurisdiction which subscribes to the "title theory" of mortgages rather than the "lien theory." See, e.g., C. Cribbet, J. Fritz & T. Johnson, Cases and Materials on Property 500-01 (1972). In such a jurisdiction, the mortgaging of a burdened interest might be successfully argued to be a triggering sale. This writer has found no cases that have considered this issue.
77. 400 S.W.2d at 547.
78. Id. See also Nu-Way Serv. Stations v. Vandenberg Bros. Oil Co., 283 Mich. 551, 278 N.W. 683 (1938).
79. 400 S.W.2d at 547.
80. 171 La. 985, 132 So. 653 (1931).
82. In re Rigby's Estate, 62 Wyo. 401, 167 P.2d 964 (1946) (sale at public auction by administrator of decedent's estate held not voluntary within the scope of the first refusal clause).
83. Cities Serv. Oil Corp. v. Estes, 208 Va. 44, 155 S.E.2d 59 (1967) (a judicial sale should not be distinguished from a private sale in terms of the purpose of the preferential right provision).
84. Blankman v. Great W. Food Distrib., Inc., 57 Misc. 2d 754, 293 N.Y.S.2d 368 (Sup. Ct. 1968) (a first refusal option cannot apply to a judicial sale).
tial right clause.\textsuperscript{85} Also, an early Canadian case held that a preferential right provision does apply to a liquidation sale of an insolvent owner of a burdened interest.\textsuperscript{86}

Thus, many uncertainties may arise in determining the applicability of a preferential right to an involuntary sale. The courts should recognize that a preferential right in an oil and gas instrument often is included to enable the holder to control, to an extent, who will own the burdened interest. In light of this intent, any sale should trigger the clause if failure to do so would tend to frustrate this purpose.\textsuperscript{87} The ambiguity in this area can easily be avoided, however, by precise draftsmanship of the preferential right provision in order to make clear the parties' intentions with respect to involuntary sales.\textsuperscript{88}

C. Sale of Nonoperating Interests

Joint operating agreements usually deal with the obligations and rights of the owners of working interests. Arguably, a preferential right provision in such an agreement may not be applicable to the sale of a nonoperating interest that has been carved out of the working interest.\textsuperscript{89} The most equitable way of determining whether these sales come within the scope of the provision is to consider the purpose that the preferential right was intended to serve.

For instance, the primary purpose of the provision may be to facilitate a party's ability to increase his interest in properties with which he is familiar and involved. This purpose would be furthered if the preferential right applied to a sale of a nonoperating interest. On the other hand, if the purpose of the provision was to give each party some measure of control over the parties involved in the actual operation and development of the properties, the preferential right need not apply to sales of nonoperating interests. Since the transferee of a nonworking interest has no operating rights or duties, the "control" purpose of the provision would not be furthered by application to these transactions. Unfortunately, the purpose is seldom so clear and singular in complex oil and gas transactions, and ambiguity is sure to appear. This problem could be prevented, once again, by carefully drafting the provision to reflect the intentions of the parties as to the desired application of the preferential right to sales of nonoperating interests.\textsuperscript{90}

\textsuperscript{86} McCarter v. York County Loan Co., 14 Ont. L.R. 420 (1907).
\textsuperscript{87} \textit{See} note 10 \textit{supra} and accompanying text.
\textsuperscript{88} \textit{See} Appendix, note \textit{a infra} and accompanying text.
\textsuperscript{89} A nonoperating interest is one that does not bear a share of operating expenses, but that shares to some extent in the profits. Three common nonoperating oil and gas interests are a royalty, an overriding royalty, and a production payment.
\textsuperscript{90} \textit{See} Appendix, note \textit{a infra} and accompanying text.
D. Applicability to Multi-Interest Transactions

One of the most common oil and gas transactions is the sale of several mineral interests together in a "package deal." If a burdened interest is part of the package, the deal technically falls within the language commonly used in preferential right provisions. A standard provision, however, does not comprehend multi-interest deals in which no specific offer is made for the burdened interest and no particular portion of the purchase price is allocated to it. This is particularly significant in oil and gas transactions because the separate value of an individual portion of a package of interests is often quite different from a mere pro rata division of the whole purchase price. The logic seems clear; because various types of package deals are so basic to the industry, the failure to provide a workable formula for applying the right to a package deal is arguably evidence that the parties did not intend the preferential right to apply to such transactions.

Nevertheless, most courts which have considered the question, albeit in situations involving other than oil and gas transactions, have held that a preferential right provision is applicable to a package deal. Divergence appears, however, with respect to the remedies available to protect the holder of the right in package-deal situations, and the various courts have developed three approaches. First, if the holder of the right is notified of the proposed package sale before its actual consummation, some courts will grant an injunction preventing the sale of the burdened interest unless the holder is given an opportunity to exercise his right. If the holder does not discover the transaction until after it has taken place, the same courts will usually order a reconveyance of the burdened interest to the owner, who is then enjoined from subsequent sales unless he honors the provision. None of these courts, however, has been willing to decree

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91. A package deal is an oil or gas transaction involving the conveyance of several adjoining properties in one single price “package.” See generally Sellingsloh, supra note 13, at 50.

92. Reasoner, supra note 10, at 72. This view has not as yet been presented to a court. It used to be followed in New York in situations not involving oil and gas, Sautkulis v. Conklin, 1 App. Div. 2d 962, 150 N.Y.S.2d 356 (1956), aff'd mem., 2 N.Y.2d 919, 141 N.E.2d 916, 161 N.Y.S.2d 885 (1957) (a preferential right provision found inapplicable to a package deal), but has since been abandoned, C & B Wholesale Stationery v. S. De Bella Dresses, Inc., 43 App. Div. 2d 579, 349 N.Y.S.2d 751 (1973). Due to the complex nature of oil and gas transactions, this view might well be persuasive if presented to a court. See Appendix, note 1 infra and accompanying text, for a solution to this problem.


specific performance in favor of the holder of the right. Their reasoning is that the owner's attempt to sell the package of interests is not an indication of a desire to sell the burdened property separately—the only transaction to which the right applies—at least where no specific value is placed on that interest. In addition, in the most recent case on this point, *Myers v. Lovetinsky*, the Iowa Supreme Court, in denying specific performance, drew an analogy between a preferential right and an option. The general rule as to options is that no specific performance will be decreed unless all the terms, including price, are specific, or a definite means is provided for fixing a specific price. Thus, in the absence of such a formula, when a burdened property is sold as a part of a package deal without specifically pricing the burdened interest, it may be held that the price of that portion is too indefinite to warrant specific performance. As the court stated, "To say that the price of the [burdened] premises is an exact portion of the whole price in proportion to acreage is unwarranted, for the [burdened] premises may have a considerably different value from a parcel of the same size elsewhere [within the package]." Although logical, the ultimate equity of such a remedy is questionable. Under this theory denying specific performance, the burden is on the holder of the right to inform himself of the proposed transfer and instigate litigation to protect his interests. Even if the holder wins his case and receives injunctive relief, he has no concrete or immediate benefit, merely the abstract preservation of his right. The owner of the burdened interest may then decide against selling the burdened premises. The result under this approach is that the holder is forced to initiate and bear the cost of the legal proceedings without receiving any tangible recovery for his efforts. This hardship could be reduced, however, by charging the holder's attorney's fees and costs to the malfeasant owner of the burdened interest or against a purchaser who took with notice of the preferential right. Even then, however, the only benefit is a return to status quo.

Other courts have taken exactly the opposite view with regard to the appropriateness of specific performance. These courts are willing to fix a price for the burdened interest, usually by pro rata allocation, and

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96. See authorities cited in note 94 supra.
97. 189 N.W.2d 571 (Iowa 1971).
afford the right holder the opportunity to purchase. If he so chooses, the court will then decree specific performance in his favor. For example, in *Berry-Iverson Co. v. Johnson* the court determined that specific performance would be more consistent with the intentions of the parties at the time they entered the agreement.

Finally, a third approach is to recognize the preferential right and allow the holder to exercise it with respect to the entire package of properties, assuming all of the property belongs to the owner of the burdened interest. As yet, this view is adopted only in Virginia and Missouri. This analysis is the least satisfactory of the three approaches and the least consistent with the purposes of preferential right provisions. In any event, the uncertainties pointed out in this subsection can be avoided by drafting preferential right provisions that specifically detail the desired application to multi-interest transactions.

III. Obligations, Rights, and Remedies Associated With Preferential Right Provisions

A. Obligations of the Parties

All three parties who may be affected by a preferential right provision have some duties with respect to it. The owner of the burdened interest has the greatest responsibility. Essentially, the owner of the property must notify the holder of the right of a proposed sale and offer him the opportunity to exercise such right should he so desire. To reduce controversies involving the sufficiency of notice, the provision should specifically state the form of notice required. Refusal of the holder to meet one offer that the owner himself ultimately rejects does not extinguish the preferential right; it is a "continuing property right" which attaches to any subsequent sale. This duty is not satisfied by giving the holder an opportunity

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102. 242 N.W.2d 126 (N.D. 1976).
104. Beets v. Tyler, 365 Mo. 895, 290 S.W.2d 76 (1956).
105. The owner of property subject to a preferential right should not be permitted to increase unilaterally the consideration required to be paid to exercise the right, whether by packaging the property or creating extraordinary terms for the exercise of the right. For instance, what happens when the holder of the right is unable to finance the purchase of the entire package? Does he lose the right to the burdened interest? Similarly, what if he has no desire to own the remainder of the package properties? Still another problem arises if the other portions of the package are burdened by other preferential rights. These questions would appear to require resort to one of the other possible solutions to this problem, *i.e.*, injunction, reconveyance, allocation, or specific performance.
106. See Appendix, note *infra* and accompanying text.
merely to make an offer nor by giving the holder an opportunity to buy at a price greater than that for which the owner subsequently sells. Neither is the obligation fulfilled by offering the holder the opportunity to purchase on significantly less favorable terms than those available to the third party. This situation is especially problematic when the owner is willing to take a third party’s promissory note. Is the owner also obligated to take the holder’s note, even though the holder is a poor credit risk? This dilemma can be best solved, once again, by precisely drafting a provision which details the manner in which the financing arrangements of a third party will affect the right.

Another question which may arise concerns the owner’s responsibility to the holder when the third party offer is withdrawn before the holder has decided whether to exercise his right. This was most recently answered by a Texas court of civil appeals in *Henderson v. Nitschke*. In that case a preferential right provision gave the holder sixty days in which to act. Specific performance was granted to the holder who exercised his right within the sixty-day period even though the third party’s offer had been withdrawn. The court reasoned that when the owner gave the holder notice, the preferential right matured into an enforceable option for the entire period stated in the provision. Since practically every preferential right clause contains such a time limitation, this case seems to be an equitable and practical decision. Care must be taken, however, to guard against collusion in this area. For instance, the holder could cause a third party to make an offer and then withdraw it for the sole purpose of giving the holder the right to buy. In such a situation, however, if a holder is found to be in collusion with a third party, he should not be able to obtain specific performance because of the equitable “clean hands” doctrine.

In the event of a proposed package sale, the obligation of the owner would appear to be met, according to *Humphrey v. Wood*, by his tendering the burdened interest to the right holder at an allocated portion of the total purchase price proposed. If the holder is not satisfied with such offer, the owner may be forced to choose among purchasing a waiver of the preferential right, removing the burdened interest from the package and possibly frustrating the entire deal, or simply breaching the provi-

110. See Aldridge & Stroud, Inc. v. American-Canadian Oil & Drilling Corp., 235 Ark. 8, 357 S.W.2d 8 (1962); Nelson v. Reisner, 51 Cal. 2d 161, 331 P.2d 17 (1958); Barling v. Horn, 296 S.W.2d 94 (Mo. 1956).
111. See generally Reasoner, supra note 10, at 73.
112. See Appendix, note f infra and accompanying text.
114. 470 S.W.2d 410 (Tex. Civ. App.—Eastland 1971, writ ref’d n.r.e.).
115. 256 S.W.2d 669 (Tex. Civ. App.—Amarillo 1953, writ ref’d n.r.e.).
116. Accord, Shell Oil Co. v. Blumberg, 154 F.2d 251 (5th Cir. 1946).
117. This, of course, raises restraint on alienation questions. *See* notes 23-34, supra and accompanying text.
The holder of the preferential right and the third party purchaser also are subject to certain obligations. For instance, when the holder receives notice that the owner is contemplating a sale of the burdened interest, he must affirmatively offer to meet the terms of the provision. Failure to make this offer may not terminate the preferential right, however, if the holder can show a valid excuse. Additionally, payment or tender of purchase money may be required within the period given to exercise the preferential right. As for a third party purchaser, if he has actual or constructive notice of a preferential right outstanding on the property, he may be obligated to make reasonable inquiries to determine whether the owner's obligations under the provision have been met or face the possibility of being held liable to the holder of the right.

B. Remedies

The alternative remedies in the event of a breach of a preferential right provision in a multi-interest transaction have been previously considered. This discussion, therefore, refers to breaches in the individual sale of the burdened interest. As a rule, a court will grant the holder of a preferential right some form of legal redress, such as specific performance, injunctions restraining sale, orders requiring reconveyance, or damages, if the right is breached. Where only the burdened interest is involved, the holder can usually obtain specific performance from the owner or from a transferee who took with actual or constructive notice of the preferential right. When the transferee does not have actual or constructive notice, however, the holder may be limited to a damage action against the transferee. Thus, the holder of a preferential right should always make certain that it is recorded. In addition to specific performance, the holder may also sue for damages occasioned by the breach. For example, in Nel-

118. Other problems concerning multi-interest deals have been previously discussed. See notes 91-105 supra and accompanying text.
122. See Foster v. Bullard, 496 S.W.2d 724, 736 (Tex. Civ. App.—Austin 1973, writ ref'd n.r.e.).
123. See notes 91-105 supra and accompanying text.
126. See H. WILLIAMS & C. MEYERS, supra note 8, § 428.3.
son v. Reisner damages were awarded for loss of anticipated profits. Additionally, the injured holder could seek damages for the disruption of joint operations if such occurs. One court has allowed damages which accrued between the date of the wrongful conveyance and the date of specific performance. Finally, those courts which grant specific performance would also be likely to grant injunctive relief when appropriate.

C. Defenses

Since many of the suits arising from the breach of a preferential right provision seek equitable relief, equitable defenses such as laches and unclean hands apply. The most often used is laches, the equitable counterpart of a statute of limitations. As a general rule, courts are quick to apply the doctrine of laches when there is a substantial change in the value of property, which is an especially germane consideration in oil and gas transactions. Delay caused by the owner of the burdened interest, however, and not by the holder of the right, would not support the defense. Also, it must be remembered that equitable defenses are considered affirmative defenses, the burden of proof of which would be on the defendant.

IV. Conclusion

Preferential right provisions can provide important benefits in oil and gas transactions. Care must be taken when drafting such provisions to assure that they are valid, and that they will apply to all the transactions desired by the parties. The following checklist should be helpful when drafting a preferential right provision:

A. Validity: Does the provision comply with the requirements of:
   (a) the Statute of Frauds,
   (b) the Rule Against Restraints on Alienation, and
   (c) the Rule Against Perpetuities?

B. Applicability: To exactly what transactions do the parties intend the right to apply:
   (a) What “sales” will trigger the provision?
   (b) Will the provision apply in the event of:
      (i) exchanges?

127. 51 Cal. 2d 161, 331 P.2d 17 (1958). The court rejected an argument that the damages were too speculative since the owner of the interest had created the situation by his own misconduct. 331 P.2d at 23-24.


132. See, e.g., City of Fort Worth v. Johnson, 388 S.W.2d 400, 403 (Tex. 1964); Foster v. Bullard, 496 S.W.2d 724, 737 (Tex. Civ. App.—Austin 1973, writ ref’d n.r.e.).
(ii) involuntary sales?
(iii) sale of a nonoperating interest?
(iv) multi-interest sales?
(v) mergers?

C. What form of notice is required and when must it be made?

D. What remedies will be available and what damages can be recovered if the provision is breached?

If careful attention is given to drafting a provision that accurately covers all the intentions of the parties, the possibility of ambiguity and resulting litigation can be substantially reduced.

APPENDIX

The following is a sample preferential right provision tailored for use in a joint operating agreement and designed to provide maximum protection for the holders of the right.

**Preferential Right to Purchase**

1. Should any party desire to sell or dispose of all or any part of its operating or nonoperating interest under this agreement, or its rights and interests in the Contract Area, it shall promptly give written notice to the other party(s), sent by registered mail to the address(es) stated elsewhere in this instrument, with full information concerning its proposed sale, which shall include the name and address of the prospective purchaser, who must be ready, willing, and able to purchase, the purchase price, and all other terms of the offer. The other party(s) shall then have an absolute optional prior right, for a period of ten (10) days after receipt of the notice, to purchase the subject interest upon the same terms and conditions contained in the third party's offer to purchase, provided that if the terms and conditions of the offer include as part or all of the consideration to be given by the prospective purchaser an instrument evidencing the indebtedness of said purchaser, then the other party(s), if they wish to exercise this preferential right upon such terms and conditions, must meet the same standard of credit worthiness as required of the prospective purchaser. If this preferential right is not exercised, and the announced sale is not consummated, the preferential right shall remain in effect, equally applicable to any future sale. If the preferential right is exercised by more than one of the preferential right holders, the purchasing parties shall share the purchased...
interest in the proportions that the interest of each bears to the total interest of all purchasing parties.

2. Transactions that shall be considered a sale or disposition invoking this provision include but are not limited to:
   (a) An exchange of the interest for other property, provided that in such a situation if the other party(s) wish to exercise this preferential right, the price that they shall pay shall be the fair market value of the property proposed to be exchanged;
   (b) judicial sales;
   (c) sales by the administrator of the estate of one of the parties;
   (d) liquidation sales upon the insolvency or bankruptcy of one of the parties;
   (e) sale or disposition of all or any part of any parties' interests as part of a "package-deal" multi-interest transaction. In the event that the other party(s) wish to exercise this right in such a situation the purchase price shall be determined by ————; and
   (f) mergers not covered by paragraph 3(c) of this clause.

3. There shall be no preferential right to purchase in those cases where any party wishes:
   (a) to mortgage its interest, provided that this preferential right provision shall be applicable to any resulting mortgage foreclosure sale;
   (b) to enter into production payment financing by conveying an interest to a production payment owner for funds to be used to develop the properties; or
   (c) to dispose of its interest by merger, reorganization, consolidation, or sale of all or substantially all of its assets to a subsidiary or parent company, to a subsidiary of a parent company, or to any company in which any one party owns a majority of the stock, provided that the new owner of the interest shall be subject to this preferential right provision.

There shall also be no preferential right to purchase in cases of:
   (a) donative transfers, provided that the donee shall be subject to this

   h. In a jurisdiction such as Texas, where a valid preferential right provision may run with the land, drafting the provision so that exchanges are not triggering transactions may be satisfactory, since the preferential right will still apply. Nevertheless, it is best to include exchanges as triggering transactions for two reasons. First, if in a jurisdiction in which a valid preferential right clause must be considered personal, an exchange completely frustrates the right. See notes 63-68 supra and accompanying text. Secondly, even in jurisdictions where the provision is not personal and passes with the exchanged interest, the proposed new owner may be unacceptable to the other parties. See note 10 supra and accompanying text.

   i. See notes 83-84 supra and accompanying text.
   j. See notes 81-82 supra and accompanying text.
   k. See note 86 supra and accompanying text.
   l. This statement shows the parties' clear intentions as to the applicability of the provision to package deals, and avoids problems with the Rule Against Restraints on Alienation. See notes 30-34 supra and accompanying text.

   m. The parties should decide upon an acceptable method to determine the price to be accorded the burdened interest. Possible methods include third party determination, mutual agreement subject to third party arbitration, and pro rata allocation.

   n. See note 65 supra and accompanying text.

   o. See notes 73-80 supra and accompanying text.

   p. This proviso should not be included in a jurisdiction where it is held that a preferential right provision that runs with the land is void under the Rule Against Perpetuities.
preferential right provision;\(^q\)
(b) granting of easements;\(^r\) or
(c) condemnation sales.\(^s\)

[4. This provision does not run with the land and is personal to the parties to this agreement.]\(^t\)

5. In the event of a sale or disposition which invokes this provision by Operator of the interests owned by it which are subject hereto, the holders of a majority interest in the premises subject hereto shall be entitled to select a new operator, but unless such selection is made within ten (10) days after the sale or disposition is finalized the transferee of the present Operator shall act as operator hereunder.

\(^q\) Id. See also notes 57-58 supra and accompanying text.
\(^r\) See note 64 supra and accompanying text.
\(^s\) See note 85 supra and accompanying text.
\(^t\) This statement should only be included in those jurisdictions where a nonpersonal provision would be considered violative of the Rule Against Perpetuities. See notes 36-41 supra and accompanying text. If it is used, be certain that there are no contradictory provisions elsewhere in the clause. See, e.g., notes \(h,f,p\) & \(g\) supra and accompanying text. In any other jurisdiction, such as Texas, this statement should not be used.