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Down Step by Step—Ratification of Oil and Gas Leases by Royalty Interests in Texas

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ABSTRACT

A sporadic series of opinions dating back seven decades has incrementally established that, in Texas, the executive has no authority to pool the royalty or nonexecutive mineral interest covered by an oil and gas lease. Conversely, the owners of nonexecutive interests do have a choice whether or not to ratify leases that purport to cover their interest. This state of the law arose first from cases involving royalty apportionment and community leases, then drawing in nonexecutive interests, before finally establishing the privileged position of freestanding royalty and nonexecutive mineral interests. Texas should instead follow the lead of Louisiana and West Virginia and again recognize the executive position the lessor has vis-à-vis nonexecutive interests. So long as the duty of the executive to associated nonexecutive interests is observed, leasing executives should be able to bind those nonexecutives to all the terms of a lease, including pooling and entireties clauses. Thereafter, a lessee should be able to voluntarily pool those interests provided it does so as a reasonably prudent operator. As recent litigation shows, this change would prevent situations in which small nonexecutive interests far from production make payment claims based on dubious title assertions. It would also promote the state's policy of fostering mineral development and ease title examination burdens related to the orderly development of leases. Within the existing jurisprudence, when a freestanding royalty owner files lease ratifications in the public record or is judicially determined to have ratified a lease, it should be subject to every term in the lease. This includes provisions to apportion royalties on a tract-specific basis rather than across the entire lease. Such ratifications should not be revocable. Several defensive measures, such as drafting carefully to limit lease coverage, getting ratifications before development, and using allocation wells, may help lessees in certain, but not all, instances.

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TABLE OF CONTENTS

"[T]he stairway which leads to a dark gulf. It is a fine broad stairway at the beginning, but after a bit, the carpet ends. A little further on there are only flagstones, and a little further on still these break beneath your feet."[1]

—Winston Churchill

I. INTRODUCTION

OWNERS of nonparticipating royalty interests (NPRIs) in Texas have long held an enviable position. Unlike the owner of the executive right—who cannot authorize pooling of a nonexecutive interest such as an NPRI, absent language in the original severance that allows such—the NPRI owner has a choice whether or not to ratify the pooling.[2] This choice, in turn, depends on whether or not the NPRI is located in the pooled tracts with the producing well.[3] If the producing well is a non-tract well with regard to a particular NPRI, that NPRI's owner will typically ratify the lease in order to acquire a share of the production based on the acreage of the NPRI tract relative to the total pooled acreage. Alternatively, if the well is located on the same tract as the NPRI, the NPRI owner will probably choose not to ratify the pooling so as not to dilute the amount of royalty received by apportionment of royalties across the acreage of the entire pool.

This privileged position, once established, was apparently expanded in the 1980s so that the implied offer to pool an NPRI that came freighted with the inclusion of a pooling clause in a lease that covered the NPRI tract was triggered *even if* (1) no pooling occurs and (2) the lease contains an anti-entireties (or anti-communitization) clause.[4] In addition, case law emerged that attempted to define exactly what action by an NPRI owner ratified a lease or not, such as suing the executive, executing and filing of record a lease counterpart, or drafting a ratification and filing that of record.

Meanwhile, legal education and professional practice seemed to set in judicial granite this position of the NPRI owner in the eyes of Texas oil and gas jurisprudence: whatever the acreage of the leases involved and whatever their terms might be, the NPRI owner inexplicably got to choose, sua sponte, whether to ratify the lease. One commentator demonstrated the practical result of this curious precedent with this example:

> The owner of the executive right owns the mineral estate in two adjoining tracts, Tract A and Tract B. Only Tract B is burdened with [an NPRI]. The executive enters into a [community] lease covering both

1. Winston S. Churchill, While England Slept: A Survey of World Affairs, 1932–1938, at 403 (1938).
2. 1 Ernest E. Smith & Jacqueline Lang Weaver, Texas Law of Oil and Gas § 4.8(B)(1) (2d ed. 2019).
3. *See id.*
4. *See* London v. Merriman, 756 S.W.2d 736, 740 (Tex. App.—Corpus Christi–Edinburg 1988, writ denied); 1 Smith & Weaver, *supra* note 2, § 4.8(B)(2).

> [tracts]. The lease contains a pooling clause, but also contains [an] anti-communitization clause . . . . A well is drilled on Tract A. There is no pooling of Tract A with Tract B or any other tract. Nonetheless, under [Texas case law], if the owner of the nonexecutive interest ratifies the lease, he is then entitled to share in production from the well on Tract A—notwithstanding the fact that the anti-communization clause contained in the lease expressly rejects any apportionment of royalties.[5]

This article first examines the individual components involved in these freestanding royalty imbroglios—NPRIs, entireties clauses and anti-entireties clauses, community leases, and ratifications. Next, this article examines the parade of cases that led to the current situation in Texas—dealing first with communitization/unitization cases, then lease ratification cases—so that the progression of fact-specific situations that have combined to yield the favorable position of NPRIs is better understood. The current jurisprudential landscape of NPRIs and the ratification of leases is then summarized.

Finally, the paper concludes that an NPRI owner's ratification should not be necessary to authorize the pooling of its executive and that to grant the NPRI owner such authority would be contrary to existing Texas public policy. If Texas courts are unwilling to go that far, it is argued they should at least recognize that when an NPRI owner files ratifications of leases in which the NPRI owner expressly agrees to make its NPRI subject to the terms of the leases, including terms providing for tract-basis payment of royalty and clauses establishing separate leases for each proration unit, the NPRI is subject to all such terms. In the meantime, it is proposed that lessors and lessees can use some defensive strategies such as strategic drafting and ratification as well as the use of allocation wells to protect themselves.

II. PRELIMINARIES

A. Nonparticipating Royalty Interests

A severed mineral estate in Texas possesses five attributes: "(1) the right to develop (the right of ingress and egress), (2) the right to lease (the executive right), (3) the right to receive bonus payments, (4) the right to receive delay rentals, and (5) the right to receive royalty payments."[6] Additionally:

> [E]ach attribute is a separate, distinct property interest that may be conveyed or reserved in connection with a conveyance of a mineral interest. "However, '[w]hen an undivided mineral interest is conveyed, reserved, or excepted, it is presumed that all attributes remain

5. Karen E. Lynch, *Problems Caused by Nonexecutive Interests Under Multi-Tract Leases:* Brown v. Smith *to* London v. Merriman, St. Bar Sec. Rep, Oil, Gas & Min. L., Dec. 1990, at 1, 1.

6. Altman v. Blake, 712 S.W.2d 117, 118 (Tex. 1986); *accord* Hamilton v. Morris Res., 225 S.W.3d 336, 344 (Tex. App.—San Antonio 2007, pet. denied).

with the mineral interest unless a contrary intent is expressed.'"[7]

Royalty in the oil and gas context in Texas is commonly defined as a nonpossessory interest in real property.[8] Owners of royalty receive a fraction of the produced hydrocarbons without having to pay any of the exploration and production costs.[9] Due to substandard drafting and inconsistent case law, an enormous amount of litigation, academic analysis, and general hand-wringing has risen over the decades around whether a conveyed or reserved interest is a royalty or an (generally fractional) interest in the actual minerals—a bundle of sticks that when complete includes the right to a landowner's royalty.

Royalty interests are often categorized into three distinct groups. One is the lessor's (or landowner's) royalty, a royalty interest that is retained when a mineral owner (the landowner) executes a mineral lease.[10] This interest is effective during the duration of the lease[11] and is determined through a negotiation between the mineral owner and the lessee, typically an oil and gas company or a broker.[12] It is generally a fixed fraction of the gross production, perhaps varying depending on the volume of production.[13]

In contrast to a lessor's royalty, an NPRI is "[a]n expense-free" real property mineral interest that does not participate (hence the name) in collecting bonus or delay rentals, leasing, or exploration and development.[14] This interest is "non-possessory in that it does not entitle its owner to produce the minerals himself,"[15] as one Texas court described it. "It merely entitles its owner to a share of the production proceeds, free of the expenses of exploration and production."[16] The executive's royalty is reduced by the amount of the NPRI because of the *Duhig* doctrine.[17] The size of an NPRI can be expressed in one of two ways: (1) the NPRI can

7. *Hamilton*, 225 S.W.3d at 344 (quoting French v. Chevron U.S.A. Inc., 896 S.W.2d 795, 797 (Tex. 1995)).

8. *See* 2 Smith & Weaver, *supra* note 2, § 2.4(A).

9. *Id.*

10. 1 Smith & Weaver, *supra* note 2, § 2.4(B)(1).

11. *Id.*

12. Joseph Shade & Ronnie Blackwell, Primer on the Texas Law of Oil & Gas 26 (5th ed. 2013).

13. 1 Smith & Weaver, *supra* note 2, § 2.4(B)(2).

14. *See* Shade & Blackwell, *supra* note 12, at 154. The third kind of royalty, not discussed in this article, is the overriding royalty interest. This is described as "[a]n interest in oil and gas produced at the surface, free of the expense of production. In modern times overriding royalty interests usually refers to a non-cost bearing interest carved out of the lessee's working interest under an oil and gas lease." *Id.*

15. Plainsman Trading Co. v. Crews, 898 S.W.2d 786, 789 (Tex. 1995) (emphasis omitted); *accord* Hamilton v. Morris Res., 225 S.W.3d 336, 344 (Tex. App.—San Antonio 2007, pet. denied).

16. *Plainsman Trading*, 898 S.W.2d at 789; *accord Hamilton*, 225 S.W.3d at 344.

17. *See* Duhig v. Peavy-Moore Lumber Co., 144 S.W.2d 878, 879–80 (Tex. 1940). The *Duhig* doctrine generally provides that where full effect cannot be given both to a granted interest (i.e., the right to collect profits granted in the lease to the lessee) and to a reserved interest (i.e., the lessor's royalty reserved in the lease) in a conveyance, the courts will give priority to the granted interest until the granted interest is fully satisfied. *See id*. Therefore, NPRIs are subtracted from the lessor's royalty. *See id.*

be reserved or conveyed as a fixed fraction of gross production, commonly one-sixteenth, or (2) it can be dependent upon the lessor's royalty in the existing lease and every lease covering the captioned land thereafter.[18] In the second instance, the NPRI fraction is typically multiplied by whatever lessor's royalty is found in the existing oil and gas lease covering the captioned land.[19]

B. Non-Apportionment and Entireties/ Anti-Entireties Clauses

In what has become known as the "non-apportionment rule," the Supreme Court of Texas has accepted the following principle:

> Where the lessor of land for oil and gas, subsequently to the execution of the lease, but prior to the development of the land and the production of oil or gas under the lease, sells a portion or portions of the land to others, and oil and gas are thereafter produced under the lease from some portion of the leased premises, the royalties therefrom belong to the owner of the particular tract upon which the well is located, and the owner or owners of other portions of the leased premises have no interest therein.[20]

This is true unless the conveyance of a portion of the leased mineral interest provides otherwise.[21]

The non-apportionment doctrine is still the rule in Texas and the majority of other relevant jurisdictions, although its fairness has been questioned.[22] State legislatures and courts have been urged to adopt instead a rule apportioning royalties among the owners of the subdivided tract.[23] The non-apportionment doctrine is so ingrained in Texas jurisprudence, however, that "the spacing and density rules of the Railroad Commission [may] prohibit drilling on one of the [subdivided] tracts resulting from the subdivision . . . [even though] that tract is being drained by the producing

18. 1 Smith & Weaver, *supra* note 2, § 2.4(B)(2).

19. *Id*.

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

Christopher S. Kulander, *Fixed vs. Floating Non-Participating Oil & Gas Royalty in Texas: And the Battles Rage On . . .*, 4 Tex. A&M L. Rev. 41, 44 n.14 (2016).

20. Japhet v. McRae, 276 S.W. 669, 670 (Tex. Comm'n App. 1925, judgm't adopted).

21. *See id.*

22. John Lowe et al., Cases and Materials on Oil and Gas Law 647 n.2 (7th ed. 2018).

23. *See, e.g.*, William O. Huie, *Apportionment of Oil and Gas Royalties*, 78 Harv. L. Rev. 1113, 1133–34 (1965).

well."[24]

In response to this rule, parties have used lease language known as an entirety (or entireties) clause that is meant to avoid later application of the non-apportionment rule.[25] The main practical feature of an entireties clause concerns the payment of royalties and typically requires the payment to a party who owned no interest in the tract where a well was producing.[26] For example, such a clause might read:

> If the leased premises shall hereafter be owned severally or in separate tracts, the premises nevertheless shall be developed and operated as one lease and all royalties accruing hereunder shall be treated as an entirety and shall be divided among and paid to such separate owners in the proportion that the acreage owned by each such separate owner bears to the entire leased acreage.[27]

The entirety clause is not used as frequently today as it once was. A lessee may find that an entireties clause imposes a heavy administrative burden if the land subject to lease is subdivided into many small tracts, as may happen with a residential subdivision, because each owner of the subsequently created tracts—every house on the new block, as it were—is due a portion of royalties for the well that is probably on the larger portion of the original leased tract that is still owned by Farmer Brown, the lessor, or his successor.[28] It can be onerous to update the division orders made necessary by production on tracts that were subdivided post-leasing. Case law can provide some frights to those relying on entireties clauses as well, as a couple of the cases described below will show.

C. Community Leases and Ratifications

The term "community lease," as it is most commonly used in industry custom and practice, refers to a single lease comprising several separate tracts with separate lessors each executing a single lease form or counterparts of same.[29] In Texas, a community lease triggers actual pooling as a matter of law—the lessee is allowed to treat all tracts and interests executing the lease or a counterpart as a single "leased premises."[30] Community leases are relatively rare and are becoming even more so, but they may arise unintentionally.[31] Unless the terms of the community lease pro-

24. Lowe et al., *supra* note 22, at 647 n.4; *see also* Ryan Consol. Petroleum Corp. v. Pickens, 285 S.W.2d 201, 206 (Tex. 1955); Mueller v. Sutherland, 179 S.W.2d 801, 807–08 (Tex. App.—El Paso 1943, writ ref'd w.o.m.).
25. Huie, *supra* note 23, at 1120 n.12.
26. Robert E. Hardwicke & Robert E. Hardwicke, Jr., *Apportionment of Royalty to Separate Tracts: The Entirety Clause and the Community Lease*, 32 Tex. L. Rev. 660, 671–72 (1954).
27. *Id.* at 660.
28. Bruce M. Kramer, *The Nuts and Bolts of Pooling: A Primer for the Uninitiated*, *in* State Bar of Texas 24th Annual Advanced Oil, Gas, and Energy Resources Law Course ch. 16, at 2 (2016).
29. *See id.*
30. *See id*.
31. 1 Smith & Weaver, *supra* note 2, § 4.8(B)(2).

vide otherwise, royalties accruing under the community lease are apportioned among the lessors in proportion to the ratio between the area covered by any particular tract or undivided interest and the total acreage covered by the lease.[32] If a lease is deemed a community lease, it is communitized at the time of execution and not upon some later event, such as when an NPRI owner within the leased acreage files ratifications of said leases in the public property records.[33]

A cotenant can lease his or her undivided mineral interest without joinder from the other cotenants.[34] The cotenants' remedies, however, are to either (1) ratify the lease and request an accounting for all profits received by the leasing cotenant,[35] or (2) refuse to ratify the lease and collect the value proportionate to their share of the minerals less reasonable production expenses.[36] Ratification of a lease places the ratifying party's mineral or royalty interest under the terms of the lease.[37]

III. TEXAS CASE LAW INVOLVING COMMUNITY LEASES, POOLS, AND ROYALTY

In 1943, the Supreme Court of Texas handed down its holding in *Veal v. Thomason*,[38] spawning the first case in a panoply of opinions that would lead, step by step, to modern ratification jurisprudence. The first round of cases involved the definition of community leases and the effect of community leases on royalty payments. Building on that, the second round of cases considered NPRIs and the effects of ratification on royalty payments.

A. Communization/Unitization Cases

The following quintet of cases deals primarily with community leases and features such questions as whether payment of rentals covering one part of the combined tract carries it all, whether production anywhere in a community lease maintains the whole lease, and whether parties to community leases not on the well tract are due a portion of the royalty. The opening group of cases primarily involved mineral owners; only one, *Brown v. Smith*, dealt directly with an NPRI.[39] These opinions were released in a stretch from 1940 to 1952, with four released from 1940 to 1943.

32. *See* Kramer, *supra* note 28, at 2.
33. *See id.*
34. Aycock v. Vantage Fort Worth Energy, No. 11–13–00338–CV, 2015 WL 1322003, at *1 (Tex. App.—Eastland 2015, pet. denied) (mem. op.); Glover v. Union Pac. R.R. Co., 187 S.W.3d 201, 213 (Tex. App.—Texarkana 2006, pet. denied) (citing Burnham v. Hardy Oil Co., 147 S.W. 330, 334 (Tex. App.—San Antonio 1912), *aff'd*, 195 S.W. 1139, 1146 (Tex. 1917)).
35. Tex. & Pac. Coal & Oil Co. v. Kirtley, 288 S.W. 619, 624 (Tex. App.—Eastland 1926, writ ref'd).
36. Cox v. Davison, 397 S.W.2d 200, 201 (Tex. 1965).
37. *See Tex. & Pac. Coal & Oil Co.*, 288 S.W. at 624.
38. 159 S.W.2d 472 (Tex. 1942).
39. *See* Brown v. Smith, 174 S.W.2d 43, 46 (Tex. 1943).

1. Parker v. Parker

In *Parker v. Parker*, the Galveston Court of Appeals opened the communization ball in Texas by considering whether parties who owned discrete, contiguous mineral tracts and executed a single instrument that purported to lease all the tracts as if they were one large tract had, in effect, pooled their interests.[40] Such unitization would result in the lessor's royalty being shared by all lessors on an apportioned basis.

In 1935, seven parties executed one lease in Cass County, Texas, wherein the lands covered were described as a single tract.[41] The lease provided that payment of royalty to each lessor would be made pro rata based on acreage.[42] At trial, the jury found that the lessors had orally agreed that the lease was to be considered unitized.[43] Production was achieved on some of the tracts, while others remained fallow.[44] The owners of the non-drilled tracts received delay rental payments.[45] Some accepted the delay rentals while others did not.[46] Eventually, the owners of the non-drilled tracts sued, claiming that they were owed royalty apportioned on an acreage basis instead of delay rentals.[47] The trial court agreed, finding that the lease was unitized and that the royalty should be apportioned on an acreage-pro-rata basis.[48]

Citing West Virginia and Louisiana law, the court of appeals affirmed, quoting the Supreme Court of West Virginia opining on a nearly identical situation: "Nowhere in the lease is there an intimation of several ownerships of parts of it, or a suggestion of intent to make separate tenancies."[49] The court of appeals took notice that the lessors had allowed the lessee to treat the entire 244 acres as being subject to common ownership and allowed the lessee to keep the entire lease by drilling anywhere on it.[50] In addition, "lessor" was defined in the captioned lease as, collectively, *all* the lessors, not any one singly.[51]

2. Veal v. Thomason

In *Veal v. Thomason*, the Texas Supreme Court first considered the way in which royalties would be split among multiple parties who executed separate, identical counterparts to a multi-tract "unitized" lease.[52] The lease form provided that each lessor would participate in royalties in

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40. Parker v. Parker, 144 S.W.2d 303, 303 (Tex. App.—Galveston 1940, writ ref'd).
41. *Id.*
42. *Id.*
43. *Id.* at 304.
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.* (quoting S. Penn. Oil Co. v. Snodgrass, 76 S.E. 961, 963 (W. Va. 1912)).
50. *Id.* at 305.
51. *Id.*
52. Veal v. Thomason, 159 S.W.2d 472, 473 (Tex. 1942).

the proportion of ownership of each lessor to the total leased acreage.[53] The court's choice came down to either apportioned royalties uniformly owned across all the tracts or royalties that accrued on an individual-tract basis.[54]

The trial court dismissed the suit.[55] Upon appeal, the court of appeals reversed and held, among other positions, that the other lessors were not necessary parties to the suit as their royalty interests would not be affected by the outcome of the quiet title action instigated by the Thomasons.[56] This position, the supreme court believed, would necessarily entail that the individual leases constituting the unitized block would "only operate to reserve to the respective lessors . . . the royalty stipulated in [this] lease contract."[57] In other words, each lessor was entitled to a tract-based lessor's royalty, not a royalty apportioned across the entirety of the leased acreage.

After a lengthy deconstruction of various terms of the lease, the Supreme Court of Texas overturned the court of appeals and affirmed the district court's judgment.[58] Specifically, the court noted that paragraph 3 of the lease provided that the lessor's royalty to be paid on production was "reserved by lessor for the benefit of himself and other lessors executing similar leases in the unitized block."[59] Further on, the court described how paragraph 4(b) of the lease allowed that:

> [I]t is agreed and covenanted that each lessor in said similar lease covering land in said unitized block will participate in the royalty herein provided from oil, gas or other mimerals [sic] produced from this land if, when and as produced and sold, in the exact proportion as the individual royalty owner's interest in any tract bears to the aggregate number of acres still held by lessee . . . .[60]

Finally, the court took note of paragraph 9, which read:

> It is understood and agreed that any royalty payable under this lease or similar leases on the unitized block shall be paid to the [bank] for the benefit of the lessor herein and lessors executing similar leases on land in said unitized block and for the purpose of accomplishing this, the named lessors do hereby designate said bank as their agent to receive payment for all of them and lessee shall not be required to make payments to such persons except through the designated agent.[61]

From these recitations, the court then summarized the result: each lessor would reap lessor's royalty from production calculated equal to his

53. *Id.* at 474.
54. *See id.* at 475.
55. *Id.* at 474.
56. *Id.*
57. *Id.* at 475.
58. *Id.* at 477.
59. *Id.* at 473.
60. *Id.* at 474.
61. *Id.*

individual tract's acreage apportioned across the acreage of all the leases in the unitized tract.[62] Likewise, the court noticed that the individual lessors could not even directly collect lessor's royalty from their individual tracts or any other acreage in the unitized block—all the money accruing as lessor's royalty went to the named bank.[63] Ultimately, the court held that when the leases were "read and construed from [their] four corners," no other interpretation was possible.[64]

Given both the express provisions of the leases and the apparent intent of the leasing parties that can be surmised from other lease terms, the result in *Thomason* is not surprising. The leases were clearly unitized—the entireties clauses evidenced clear intent to apportion royalties. In addition, all of the lessor's royalty paid under each lease form went into the same repository.

3. French v. George

Released one month after *Veal* and reflexively cited to this day by scholars, courts, and NPRI owners seeking to establish that royalties within a community lease should be divided among lessors in the proportion that their acreage bears to the total acreage of a multi-tract lease, *French v. George*[65] bears a closer look. At the start of 1937, a group of parties owning all of the mineral rights within a portion of land in Wheeler County, Texas, executed to DuMar Oil Gas Company (DuMar) an oil and gas lease covering 240 acres.[66] The land included in the lease was "described in separate tracts and [comprised] the E/2 of the NW/4, the S/2 of the NE/4, and the E/2 of the SE/4" of the section.[67] The lease had a primary term of ten years and provided that "if a well should not be commenced on the [captioned] land within one year from its date [of execution], the lease could be continued in force by the payment of rentals in the sum of $240 each [year] during the primary term."[68] All the lessors, whether one or more, were designated as "the lessor," and the royalty reserved was to be paid or delivered to the lessor.[69]

DuMar completed a producer on the SE/4 of the NW/4 of the section in September 1937.[70] When one group of lessors (collectively, George)—those with no interest in the drill tract—brought suit to recover the royalty due from the production and sale of gas from the well, DuMar interpleaded the lessors with mineral interests in the drill tract (collectively, French) as cross-defendants and asked the court to determine how the royalty should be paid.[71] At a bench trial, the district court "decreed that

62. *Id.* at 476.
63. *Id.*
64. *Id.*
65. 159 S.W.2d 566 (Tex. App.—Amarillo 1942, writ ref'd).
66. *Id.* at 567.
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*

the lease was a unitized or pooling instrument"; therefore, all of the lessors were due a portion of the lessor's royalty on an acreage-apportioned, pro rata basis.[72]

On appeal, French argued that the lease was not a pooling or unitized lease and claimed that the royalty should have been instead paid to the lessors by the proportion of mineral ownership that the lessors had in any particular tract within the lease.[73] The court of appeals affirmed, however, noting that the lease was that of an "ordinary form" and that "no provision or suggestion contained in it . . . is different in any respect from what it would have been if it had been executed by only one lessor."[74] In addition, the ordinary form lease provided that the lessors each had waived the implied covenant to drill offset wells, seemingly furthering the intent to pay royalty on a lease-wide basis instead of on a tract basis.[75] If the lessors were not concerned about drainage, the court believed, this suggested that they expected to be paid on a lease-wide basis in which incidents of drainage from one tract within the lease to another would not impact recovery from an undrilled tract and, hence, would not affect the amount of royalty to be paid to the mineral owners of the tract experiencing intra-lease drainage.[76]

Of particular interest to the court in deciding how the lease royalty was to be paid was the size of the lease in relation to the spacing unit for a gas well.[77] The court noted that if the French interpretation prevailed, a gas unit of 160 acres would hold the entire 240-acre lease as long as the well-produced in paying quantities.[78] This would potentially leave mineral owners in the leftover 80 acres bereft of royalties and without opportunity to lease their minerals again until the current lease expired—possibly after all their hydrocarbons were gone. Since only a few of the mineral owners in the leasehold held mineral tracts larger than 40 acres, the court regarded this scenario as entirely possible.[79] The court found it difficult to imagine that a lessor would intend that result to be a possibility, particularly since the lessors could have expressly provided for tract-basis royalty payments in the lease terms.[80] At multiple points in the opinion, the court said that the terms of the lease control whether the lease should be considered a "unitizing or pooling" agreement and that, *in the absence of terms to the contrary*, the royalties should be paid in the proportion that any particular lessor's acreage bears to the entire lease.[81]

72. *Id.* at 567–68.
73. *Id.* at 568.
74. *Id.*
75. *Id.*
76. *See id.*
77. *Id.*
78. *Id.*
79. *See id.*
80. *See id.*
81. *See id.* at 569.

4. Brown v. Smith

The Texas Supreme Court once again considered a multi-tract lease but this time one partially encumbered by an NPRI in *Brown v. Smith*.[82] The result was a ruling that started the troublesome trend in Texas toward placing NPRI owners at once beyond the reach of executives and in the privileged position of choosing to ratify a lease depending on the location of their tract to a producing well.

In *Brown*, a mineral owner possessed a 20-acre tract encumbered by a 1/32 NPRI.[83] Another mineral owner owned the entire mineral estate in a neighboring tract measuring 42.75 acres.[84] Both mineral owners executed the same oil and gas lease, which described both of the tracts and covered 62.75 acres in total.[85] While the lease mentioned the acreage split, it also contained a clause that expressly pooled both of the tracts: "Of the acreage above described . . . it is understood and agreed as between Lessors, that the rents and royalties hereinafter stipulated to be paid on said 62.75 acre tract are to be pooled and shared by said Lessors in proportion to acreage owned."[86]

The parties executed a lease for which delivery of consideration was subject to various terms and conditions, namely: the lessors delivering abstracts of title, time for the lessees to examine same, and the finding by lessees that lessors had good title.[87] A dispute arose over whether the existence of the NPRI encumbering the 20-acre tract violated a guarantee of lessor's title made necessary by the lessees before they would release from escrow for delivery to the lessors the amount of $6,275.[88] The lessees claimed that the existence of the NPRI constituted faulty title to the degree such that they would not have to honor the contract for sale.[89] The case eventually turned on whether the lessors could have pooled the NPRI through execution of the lease.[90] The trial and appellate courts held that the executives had pooled the NPRI,[91] a perspicuous position.

The Supreme Court of Texas reversed and held that the NPRI was not included in the pool.[92] Citing *Veal*—then just a year old—the court noted that a lease jointly executed by two or more lessors of separate tracts, and which contained provisions providing for the pooling of royalties (on an acreage basis) from production anywhere on the lease, "has the effect of vesting all of the lessors, at least during the life of the lease, 'with joint ownership of the royalty earned from all the land in such block.'"[93] If the

82. 174 S.W.2d 43, 45 (Tex. 1943).
83. *Id.*
84. *Id.*
85. *Id.* at 44.
86. *Id.* at 44–45.
87. *Id.* at 44.
88. *Id.* at 45.
89. *Id.* at 44.
90. *See id.* at 45–46.
91. *See id.* at 44, 47.
92. *See id.* at 46–47.
93. *Id.* at 46 (quoting Veal v. Thomason, 159 S.W.2d 472, 476 (Tex. 1942)).

NPRI owner had joined in the lease, the court opined, she would have necessarily subjected her interest to the lease's embedded pooling agreement; therefore, she would have conveyed to the 42.75-acre tract owner a portion of her NPRI covering the 20-acre tract and would likewise have become an owner of the royalty in the 42.75 acres.[94] By not executing the lease, the NPRI owner did not divest herself of any part of her NPRI in the 20-acre tract and did not gain any interest in the royalty arising from the 42.75-acre tract.[95]

This decision was reached despite the fact the community lease was also expressly pooled upon execution.[96] In a thunderbolt, the court had solidified the curious Texan oil and gas rule that the executive is precluded from pooling an NPRI. The Supreme Court of Texas excused this stance by explaining that a lessor could dilute the ownership interest of an NPRI owner across an entire pool, since under Texas law, pooling leasehold interests generally results in a cross-conveyance by each pooled lessor to all the other lessors of its leasehold interest resulting in multiple undivided interests across the entire pool.[97]

5. Southland Royalty Co. v. Humble

Finally, in 1952, the Texas Supreme Court rang down the curtain on the community lease litigation outbreak with *Southland Royalty Co. v. Humble Oil & Refining Co.*, which considered whether production anywhere in a community lease should maintain the whole lease.[98] In 1925, the Powells, owners of a 640-acre square of land in fee (the Section), conveyed one-half of the minerals in the south half—320 acres—to Youngmeyer.[99] Later that year, the Powells conveyed one-half of the minerals in the northwest quarter (160 acres) and in the northeast quarter of the southwest quarter (40 acres) of the Section to Southland Royalty Company (Southland).[100] The grant to Southland was "limited to a period of twenty years from the date of the deed 'and as long thereafter as oil, gas or other minerals are produced from said land.'"[101] Subsequently, "[i]n 1926[,] Southland sold a 1/32nd interest in the minerals in [its two] tracts," which eventually wound up owned by Sneed.[102] Therefore, after the conveyances, the Powells and Southland each owned an undivided half of the minerals in the 160-acre tract, and Youngmeyer and Southland each owned an undivided half of the minerals in the 40-acre tract (with both defeasible interests of Southland subject to the defeasible 1/32 interest owned by Sneed's predecessor).[103] Powell owned a reversionary inter-

94. *Id.*
95. *Id.*
96. *Id.* at 44–45.
97. *See id.* at 46.
98. Southland Royalty Co. v. Humble Oil & Refining Co., 249 S.W.2d 914 (Tex. 1952).
99. *Id.* at 914.
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.* at 914–15.

est in the minerals owned by Southland and its grantees.[104]

Approximately four years later, in 1932, "the Powells, Youngmeyer, Southland, Sneed's predecessor in title and others . . . jointly executed [and conveyed] to Gulf Production Company [(Gulf)] a general mineral lease" covering 250 acres, comprising the aforementioned 160 and 40-acre tracts and the north 50 acres of the west one-half of the southwest quarter of the Section.[105] "Gulf assigned its lease to a depth of 3000 feet to Garrett M. Smith who completed [in 1941] two producing wells on the 50 acre tract" in the west one-half of the southwest quarter of the Section.[106] "No wells were drilled on either the 160 acre tract or the 40 acre tract in which Southland owned a mineral interest until after" twenty years had elapsed from the date of the deed from the Powells to Southland.[107] Also in 1932, the Powells conveyed all mineral rights they owned "in the section, including all 'reversionary' rights" to Humble; half of which Humble then conveyed to Continental Oil Company.[108]

A dispute arose as to whether the production on the 50-acre tract in the west one-half of the southwest quarter of the Section kept the defeasible interest owned by Southland from reverting back to Humble.[109] Whether or not that happened, in turn, depended on whether the jointly executed lease had effected a unitization of all three tracts constituting the captioned land.[110] Humble, while acknowledging that the precedent of *Parker* and *French* would suggest that the three tracts described in the lease were unitized so production from any covered tract entitled Southland to apportioned royalties for twenty years, argued that Southland's interest had ended after twenty years because no actual production had taken place on the two defeasible tracts.[111]

The trial court found for Southland.[112] The El Paso Court of Appeals reversed, believing that the trial court had expanded the defeasible grants past its expressed terms.[113] Upon appeal to the Texas Supreme Court, Humble contended that the jurisprudence of *Parker* and *French* should be re-examined and that "courts should not attribute to lessors jointly executing a general form lease, without more, an intent to pool or unitize their properties; that the language of the general form lease was never intended to effect or to operate as a pooling agreement."[114] Despite first conceding that Humble's argument was "not entirely unappealing," the court nevertheless reversed the El Paso court, noting that *Parker* and

104. *Id.* at 915.
105. *Id.* at 914–15.
106. *Id.* at 915.
107. *Id.*
108. *Id.*
109. *Id.*
110. *See id.* at 916.
111. *See id.*
112. *Id.* at 915.
113. *Id.* at 914–15.
114. *Id.* at 916.

French had become accepted real property precedent in Texas.[115]

In the final pages of the court's opinion, it was noted twice that "in the absence of express agreement" the form lease unitized the three tracts, so production from any one tract maintained the lease and, in this case, the disputed defeasible interest.[116] In this instance, the royalty payment clauses and other lease terms did nothing to suggest a separate-tract basis for royalty calculations.[117] Presumably, then, this arrangement could have been altered with specific lease terms to the contrary.

B. Ratification Cases

The following six cases largely deal with ratification of pooled leases by NPRI owners seeking royalty. The opinions were released from 1968 to 1988. They largely provide the jurisprudential prism through which we commonly look at how and when NPRI owners can ratify leases in Texas and what actions may constitute constructive ratification.

1. Montgomery v. Rittersbacher

In *Montgomery v. Rittersbacher*,[118] Montgomery was the owner of a freestanding royalty interest[119] in eighty acres of land, designated in the record as the "First Tract."[120] Respondents (collectively, Rittersbacher) held the executive rights to the First Tract and also owned executive rights in adjacent land, designated in the record as the "Second Tract."[121] Rittersbacher leased both the First Tract and the Second Tract under a single lease.[122] The lease contained a pooling clause and an entireties clause.[123] The entireties clause provided as follows:

> If the leased premises are now or shall hereafter be owned in severalty or in separate tracts, the premises, nevertheless, shall be developed and operated as one lease, and all royalties accruing hereunder shall be treated as an entirety and shall be divided among and paid to such separate owners in the proportion that the acreage owned by each such separate owner bears to the entire leased acreage.[124]

Sun Oil Company (Sun), the lessee, "formed several units out of the original leased acreage."[125] A portion of the Second Tract was pooled with other land, designated in the record as the "Crutchfield tract."[126] Sun completed a producing well on the Crutchfield tract but drilled a

115. *Id.*
116. *Id.*
117. *Id.* at 915.
118. 424 S.W.2d 210 (Tex. 1968).
119. A freestanding royalty interest is the same as an NPRI.
120. *Id.* at 211.
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.* at 212.
125. *Id.*
126. *Id.*

duster in the unit that included the First Tract.[127] Montgomery brought suit claiming to have ratified the lease and claiming a share of the royalties by virtue of the entireties clause from the production on the Crutchfield tract.[128] The court of appeals ruled in favor of Rittersbacher, and Montgomery appealed.[129]

The Texas Supreme Court reversed in favor of Montgomery, finding that if a multi-tract lease is (a) pooled with outside acreage, (b) contains both acreage encumbered by an NPRI and acreage not so encumbered, or (c) both, such pooling and/or apportionment invoked an implied offer in favor of the NPRI owner to apportion the royalties if the NPRI owner chose to do so.[130] In considering the pooling clause and the entireties clause, the court opined:

> We can see no distinction between the pooling clause, insofar as it has the effect of changing the aggregate ownership of the non-participating royalty owner, and the entiret[ies] clause, which, in effect, would allow the holder of the executive rights to either diminish or enlarge the ownership of that of the royalty owner. In either case, the consent of the owner must be obtained.
>
> . . . .
>
> . . . The lease executed by [Rittersbacher] and the original lessee explicitly described the entire tract in which Montgomery had a non-participating interest as being covered by the lease. The unambiguous entirety clause clearly indicates that it was to apply to all the interests covered by the lease. The clause points out that even if the premises are owned in severalty *at the time of the execution of the lease*, as the premises were in this case, "the (leased) premises, nevertheless shall be developed and operated *as one lease*, and *all royalties* accruing hereunder shall be treated as an entirety and shall be divided among and *paid to such separate owners in the proportion that the acreage owned by each bears to the entire leased acreage*" . . . . This Court has held that an "are now" entirety clause as was contained in the present lease applies to minerals held in severalty at the time of the execution of the lease.[131]

Furthermore, this offer was accepted by ratifying the lease or even just filing suit to seek apportioned royalties from the off-lease well.[132] Rittersbacher argued that, since they did not have the power to invoke any provision in the lease that might somehow lessen the NPRI owner's royalty through pooling and/or apportionment, the NPRI owner should not be free to selectively invoke clauses in the lease that allowed him to collect royalties arising from production on tracts unencumbered by the

127. *Id.*
128. *Id.*
129. *Id.*
130. *See id.* at 215.
131. *Id.* at 213 (citing Thomas Gilcrease Found. v. Stanolind Oil & Gas Co., 266 S.W.2d 850, 853 (Tex. 1954)).
132. *Id.* at 214.

NPRI.[133] But later in the opinion, the court dispatched that sagacious notion with a leaden knell:

> This Court has never been called upon to decide the question of whether a holder of non-participating royalty has an option to make an entirety clause operative on his interest. We think that the non-participating royalty owner, so far as the existence of an option is concerned, occupies a comparable position to that of a cotenant under a lease made by his cotenant or a non-participating royalty owner under a pooling agreement made by the holder of the executive rights. As to the cotenant, it has been held that he has the right to ratify or repudiate a lease made by his cotenant which covers his interest. Likewise, in the pooling area, if a non-participating royalty owner ratifies a pooling agreement, either by joining in the execution of the agreement or by accepting royalties from the pool, his interest is bound by the pooling agreement. Therefore, we hold that the non-participating royalty owner has the option to ratify or repudiate a lease containing provisions which as to his interest the holder of the executive rights had no authority to insert in the lease.

Montgomery, in bringing this suit, seeks two things under the lease—royalties that have already accrued and royalties that are to accrue in the future. We have held that Montgomery has ratified the lease in question by filing suit; consequently, he is only entitled to receive royalties accruing from and after May 12, 1964, the date this suit was filed. In this connection, we point out that Montgomery, having thus ratified the lease, is as much bound thereby as if he had joined in the original execution thereof. As long as the lease is in force, he is not free to claim his full 1/2 non-participating interest under "First Tract."[134]

By finding that the lessor had somehow made an implied offer to pool or apportion the NPRI acreage with either acreage outside the lease or unencumbered acreage within the lease, respectively, the court significantly empowered the NPRI owner. Presumably, under this jurisprudence, unless the court treated the entireties clause and pooling clause as indivisible, Montgomery could have ratified the lease insofar as the entireties clause was concerned and, yet, disavowed the pooling. If the well drilled on the Crutchfield tract had been located on the Second Tract, then Montgomery would have wanted to ratify only the entireties clause. If a prolific well had been drilled on a tract pooled with the First Tract, then Montgomery would have wanted to ratify only the pooling clause.

The court's majority particularly focused on the presence and wording of the entireties clause, noting that had Rittersbacher "not intended to include Montgomery's nonparticipating interest within the provisions of the entirety clause, they could have easily taken affirmative steps to exclude the interest from the operations of the clause."[135] This thought—

133. *Id.* at 213.
134. *Id.* at 215–16 (citation omitted).
135. *Id.* at 213. The entireties clause expressly operated where "the leased premises are now or shall hereafter be owned in severalty." *Id.* at 212.

while seemingly highlighting an outlet available to the lessor that would have facilitated precluding an NPRI owner from seeking an apportioned portion of the royalty from production from any portion of a multi-tract lease (i.e., inclusion of an anti-entireties clause, perhaps one that expressly applies to any NPRI within the captioned acreage)—is curious, given the fact that actions such as pooling made on part of the lessor cannot be binding on the NPRI owner without its consent in the first place.[136]

Justice Griffin dissented regarding this expansive interpretation of the effect of the entireties clause on NPRIs, noting:

> The entirety clause in a lease was never intended to convey and does not convey any interest owned by any land owner or mineral owner in any tract of land in any lease. It merely provides for each person to receive such part of the common production as was the ownership of the one who receives in his original tract of land or minerals.[137]

2. Ruiz v. Martin

Ruiz v. Martin, a 1977 decision from the San Antonio Court of Appeals, considered whether an NPRI owner got a portion of the royalty derived from a lease where the NPRI encumbered one tract in the lease while another contained a producing well.[138] The lease, executed June 14, 1968, covered 600 acres total.[139] The lease form at issue, another short-form "Producer's 88," did not include an entireties clause but did provide for pooling or unitization.[140] The NPRI owner ratified the lease by an instrument dated December 9, 1974, which provided that ratification of the lease occurred "to the same extent as if [the NPRI owner] had originally joined in the execution thereof."[141]

The trial court found that the NPRI owner should have received an apportioned part of the royalty despite Texas's non-apportionment rule because use of the community lease and the subsequent ratification "effected a cross-conveyance of royalty agreement between them . . . for the reason that the . . . lease did not purport to bind [the NPRI owner]."[142]

Basing its opinion on *Parker*, *Montgomery*, *Southland*, *French*, and others, the San Antonio Court of Appeals affirmed.[143] First, the court noted that, in the case of an "ordinary" oil and gas lease, if it is executed by all the owners of different mineral interests in multiple tracts, the roy-

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136. *Id.* at 213.
137. *Id.* at 216 (Griffin, J., dissenting).
138. Ruiz v. Martin, 559 S.W.2d 839, 840 (Tex. App.—San Antonio 1977, writ ref'd n.r.e.).
139. *Id.* at 841.
140. *Id.* The court highlighted that "the lease [was] in a form sometimes referred to as a Commercial Producer's 88 lease. It contain[ed] an unless clause" and provided for a 1/8 lessor's royalty for oil and gas produced. *Id.*
141. *Id.*
142. *Id.*
143. *Id.* at 842, 844.

alty is pooled and apportioned among them.[144] Second, citing lengthy portions of *Montgomery*, the court recited the Texas rule that an NPRI owner "so far as the existence of an option [to make an entirety clause operative on his NPRI] is concerned, . . . [the NPRI owner] has the right to ratify or repudiate a lease made by his cotenant which covers his interest."[145] The *Ruiz* court stuck to this ratification jurisprudence even though, unlike in *Montgomery*, the lease in question did not contain an entireties clause.[146]

3. Brown v. Getty Reserve Oil, Inc.

In *Brown v. Getty Reserve Oil, Inc.*, the mineral owner leased two tracts, Sections 27 and 29, in a single lease located in Hansford County, Texas.[147] "Each of the sections contain[ed] 320 acres of land, more or less."[148] Section 27 was subject to a freestanding royalty interest owned by one owner, and Section 29 was subject to a freestanding royalty interest owned by another.[149] Neither royalty owner ratified the lease, which contained a unitization clause.[150] The successor lessee brought in a gas well on Section 29 and attempted, by use of a division order, to pool the two sections constituting the entire leased acreage.[151] Not surprisingly, given the prior case law, the Section 27 NPRI owner executed the division order, but the Section 29 NPRI owner refused.[152]

The successor lessee brought suit.[153] After asserting that it was "an innocent and disinterested stakeholder," the successor lessee expressed concern that it was "'or may be exposed to double or multiple liability,' and that it 'ha[d] a reasonable doubt concerning the manner in which the 1/16th [NPRI] should be apportioned, if at all, as between the [NPRI owners], and is faced with conflicting claims."[154] The trial court agreed with the successor lessee and apportioned the two NPRIs across both sections.[155] On appeal to the Amarillo Court of Appeals, the Section 29 royalty owners argued that the trial court had erroneously unitized and diluted their NPRI.[156]

Citing *Montgomery*, the court of appeals held that the NPRIs in Sections 27 and 29 were not pooled, and therefore, the Section 29 NPRI

144. *Id.* at 842.
145. *Id.* (quoting Montgomery v. Rittersbacher, 424 S.W.2d 210, 214–15 (Tex. 1968)).
146. *Id.* at 841.
147. Brown v. Getty Reserve Oil, Inc., 626 S.W.2d 810, 811–12 (Tex. App.—Amarillo 1981, writ dism'd w.o.j.).
148. *Id.* at 811.
149. *Id.* at 812. The NPRIs were actually owned by multiple parties. For ease of analysis, each NPRI is described herein as being undivided. *Id.*
150. *Id.*
151. *Id.*
152. *Id.* Specifically, all but one of the multiple NPRI owners refused to sign the division order and ratify the lease. *Id.*
153. *Id.*
154. *Id.*
155. *Id.* at 813.
156. *Id.*

owner was entitled to a royalty on all production from the well on Section 29.[157] The Section 27 NPRI owner was judged not to be entitled to any royalty from the well on Section 29.[158] The court concluded that the Section 29 NPRI owner could claim full royalty without having to ratify a pooling because the well was located on Section 29, and while the mineral owner had clear authority to subject the NPRI to a lease, it had no authority to pool the NPRI.[159]

With regard to why the NPRI owner on Section 27 was not entitled to royalty, it remains unknown why the Section 27 NPRI owner's execution of a division order was insufficient to give it a royalty share of the Section 29 well even though the Section 29 NPRI owner had not executed the division order. Apparently, the court felt that the division order was invalid unless signed by all parties. Presumably, if the Section 27 NPRI had ratified the lease, it would be entitled to an apportioned portion of royalties in addition to the unapportioned portion of royalty owed to the Section 29 NPRI owner—the exact situation about which the successor lessee was concerned.

4. Verble v. Coffman

The Austin Court of Appeals, in *Verble v. Coffman*, continued to sweeten the position of NPRI owners.[160] *Verble* involved a dispute in which a lessor owned all the mineral interest in a 149-acre tract encumbered by an NPRI that provided the owner would receive a royalty equal to 1/2 *of* royalty (a "floating" NPRI).[161] The north half of the NPRI was owned by McAnelly and the south half by Verble.[162] The lease contained an anti-entireties clause.[163] It also contained a pooling clause,[164] common to such Producer's 88 lease forms:

> Lessee, at its option, is hereby given the right and the power to pool or combine the acreage covered by this lease or any portion thereof as to oil and gas, or either of them, with any other land covered by this lease, and/or with any other land, lease or leases in the immediate vicinity thereof to the extent hereinafter stipulated, when in Lessee's judgment it is necessary or advisable to do so in order properly to explore, or to develop and operate said leased premises in compliance with the rules or regulations of the Railroad Commission . . . .[165]

Both royalty owners ratified the lease.[166] Coffman then brought a producing well on the southern half of the tract and established a proration

157. *Id.* at 814.
158. *Id.* at 814–15.
159. *Id.* at 814.
160. Verble v. Coffman, 680 S.W.2d 69 (Tex. App.—Austin, 1984, no writ).
161. *Id.* at 69, 70.
162. *Id.* at 69.
163. *Id.* at 70.
164. *Id.* at 69.
165. Lynch, *supra* note 5, at 5 (emphasis omitted).
166. *Verble*, 680 S.W.2d at 70.

unit that covered the entire tract.[167] Apparently looking toward the anti-entireties clause, Coffman did not apportion the royalties, and McAnelly sued, claiming an acreage-apportioned share of the royalty.[168] Verble argued that apportionment of the NPRI was barred by the non-entireties clause of the lease, as it nullified any communization of the NPRI.[169] McAnelly countered that the express ratification by the NPRI owners constituted an offer—and then acceptance—of pooling.[170] The trial court held for the NPRI owner seeking apportionment, ruling that McAnelly's royalty interests had been pooled, communitized, and therefore apportioned over the entire tract.[171]

The court of appeals, in a three-page opinion, affirmed.[172] Citing *Montgomery* and *Ruiz*, the court held that "[r]atification of an oil and lease by [NPRI] owners is only necessary to effect a pooling of production, and such ratification has been construed as an offer made by the lessor, and accepted by the royalty owners to apportion all proceeds from the lease."[173] One commentator believes that the court apparently thought, since the lessor (or lessee) had actively sought the ratifications, that the lessor wanted the royalties apportioned.[174] Crucially, the court did not address why the ratifications by the NPRI owners, which ostensibly meant they accepted all the terms of the lease, did not include their accepting application of the anti-entireties clause.

Further, while the *Verble* court strangely seems to suggest that the reason for seeking ratification of the NPRI owners was to allow the anti-entireties clause to be overridden and "constituted an offer to pool and an acceptance of that offer,"[175] the author believes a more likely reason was that the lessee was looking to pool the leased acreage with land *outside* the 149-acre tract and merely wanted the NPRI owners on board with the lease as a well drilled on the NPRI acreage *without* such ratifications would have allowed the NPRI owner to collect the full measure of royalty without apportionment with the outside pooled acreage.

5. London v. Merriman

Verble was largely overlooked at the time of its release, with producers and lessors seemingly resigning it to the ash heap of outlier opinions produced by peculiar facts.[176] *London v. Merriman*,[177] released two years

167. *Id.*
168. *See id.*
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.* at 71.
173. *Id.* (citing Montgomery v. Rittersbacher, 424 S.W.2d 210 (Tex. 1968); Ruiz v. Martin, 559 S.W.2d 839 (Tex. App.—San Antonio 1977, writ ref'd n.r.e.); Standard Oil Co. of Tex. v. Donald, 321 S.W.2d 602 (Tex. App.— Fort Worth 1959, writ ref'd n.r.e.).
174. Lynch, *supra* note 5, at 5.
175. *Verble*, 680 S.W.2d at 70.
176. Lynch, *supra* note 5, at 5.
177. 756 S.W.2d 736 (Tex. App.—Corpus Christi–Edinburg 1988, writ denied).

later, was received with broader coverage and continues to resonate today,[178] perhaps because the *London* court made the foundation for its decision clearer than the *Verble* court did.

In the case, London owned two adjacent tracts of land (the eastern tract and the western tract).[179] "The Merrimans owned a 1/16 [NPRI] in the western Tract."[180] In 1980, London executed a single oil and gas lease covering both the eastern and western tracts.[181] This lease, a Producer's 88 lease which contained an internal pooling clause (authorizing pooling among the eastern and western tracts), also contained what

> London characterize[d] as a "non-unitization" or "anti-communitization" clause: "If this lease now or hereafter covers separate tracts, no pooling or unitization of royalty interest as between any such separate tracts is intended or shall be implied or result merely from the inclusion of such separate tracts within this lease but Lessee shall nevertheless have the right to pool as provided above with consequent allocation of production as above provided. As used in this paragraph 4, the words "separate tract" mean any tract with royalty ownership differing, now or hereafter, either as to parties or amounts, from that as to any other part of the leased premises."[182]

The lease was later assigned to McCord Exploration.[183] "In 1982, McCord brought in successful gas wells on the eastern tract."[184] In March of 1984, the Merrimans secured compulsory pooling.[185] Earlier, in 1983, the Merrimans brought suit against both London and McCord on alternate theories: (1) that McCord had breached his duty to protect the Merrimans' interest against drainage; and (2) that the Merrimans had ratified the lease by *merely filing suit* in 1983 and, therefore, accepted London's offer in the lease to pool their 1/16 royalty interest in the western tract with London's interest in the eastern tract.[186] The Merrimans succeeded on both theories, but they elected judgment on their ratification theory and were thus awarded approximately $400,000 for royalty accrued from the effective date of ratification—the day the Merrimans brought the claim.[187]

London appealed, arguing that the non-unitization clause (perhaps better described as an anti-entireties clause), expressly prevented the Mer-

178. *See, e.g.*, LOWE ET AL., *supra* note 22, at 667 (wherein *London* is used as an example of nonparticipating interests and their effects on pools).

179. *London*, 756 S.W.2d at 738. The case does not provide the acreage of lease. I believe it to be in the three-digit range as the NPRI owner's royalty was included in a Railroad Commission pooling order for a 640-acre gas unit, indicating that Merrimans' NPRI (in the western tract) and the producing wells (in the eastern tract) were proximal. *See id.*

180. *Id.*

181. *Id.*

182. *Id.* at 740.

183. *Id.* at 738.

184. *Id.*

185. *Id.*

186. *Id.* at 738–39.

187. *Id.* at 739.

rimans from receiving royalty on production from any land other than the western tract.[188] The court of appeals, relying on *Ruiz* and *Montgomery*, held that this clause did not prevent the pooling of the Merrimans' interest across both tracts.[189] The court instead concluded: "The purported non-unitization clause simply provides that no pooling or unitization of royalties is intended 'merely from' the inclusion of the two tracts in one lease. We agree that no such pooling results *merely* because the lease included two tracts."[190] Then, pointing back at the pooling clause found earlier in the lease, the court of appeals found language whereby the lessee could pool or unitize "in any fashion" and which was not impinged on in any way by the non-unitization clause.[191] The court further held that, although the Merrimans were not bound by any pooling without their consent, they had ratified the pooling of their royalty interest by filing suit in 1983 and were entitled to royalty from that date.[192] This ratification resulted in pooling.[193]

It is striking in *London* that, while the anti-entireties clause prevented application of any apportionment presumption, it strangely did not modify the ability of the NPRI owner to have his interest apportioned across both tracts when he was judicially determined to have ratified the lease with his lawsuit.[194] This was allowed even though the pooling clause was never exercised.[195] Essentially, the NPRI holder not only *ratified* the lease by filing suit but also *pooled* his interest, even though the pooling clause allowed *only the lessee* to pool the premises *and only after* filing a unit designation.[196] Why the NPRI owner was apparently allowed to both ignore the express terms of the pooling clause while still utilizing the pooling clause *and* to ignore the anti-entireties clause so that the NPRI could be apportioned across both tracts in a fashion not available to the lessee was left unexplained.

6. MCZ, Inc. v. Triolo

The fortuitous position in the eyes of Texas oil and gas jurisprudence of an NPRI owner was further emphasized in *MCZ, Inc. v. Triolo*, in which an NPRI owner not only was allowed to ratify (or not ratify) after the completion of wells but also was allowed to ratify part of his interest where it benefited him and to disallow ratification of a portion of his interest where it did not.[197] In 1964, Palermo conveyed by warranty deed

188. *Id.* at 740.
189. *See id.*
190. *Id.*
191. *Id.*
192. *Id.* at 741.
193. *Id.* at 740.
194. *See id.* at 740–41.
195. *Id.*
196. *Id.* at 741. Merriman had, however, previously gotten a pooling order from the Railroad Commission of his royalty interest. *Id.* at 738.
197. MCZ Inc. v. Triolo, 708 S.W.2d 49, 53–54 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.).

a 150-acre tract in Brazos County, Texas (the Triolo Tract) to D.M. Triolo and M.J. Triolo (collectively or singly, Triolo). Palermo's deed to Triolo reserved a 1/16th NPRI.[198]

> In 1976, Triolo and his wife, as lessors, executed an oil, gas, and mineral lease (the "Triolo Lease") of the entire tract to Amalgamated Bonanza Oil Company, Ltd., reserving a 1/8th [lessor's] royalty. . . [t]he lease granted to the lessee the right to pool the land in accordance with terms set out. The lease was eventually acquired by appellant MCZ, Inc. ("MCZ").
>
> In 1980, Mrs. Palermo conveyed her entire reserved interest in the [Triolo] tract to appellant, Roy L. Turner, Trustee.
>
> By a "Designation of Pooled Oil Unit," dated August 17, 1981, MCZ pooled 27.06 acres of the Triolo Tract to form the Philipello Oil Unit No. 1 (the 'Philipello Unit').
>
> Turner signed an instrument entitled "Pooling Agreement," dated May 3, 1982, which recited that Turner was the owner of a[n NPRI] in the described tract and further stated:
>
> "Whereas, such unit includes 27.06 acres out of the above described 150.00 acre tract, and the said Roy L. Turner, Trustee, to the extent expressly set forth herein, is willing to have such 27.06 acres out of said 150.00 acres included in and pooled with said unit;
>
> Now Therefore, Roy L. Turner, trustee, does hereby Grant, Lease and Consent unto Prodeco Oil & Gas Company Ltd., and Gulf Oil Corporation the right to so pool said 27.06 acres within said Unit, PROVIDED that this Grant, Lease and Consent does not apply to all or any portion of said 150.00 acre tract that is not included within said 27.06 acre tract."[199]

A producer was completed "on a portion of the Philipello Unit other than the 27.06 acres included from the Triolo tract."[200] "Thereafter, on August 3, 1982, MCZ pooled the remaining 123.8 acres of the Triolo tract into the M.J. Triolo Unit No. 1 (the 'Triolo Unit')."[201] Then a producer was brought in "on the Triolo Unit *within* the acreage of the Triolo tract. As operator of both wells, MCZ paid Turner for his interest in production from both units."[202]

In early 1983, Triolo advised MCZ that Triolo believed "that Turner's acceptance of royalty payments for production from the Philipello Unit on acreage not owned by Turner constituted ratification by Turner of the pooling provisions of the Triolo lease, and that such ratification authorized the pooling of Turner's interest in the Triolo Unit as well."[203] Therefore, Triolo demanded that he be credited "with a royalty interest of

198. *Id.*
199. *Id.* at 50–51.
200. *Id.* at 51.
201. *Id.*
202. *Id.*
203. *Id.*

0.0483938, rather than the royalty interest of 0.0342875 that MCZ had credited to Triolo in a division order."[204]

Turner, on the other hand, claimed he refused to ratify the Triolo Unit and demanded he receive a full 1/16th of the production from the well located upon the Triolo Unit.[205] Triolo thereafter brought suit to determine the royalty rights.[206] The court held that because Triolo's ratification of the pooling was limited to the portion of the Triolo tract that was included in the Philipello Unit, Turner was entitled to royalty on the entire production from the well on the Triolo tract.[207] The result is fascinating: through creative partial ratification of its interest and the court's recognition of same, the NPRI owner managed to retain royalty from the well on his tract and acquire royalty from proceeds on the off-tract well on acreage pooled with his own.[208] This extension of the NPRI owner's power to allow selective ratification resulted in Turner receiving "1/16th × 27.06/160 of the Philipello Unit's production *in addition* to a full 1/16th of production from the Triolo Unit, thereby reducing Triolo's own interest" in both units.[209]

The court of appeals did not see this as a case of partial or selective ratification, but rather as two distinct acts by others, one of which Turner had ratified and one he had not.[210] In order to force Turner to fully ratify the Philipello Unit with its entire NPRI, the court believed, it would be necessary to view the formation of the two separate pooling units that each contained portions of the entire Triolo tract as a single event or operation, a leap it found contrary to the facts.[211]

IV. THE PRESENT AND POSSIBLE FUTURE IN TEXAS

A. Communization/Unitization and Ratification Jurisprudence Now

The present state of nonexecutive ratification of oil and gas leases in Texas began with community leasing cases. The first trio, *Parker*, *French*, and *Veal*, provided that absent language to the contrary in a community lease, royalties are to be apportioned on an acreage-pro-rata basis, no matter where production is achieved on the lease.[212] *French*, perhaps the most well-known of the cases, specifically provided that royalties within a lease signed in counterpart should be divided among all lessors—even if the individual tracts owned by the lessors are separately described—in

204. *Id.*
205. *Id.*
206. *Id.*
207. *Id.* at 53.
208. *See id.*
209. *Id.* (emphasis added).
210. *Id.*
211. *See id.*
212. *See* Veal v. Thomason, 159 S.W.2d 472, 476 (Tex. 1942); French v. George, 159 S.W.2d 566, 569 (Tex. App.—Amarillo 1942, writ ref'd); Parker v. Parker, 144 S.W.2d 303, 305 (Tex. App.—Galveston 1940, writ ref'd).

the proportion that their acreage bears to the total acreage of a multi-tract lease.[213] The *Brown v. Smith* opinion introduced an NPRI to the multi-tract community leasing cases and precluded executives from applying voluntary pooling clauses to freestanding royalty—a crucial holding.[214] *Southland Royalty* cemented *Parker* and *French* in Texas jurisprudence, affirming that absent express agreement, a community lease unitizes the multiple tracts therein so that production from any one tract maintains the lease.[215]

Two decades later, the cases turned from limiting executive power over NPRIs to expanding both the power of those same nonexecutives and the timing and methodology of ratification. First, *Montgomery* allowed an NPRI owner to choose whether an entireties clause in a lease could operate as to the NPRI and deemed ratification of the NPRI to have occurred when the royalty owner filed suit.[216] Then, *Ruiz* allowed a ratifying NPRI on a nonproducing tract within a community lease and without an entireties clause to avoid application of the non-apportionment rule.[217] *Brown v. Getty Reserve Oil, Inc.* reinforced that no authority to pool an NPRI was left with the executive or its lessee and that an NPRI owner on a well tract did not have to ratify a lease but instead could collect a non-apportioned share of the royalty.[218] Three years later, in *Verble*, a court found ratification by a non-well tract NPRI owner constituted an offer to pool the NPRI across the entire leased tract notwithstanding an anti-entireties clause in the lease.[219] In 1988, *London* echoed this finding, while curiously allowing the non-well tract NPRI owner to utilize the pooling clause generally (while ignoring some of the more specific terms of the pooling clause) and to avoid application of the anti-entireties clause so the non-well tract freestanding royalty could be apportioned across the entire lease.[220] Finally, *MCZ, Inc.* introduced the idea of partial or selective ratification by the freestanding royalty and expanded the actions that qualify as constructive ratification.[221]

After *Verble* and *London*, NPRIs in Texas were removed from coverage by the doctrine of non-apportionment.[222] Further, the use of anti-entireties clauses was significantly diminished in leases with pooling

213. *French*, 159 S.W.2d at 569.
214. Brown v. Smith, 174 S.W.2d 43, 46–47 (Tex. 1943).
215. Southland Royalty Co. v. Humble Oil & Refining Co., 249 S.W.2d 914, 916 (Tex. 1952).
216. Montgomery v. Rittersbacher, 424 S.W.2d 210, 213–15 (Tex. 1968).
217. Ruiz v. Martin, 559 S.W.2d 839, 842 (Tex. App.—San Antonio 1977, writ ref'd n.r.e.).
218. Brown v. Getty Reserve Oil, Inc., 626 S.W.2d 810, 812, 813 (Tex. App.—Amarillo 1981, writ dism'd w.o.j.).
219. Verble v. Coffman, 680 S.W. 2d 69, 70 (Tex. App.—Austin 1984, no writ).
220. London v. Merriman, 756 S.W.2d 736, 740 (Tex. App.—Corpus Christi–Edinburg 1988, writ denied).
221. MCZ, Inc. v. Triolo, 708 S.W.2d 49, 52, 53 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.).
222. *See London*, 756 S.W.2d at 741.

clauses to alleviate the hassles associated with title examination and royalty payments on multi-tract leases with ununiform development.

Practically, the above process has led step-by-step to a situation in which freestanding royalty interests like NPRIs, net profit interests, or depending on the pooling clause, perhaps even overriding royalty interests that encumber all or a portion of a lease can wait on the sidelines while development occurs and then possibly ratify the lease. The negative effect of this opportunistic ratification of leases is illustrated by the following example. Consider a lease covering 320 acres encumbered by a 1/16 NPRI on the west half and a separate 1/16 NPRI on the east half of the leased acreage. Under current Texas jurisprudence, if a well is brought on a spacing unit covering all of the west 160 acres, the owner of the well-tract NPRI probably will not ratify the lease, while the owner of the east-half NPRI will ratify the lease. While it might seem logical that the well will only be encumbered by a 1/16 NPRI (the NPRI covering the west half), the ratification by the east-half NPRI owner will result in the lessor's royalty bearing the 1/16 west-half NPRI *and* an apportioned share of the 1/16 east-half NPRI.[223] After *London*, this is apparently true even if the lease contains an anti-entireties clause.[224] The question of who pays this "extra" royalty and the notification and payment logistics attendant thereto could be another source of tension between the lessor and the lessee.[225]

B. A Cautionary Tale

While the NPRI's advantaged position may not matter if the lessee seeks ratification before exploration and production occurs, if the interests are small enough not to substantially impact the economics of development, or if the size of the lease is comparable to the size of spacing units around the wells on the lease (as in almost all of the cases described above), circumstances could arise in which a perverse application of the above case law could warp lease ratification jurisprudence in pathological directions. Indeed, it is easy to visualize a scenario where a large tract of land with small NPRIs embedded in it could challenge current ratification jurisprudence. For example, imagine a large ranch in southern Texas that grew as the owners acquired surrounding land piecemeal. Some of these acquired tracts are burdened by NPRIs. Later leases on the ranch provide that the respective lessors will not be paid on the basis of any of lessor's percentage of ownership across the entire leased ranch but rather will be paid on a "tract basis" in accordance with the percentage of undivided interest that particular family member owns in a particular producing tract. The leases expressly provide they will be split into multiple inde-

223. In the above example, acreage apportionment would be calculated as 1/16 x 160/320, or 1/32.

224. *See London*, 756 S.W.2d at 739–40.

225. In practice, like NPRIs generally, this "extra" NPRI is typically deducted from the lessor's royalty until none remains. Any remaining NPRI is then deducted from the lessee's share.

pendent leases as individual spacing units are formed around a producing well.

At this point, the NPRI owner files of record ratifications of the leases that expressly provide that the NPRI owner agrees to be subject to all the terms of the leases. What will be the result? Modern ratification jurisprudence in Texas suggests that the NPRI owner can ratify the leases and choose to be subject to the terms of the leases. Here, however, the terms of the leases mean that no part of the NPRI is in any production unit. Therefore, per the terms of royalty payment in the leases, none of the royalty derived from any production unit should be paid to any party with no interest in the production unit—including the NPRI owner.

This litigation highlights one variety of NPRI ratification dispute the future might hold for Texas: large leases burdened by small nonexecutive interests that, in turn, are located miles away from any production unit. The size of the leases, the complexity of title, and the seeming clarity of the lease terms with regard to the apportionment of royalties only among parties owning interests in productive spacing units make application of prior case law, as argued for by the NPRI owner, challenging and unsuitable. It also highlights just the kind of mercenary ratifications that could be avoided by making nonexecutive interests subject to pooling clauses executed by executives.

V. ANALYSIS AND SUGGESTIONS

The evolution of NPRI ratification of multi-tract leases and pooled units in Texas has advanced down an increasingly peculiar road, out of step with sounder jurisprudence in other states familiar with oil and gas law. Finally, litigation emerged which, before settled, both challenged the status quo to its fundamentals and highlighted the need to reexamine the relationship of NPRIs with their executives, with regard to ratifications of multi-tract leases and pools.

A. Jurisprudential Fault Lines and Pooling

An inconsistency arises when the non-apportionment rule is compared to the Texas rule on community leases. In Texas, absent lease terms to the contrary, the owners of the separate tracts leased in a community lease share royalty from any production on the lease by reason of the rule of construction in *French*.[226] Under the Texas rule of non-apportionment, however, a lessor who assigns a portion of a leased tract will not take part in royalty derived from production from that portion unless the lease contains an entireties clause.[227] Thus, seemingly inconsistent results are possible where royalty is apportioned in a single lease in the first instance but not the second.

226. French v. George, 159 S.W.2d 566, 569 (Tex. App.—Amarillo 1942, writ ref'd).
227. 2 Patrick H. Martin & Bruce M. Kramer, Williams & Meyers, Oil and Gas Law § 521.4 (2019).

Resolving the conflicting results of these two rules involves divining motives. The inconsistency could possibly be rationalized by noting that non-apportionment arises because of the conveyance subsequent to leasing, whereas a community lease arises because multiple lessors of different tracts sign one lease. In the community lease situation, Texas courts view all parties (all lessors and the lessee) as intending apportionment (pooling).[228] Regarding the partial conveyance of a leased mineral interest, the lessee is almost certainly not a party to the conveyance and, therefore, has not consented to an apportionment of royalties that may create additional royalty burdens. Texas courts view the parties to the leased mineral conveyance as intending non-apportionment.[229] Of course, absent clear language of intent, what the parties *really* intended in either situation is generally conjecture. In any event, community lease apportionment has always provided an uneasy contrast to the non-apportionment doctrine.

A fundamental disconnect of definitions and the accepted extent of each of the sticks of the mineral estate also lies at the heart of allowing lease ratification by nonexecutives in Texas as promulgated by *French* and the aforementioned cases from the 1940s. Nonexecutive mineral interest owners do not lease; leasing is left to the owner of the executive right.[230] The executive determines when royalties may begin and allows for pooling.[231] Despite this, executive power over application of certain lease terms—pooling and unitization—can later reappear in the guise of ratification of the lease by the royalty interest owner.[232] Therefore, an NPRI (or any nonexecutive interest) owner cannot lease its interest.[233] Strangely, however, it *can* choose to allow—or not—certain terms of an existing lease to affect the interest.

To further highlight the power of the executive, the executive can even control the amount of royalty received by an NPRI holder when the NPRI is of the "floating" variety. Not only do executives control when royalties begin for NPRI owners but in the case of "floating" NPRIs, they also control the *extent* of the royalties owed to the NPRI owner as a result of the royalty terms negotiated in the lease.[234] This is allowed because the executive is constrained by its duty to the nonexecutives.[235] Despite this protection, under current Texas jurisprudence, the floating NPRI owner

228. *See id.* § 521.2.

229. *See id.*

230. Hlavinka v. Hancock, 116 S.W.3d 412, 421 (Tex. App.—Corpus Christi–Edinburg 2003, pet. denied).

231. *See* 1 Texas Law of Oil and Gas § 2.6 (2019).

232. *See* Lee Jones, Jr., *Non-Participating Royalty*, 26 Tex. L. Rev. 569, 572 (1948).

233. *See id.* at 599.

234. A "floating" NPRI is necessarily dependent on the executive, as the NPRI fraction is multiplied by whatever lessor's royalty is found in the existing oil and gas lease covering the captioned land. For more on fixed vs. floating NPRIs, see generally Kulander, *supra* note 19.

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

can still choose to allow—or not allow—certain terms of an existing lease to affect the extent of the royalty accrued from production.

Turning from the executive right to the lease-granted authority to exercise voluntary pooling, a lessee seeks pooling authority from the lessor because the lessor is the repository of development rights. The NPRI, in contrast, has no development rights associated with it, so no need exists (but for Texas law) to involve it in development decisions. As with the lessor, once the lease is granted and pooling or unitization powers are conferred on its lessee, the lessee is free to exercise the authority so long as it acts prudently (or in "good faith").[236] The same sort of relational duty could protect the NPRI without giving it a capricious veto power or the ability to pounce with a lease ratification and a demand for royalty based on dubious title claims upon a lessee's bringing in production at a location potentially miles away. The lessee should be able to pool on behalf of the NPRI, without its consent or approval but with the same protections afforded to the NPRI as to lessors that the lessee must act prudently when making pooling and unitization decisions.

If the NPRI ratification rulings described above, such as *Brown v. Getty Reserve Oil, Inc.* (1981), *Verble* (1984), and *London* (1988), were released before the development of the good-faith pooling requirement, then the rulings expanding the rights of NPRI owners may have been thought to be a way to protect the nonexecutive's rights from manipulative pooling by the executive. But good-faith pooling cases largely antedated the ratification rulings; an implied requirement that the lessee exercise good faith in making the determination to pool was established in Texas decades earlier.[237] Although there is some overlap in the timing of the NPRI ratification cases and the later good-faith pooling cases in Texas—and good-faith pooling jurisprudence continues to mature—given the good-faith pooling requirement, it is not necessary to transform NPRIs into a hybrid, *partial* participating interest to provide the NPRI owner with adequate protection from improper pooling by the executive.

B. Lease Size Matters

An examination of the progression of facts and opinions arising from the cases that ricocheted down the calendar, from *Parker* in 1940 to *MCZ, Inc.* in 1986, highlights an evolution of factors that gradually established the NPRI owners in an advantaged spot.[238] First, the cases considered the effect of entireties clauses on ratification, then the effect of instances in which no entireties clauses were present, and finally the effect of an *anti*-entireties clause. Second, the acreages involved in the cases

236. *See generally* Lowe et al., *supra* note 22, at 310–23.
237. *See, e.g.*, Banks v. Mecom, 410 S.W.2d 300, 303 (Tex. App.—Eastland 1966, writ ref'd n.r.e.); Tiller v. Fields, 301 S.W.2d 185, 190 (Tex. App.—Texarkana 1957, no writ).
238. *See generally* Parker v. Parker, 144 S.W.2d 303 (Tex. App.—Galveston 1940, writ ref'd); MCZ, Inc. v. Triolo, 708 S.W.2d 49 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.).

largely fell in the three-digit range—none much bigger than a gas spacing unit.

Applying prior NPRI ratification jurisprudence lockstep to a tract so much larger introduces practical problems for lessees. The exact state of title across such an enormous space can be very difficult, expensive, and time-consuming to ascertain, particularly if the leased acreage partially burdened by NPRI tracts was acquired piecemeal starting over a century ago.[239] Determining what each ratifying NPRI owner could possibly receive under the old approach could take far longer than a developer could afford to wait. Being forced to respond to the opportunistic behavior of NPRI owners, which the old Texas jurisprudence allows, could place lessees in a position stacked against the prudence and caution that industry custom and practice requires of them, particularly when the time for development is short and title is complex. The timing of lease acquisition, exploration, and development is highly dependent on prices and other variables, and companies quickly lease large tracts of land in order to establish acreage positions from which to conduct exploration activities, such as seismic and well logging. Conducting complex title examination over leased tracts of land in an effort to identify every NPRI and other nonexecutive interest (overriding royalties, etc.) that might be entirely or partially covered is incompatible with the speed at which operators must typically conduct exploration and production activities, both for business and for acting as a reasonably prudent operator—as, after all, their leases require it.[240]

One response to the impact of old lease ratification case law on operations proposed on large tracts might be proposing a scheme whereby the royalty paid to every NPRI owner is fluid depending on the size of the NPRI relative to the eventual size of the leased acreage once all the title work is completed. Such a fluid "pay deck" is not in any way compatible, however, with the usual custom and practice of a typical producer's land, division order, and revenue departments. Furthermore, such a scheme would likely result in overpayment of royalties that would be difficult or impossible for an operator to recoup even through suit.

Similar arguments can be made for apportionment of overriding royalty interests (ORIs). For example, if a lessee of a 5,000-acre lease carves out a one percent overriding royalty interest covering only a 40-acre spacing unit that it conveys to a geologist or investor in the well, that ORI should not thereafter be apportioned over the entire lease. Again, like all nonexecutive interests, the ORI is due a duty of consideration by the executive but with the complicating factor that it is derived from and paid out of the lessee's fee simple determinable interest and the proceeds derived from the same.[241] In addition, in many instances, the ORI owner must rely on the lessee's obligations to its lessor to protect and police the

239. *See* LOWE ET AL., *supra* note 22, at 683, 686.
240. *See id.* at 680–85.
241. *See* SHADE & BLACKWELL, *supra* note 12, at 154.

ORI owner's interests. Usually these interests will coincide, but where they do not, the ORI owner can fall back on case law for protection against executive or lessor and lessee overreach.[242]

As a matter of public policy, allowing an NPRI owner who ratified a lease to be paid on a community-wide or unit-wide basis—despite contrary terms of the lease that provide that all parties to the lease will be paid royalty on a tract basis—would encourage litigation elsewhere by NPRI owners claiming they should have been paid on a community-wide or unit-wide basis instead of on a tract basis. As the NPRI burden on the royalty increases, the motivation for leasing decreases—Why expend the time and effort to exercise the executive right to lease when someone else rakes in the money? This dampening effect has been recognized in law before: on relinquishment land in Texas, surface-owning agents for the state are not permitted to spinoff royalty interests that might affect future leasing because the General Land Office and the courts recognize that this could retard the leasing of state minerals in the future.[243] Further, as more NPRI owners are due money, the lessee's bookkeeping becomes more challenging. The state's public policy of encouraging the development of oil and gas interests would be promoted by lessening the potential obstruction to development created by opportunistic ratifications by nonexecutive interests.

Furthermore, as a matter of public policy, allowing the owner of an NPRI located miles away from the proration unit for a particular well to later ratify the lease and participate on a community-wide basis would make the title work necessary for accurate calculation and correct and timely payment of royalty extremely costly and difficult, if not impossible, for lessee/producers to conduct. This would, in turn, curtail mineral development and slow royalty payment.

C. Other Jurisdictions and Commentary

Louisiana courts have long held that the owner of a mineral servitude has the power to pool on behalf of the owner of a mineral royalty.[244] Case law on the issue is "almost nonexistent" outside Louisiana, Texas, and now West Virginia,[245] probably because of the existence of compulsory pooling statutes in other states.[246] A smattering of opinions includes dicta supporting joinder of parties having non-operating interests in pro-

242. *See, e.g.*, Reynolds-Rexwinkle Oil, Inc. v. Petex, Inc., 1 P.3d 909, 919–20 (Kan. 2000).

243. *See, e.g.*, Lewis v. Oates, 195 S.W.2d 123, 132 (Tex. 1946) ("[Selling freestanding royalty interests that affect future leases] reduces or tends to reduce, leasing income in that it takes away a part of the incentive fixed to encourage leasing of the land. It sets at naught the legislative plan formulated for the purposes above indicated. According to the law as stated in [*Greene*], it ignores the basis fixed to accomplish those purposes." (emphasis omitted)).

244. Le Blanc v. Haynesville Mercantile Co., 88 So. 2d 377, 380 (La. 1956).

245. 6 Martin & Kramer, *supra* note 227, § 925.1.

246. *See id.* § 905.1.

duction.[247] For example, in *Carroll v. Caldwell*, the Supreme Court of Illinois suggested that the joinder of both the owner of leasehold working interest and the owner of an overriding royalty interest in the same land was necessary to combine their interests under a unitization agreement, noting, "[e]ach had a right to determine if unitization should be attempted and a converse power of withholding agreement to it."[248]

Recently, the Supreme Court of West Virginia considered the same question in *Gastar Exploration, Inc. v. Contraguerro*.[249] In the case, PPG Industries, Inc. (PPG) granted a lease covering multiple tracts to Gastar Exploration USA, Inc. (Gastar), including a 105.9-acre tract burdened with NPRIs.[250] Later, Gastar voluntarily pooled 700 acres from this lease, including the 105.9 acres, with other leases creating a unit called the Wayne/Lily Unit.[251] Gastar did not seek consent from any NPRI owners before creating the unit, but later on, it sought ratification after unit formation.[252] The NPRI owners in the 105.9-acre tract refused to ratify the unit.[253]

With the disputed royalties in suspense, the NPRI owners filed suit against Gastar and PPG in the trial court of Marshall County, both seeking the suspended royalties and arguing that PPG could not have given Gastar the right to pool the 105.9 acres with other acreage without consent from the NPRI owners.[254] The trial court granted partial summary judgment in favor of the NPRI owners and held that the pooling provision in the captioned lease (and the resulting unit) were nullities until the NPRI owners consented to the pooling.[255] In support of its holding, the court cited Texas case law stating that pooling effected a cross-conveyance of affected interests; the NPRIs were being conveyed to and among the other owners in the unit without consent.[256] Not surprisingly, PPG and Gastar sought appellate review.

The West Virginia Supreme Court reversed and held that West Virginia law does not effectuate a cross-conveyance of pooled royalty interests.[257] Instead, the supreme court noted that West Virginia case law determined that pooling merely amalgamates the financial and contractual components of the pooled interests but does not affect cross-conveyances of those interests.[258] Crucial to rejecting application of the cross-conveyance theory, the supreme court noted that its adoption would effectively give

247. *Id.* § 925.1.
248. 147 N.E.2d 69, 74 (Ill. 1957).
249. 800 S.E.2d 891, 893–94 (W. Va. 2017).
250. *Id.* at 895.
251. *Id.*
252. *Id.* at 896.
253. *Id.*
254. *Id.*
255. *Id.*
256. *Id.* at 896–97.
257. *Id.* at 900–01.
258. *Id.*

executive rights back to nonexecutive owners.[259] This reversal meant that a lease covering land burdened by NPRIs could be pooled without the consent or ratification of the NPRI owners.[260]

Louisiana and West Virginia provide superior jurisprudence to that found in Texas. Nearly all leases provide for voluntary pooling. An executive, acting in good faith, should be able to pool on behalf of nonexecutive mineral or royalty owners. The *Williams & Meyers* treatise agrees, opining:

> Little reason appears to support the Texas view that the executive, acting in good faith, may determine all lease provisions save one, whether the land should be pooled or unitized. . . . The self-interest of the executive can usually be trusted to protect the royalty owner from unwise or inappropriate pooling clauses . . . . The Louisiana position gives the executive the power he needs to procure a lease in many instances and facilitates the accomplishment of socially desirable ends of pooling and unitization.[261]

Another commentator has suggested that courts may simply have a "paternalistic" attitude towards NPRI owners.[262] For instance, in *Brown v. Smith*, the court explained its position by pointing out that pooling effectuates a cross-conveyance by each lessor and could dissipate the ownership interest of the NPRI owner.[263] Similarly, in *Ruiz*, the court may have wanted to prevent subjecting the NPRI owner's acreage to a lease maintained by production from an off-tract well.[264] While the mere difference in jurisprudence regarding the cross-conveyance theory of pooled interests between Texas and West Virginia may seem to have driven the opinion, the underlying bedrock of *Gastar Exploration, Inc.* lies in the court's recognition of the notion that nonexecutives have no power to make executive decisions: a phenomenon that lies beyond whether a particular jurisdiction applies the cross-conveyance theory or not.[265]

Another path of reform runs through the Texas legislature. A robust compulsory pooling statute would alleviate the NPRI ratification morass that case law has provided. Under a properly worded compulsory pooling statute, like in Oklahoma,[266] for example, a qualified party seeking forced pooling would be able to include NPRIs in the pool and not have to worry about separate questions of ratification. However, betting on the Texas legislature to quickly and correctly expand compulsory pooling authority is not a safe wager. A more realistic approach might involve a statute simply allowing lessors to subject NPRIs to the voluntary pooling authority common to oil and gas leases. The definitional lever for such a

259. *Id.* at 900.
260. *Id.* at 901.
261. 6 MARTIN & KRAMER, *supra* note 227, § 925.1.
262. Lynch, *supra* note 5, at 2.
263. Brown v. Smith, 174 S.W.2d 43, 46 (Tex. 1943).
264. Ruiz v. Martin, 559 S.W.2d 839, 842–43 (Tex. App.—San Antonio 1977, writ ref'd n.r.e.).
265. *See* Gastar Exploration, Inc. v. Contraguerro, 800 S.E.2d 891, 900 (W. Va. 2017).
266. *See* OKLA. STAT. ANN. tit. 52, § 87.1 (West 2019).

bill—necessary to simplify esoteric concepts for harried state politicians unfamiliar with a byzantine area of law like oil and gas—would be the executive right itself. Such a law would allow only the holder of the executive right attributable to a mineral interest and any nonexecutive interests carved from that mineral interest, such as NPRIs, to allow a lessee to voluntarily pool that mineral interest and all nonexecutive interests carved from that mineral interest. Legislation prohibiting NPRI owners from picking and choosing what to ratify and what not to ratify might work but could be difficult to draft because of the complexities of defining what qualifies as ratification, partial ratification, and so on, as well as what time limits, if any, should be placed on ratifications relative to discovery by the NPRI owner of the leasing and attempted pooling of their nonexecutive interests.

D. The Executive Right Ball-and-Chain

While courts in Texas have progressively extended the fortuitous position of NPRI owners, Texas oil and gas jurisprudence has empowered nonexecutive interests in other ways. For example, the executive or its lessee almost certainly has some duty to notify nonexecutives of their right to ratify community leases or pooling agreements, particularly if the executive has some knowledge of the identity and location of the nonexecutive.[267] In *Friddle v. Fisher*, the plaintiff acquired NPRIs that entitled him to 3/4 royalty in production from an 84.7-acre tract.[268] In 1998, defendants, who owned the underlying mineral estate, executed an oil and gas lease providing for a 1/8 royalty and containing a standard pooling clause.[269] The executive did not notify the plaintiff of the execution of the lease, the subsequent pooling of the leased acreage with an adjacent tract, or the drilling of a producing well on the adjacent pooled tract.[270] When the plaintiff learned these facts, he brought suit, and the court stated that if the holder of an executive right knows the identity and location of the holder of an NPRI, the executive's duty includes an obligation to notify the owner of the NPRI of a lease and of a pooling declaration or other agreement that may affect the NPRI owner's rights.[271] This duty to notify would be very burdensome after generational transfers: What due diligence must the executive perform?

The duty of an executive to nonexecutive interest owners has likewise been expanded. An executive owes a duty of good faith to the nonexecu-

267. While the Texas Supreme Court has not gone so far as to require the holder of the executive rights to search the official public records to determine the name and address of all the NPRI owners, the court has made clear that if the executive knows the name and location of an NPRI owner, "it [is] their duty to notify him of the lease amendment and account to him for his share of the payment as received." Andretta v. West, 415 S.W.2d 638, 641 (Tex. 1967).

268. 378 S.W.3d 475, 478 (Tex. App.—Texarkana 2012, pet. denied).

269. *Id.* at 478–79.

270. *Id.* at 479.

271. *Id.* at 482.

tive.[272] Depending on the jurisdiction, the scope of this duty ranges from a duty of utmost good faith to a fiduciary duty.[273] *In re Bass* found the Texas Supreme Court at first ruling that no duty to lease encumbered an executive and that no executive duty generally existed before leasing occurred.[274] Later, the court held that the executive right is exercised—and the duty to the nonexecutive invoked—*whenever* the executive does (or does not do) something that affects the value of a nonexecutive's estate.[275] While the supreme court refused to establish a general rule that the executive is liable for any refusal to lease, it did establish that a refusal by the executive to lease that stemmed from arbitrary self-dealing could be actionable.[276] While nonexecutive mineral owners and NPRI owners own very distinct interests and are potentially affected differently by the leasing activities of the executive right holder, both are nonexecutive interests.[277] In *Lesley v. Veterans Land Board*, explaining what the executive's fiduciary duty is, the supreme court opined, "We come now to the principal issue[ ] in the case: the nature of the duty that the owner of the executive right owes to the non-executive interest owner."[278] The court made no express distinction between nonexecutive mineral owners and NPRI owners, seemingly dispensing with any distinction in the fiduciary duty between a nonexecutive mineral interest owner and an NPRI owner.[279]

Combined with the incongruously favorable position an NPRI owner seems to hold after the train of cases described above, Texas lessors are now faced with a privileged class of nonexecutives to whom they hold a fiduciary-like duty in an overall climate of falling royalties. Those NPRIs may be miles from production and completely unknown until expansive and arduous title work is complete. Fortunately, at least, a lessee owes no duty to a nonexecutive unless it knowingly enters into an arrangement deliberately structured in such a way as to benefit the executive at the expense of the nonexecutive.[280]

E. Nonexecutive Ratification: An Oxymoron

Once separated, as when an NPRI is severed, the executive right, unless limited by the terms of its creation, is not only complete and irrevocable in Texas, but also perpetual: the "executive right granted or reserved to the holder, his heirs, successors and assigns is presumptively perpetual

272. *See* Manges v. Guerra, 673 S.W.2d 180, 183 (Tex. 1984).
273. *See id.*; Schlittler v. Smith, 101 S.W.2d 543, 545 (1937).
274. 113 S.W.3d 735, 745 (Tex. 2003).
275. Lesley v. Veterans Land Bd., 352 S.W.3d 479, 487–88 (Tex. 2011).
276. *Id.* at 491.
277. *Id.* at 487.
278. *Id.*
279. *See id.*
280. *See* KCM Fin. LLC v. Bradshaw, 457 S.W.3d 70, 86 (Tex. 2015). It may still be arguable, however, that the lessee might have a duty to notify owners of nonoperating interests of their right to ratify community leases or pooling agreements if the lessee knows that the holder of the executive right is profiting at the expense of the nonexecutive.

and hence purports to allow the creation of interests in real property that will vest at some indefinite time in the future."[281] In other words, the nonexecutive interest owner retains none of the perpetual real property estate that makes up the executive estate. How can the NPRI owner exercise any executive control (like ratification) when he never had such ability to start?

When the *Montgomery* court surmised that application of either the pooling or the entireties clause (or both) would "allow the holder of the executive rights to either diminish or enlarge the ownership of that of the royalty owner,"[282] it inaccurately construed what pooling and unitization actually does to royalty interests. The court also failed to consider the duty owed by executives to nonexecutives and the requirement of good-faith pooling. Pooling changes the spatial extent of a divided mineral or royalty interest—and likely changes the amount of royalty owed to royalty owners as the interest is apportioned across the pool—but it does not change the fundamental properties of the interest.[283] In any event, it is the change in royalty revenue after pooling over which royalty owners sue, not abstract notions of possible diminishment or enlargement of the legal definition of the extent of their real property estate.

The mistakes continued. The *Montgomery* court seemed to confuse the interest of a mineral cotenant and an NPRI when it opined:

> We think that the non-participating royalty owner, so far as the existence of an option is concerned, occupies a comparable position to that of a cotenant under a lease made by his cotenant or a non-participating royalty owner under a pooling agreement made by the holder of the executive rights.[284]

This is a basic error, and later cases—like *London*—that seem to have propagated this thinking have compounded the mistake.NT1,FN='314'> First, obviously, mineral interest cotenants are fundamentally different from NPRIs.[285] Cotenants are separate fee interests, whereas freestanding interests like NPRIs are carved from a mineral estate.[286] Second, nonexecutive interests simply do not participate in the self-development or leasing of minerals—or accepting judicially conjured "offers" to create community leases.[287] When the *London* court opined that leases purporting "to authorize the lessee to pool the royalty rights of the non-participating royalty interest owner with other royalty interest owners . . . is

281. RICHARD HEMINGWAY ET AL., OIL AND GAS LAW AND TAXATION § 2.2(C) (4th ed. 2004).

282. Montgomery v. Rittersbacher, 424 S.W.2d 210, 213 (Tex. 1968).

283. *See* French v. George, 159 S.W.2d 566, 569 (Tex. App.—Amarillo 1942, writ ref'd).

284. *Montgomery*, 424 S.W.2d at 214.

284. *See* London v. Merriman, 756 S.W.2d 736, 739 n.1 (Tex. App.—Corpus Christi–Edinburg 1988, writ denied).

285. *See* Benjamin Holliday, *New Oil and Old Laws: Problems in Allocation of Production to Owners of Non-Participating Royalty Interests in the Era of Horizontal Drilling*, 44 ST. MARY'S L.J. 771, 798–99 (2013).

286. Plainsman Trading Co. v. Crews, 898 S.W.2d 786, 788 (Tex. 1995).

287. 1 SMITH & WEAVER, *supra* note 2, § 2.6(A)(1).

essentially an offer by the lessor to the other royalty interest owners to create a community lease by ratifying the lease,"[288] it not only erroneously equated executive mineral-owning lessors to royalty owners but also ascribed to nonexecutive royalty interests the ability to accept offers to lease and, possibly, even to choose (by ratification) which terms to accept, such as pooling and entireties clauses. Third, if NPRIs are fundamentally nonexecutive interests, how do they have the executive power to ratify, or not ratify, pooling in the first place?

This paternalistic approach taken by Texas courts towards NPRI owners is unnecessary to protect them from rapacious lessors and lessees. Regarding the former, the duty of the executive right adequately protects nonexecutive interests; no further power need be retained by the NPRI to protect it from action by the executive. With regard to the latter, robust case law in producing states already requires good-faith voluntary pooling by lessees toward lessors.[289] Allowing a lessor to give the lessee pooling authority over the leased interests—including NPRIs derived from the leased interest—will not abjure the lessee from the requirement of good-faith pooling to the executive (who, in turn, owes a duty to the nonexecutives) and will provide legal recourse if the standard is not met. The author submits that a lease that purports to authorize the executive's lessee to pool the (nonexecutive) royalty rights of the NPRI owner with other royalty interest owners does just that.

F. Lease Terms and Ratifications

The above suggestions would fundamentally alter the relationship between lessors, lessees, and nonexecutive interests. While the author has no illusions that such changes are likely in the near term, what should happen within the boundaries of the current legal landscape?

1. *Extent of Ratification*

Within the current jurisprudence, the court in *Brown v. Smith* had it correct: if an NPRI owner joins a lease, its interest should necessarily be subjected to any pooling agreement in the lease.[290] *All* terms within leases ratified and assumed by NPRIs should be strictly applied to the ratifying interests. If those leases provide for a production-unit-based royalty allocation, the ratifying parties should be held to those terms. Even if the NPRI interests are apportioned across the entirety of the leases as a matter of law, if the terms of the leases expressly provide otherwise, the terms of the ratified instrument should apply. This would seem true especially if the nonexecutive interest owner expressly ratifies

288. *London*, 756 S.W.2d at 739 (citations omitted).

289. *See* Lowe et al., *supra* note 22, at 530–46 (containing a lengthy survey of case law from various states that describes what constitutes evidence of good-faith and bad-faith pooling and how to avoid the latter).

290. *See* Brown v. Smith, 174 S.W.2d 43, 46 (Tex. 1943).

the lease and records that ratification in the official public record for the notice of all third parties, including the lessee and its successors.

A number of the cases described above used in support of the theory of communitized royalty across the entire leased acreage involved Producer's 88 forms.[291] Such leases typically do not contain the extensive tract-basis allocations more often found in lessor-drafted leases that cover large tracts and may involve multiple undivided interests leasing across the same described leasehold.[292] In contrast to the form leases, leases drafted by lessors—some of which approach a hundred pages in length—commonly contain extensive and detailed provisions that are inconsistent with the very basic provisions contained in Producer's 88 forms or similar forms drafted by lessees, making attempts by non-ratifying NPRI interest owners to share in royalty on a lease-wide, communitized basis inappropriate.[293] Consider the effect of an NPRI owner miles away from actual production expressly ratifying one or more leases that contained one or more of the following clauses (all of which are commonly found in lessor-drafted leases that cover large tracts):

> *Payment of Royalty*: Provisions that the royalties will be paid to each mineral interest owner to the extent that the owner owns interest in the actual production.
>
> *Production Units*: Provisions that each production unit surrounding any wells drilled on the leased acreage shall be a certain size, as agreed or provided by state conservation regulation, depending on whether the well is oil or gas. Similarly, provisions that allow lessee to designate the smallest proration units.
>
> *Retained Acreage*: Provisions that only productive tracts shall be held into the secondary term by production in paying quantities from the appropriate well.
>
> *Separate Lease*: Provisions that each production unit is to be treated as a separate lease.
>
> *Termination and Release*: The lease terminates as to all lands covered at the end of the primary term except for lands within a production unit.

If an NPRI owner or other nonexecutive mineral interest owner expressly ratifies all of the terms of a lease or leases that contain such terms, records that ratification, and then finds that the interest is not included in production units, it seems preposterous that the NPRI owner can then argue that those particular terms do not apply to its interest after expressly agreeing to have its interest governed by *all* of the terms. None of

291. *Ruiz v. Martin*, 559 S.W.2d 839, 841 (Tex. App.—San Antonio 1977 writ, ref'd n.r.e.) and *London*, 756 S.W.2d at 739, mentioned use of Producer's 88 forms, excerpted lease provisions commonly included in Producer's 88 leases, or both, in the description of the backgrounds to their respective disputes. It is likely some of the other cases involved similar form leases, but the opinions in those cases do not make it clear.

292. *London*, 756 S.W.2d at 740 n.3.

293. *See id.*

these provisions are commonly included in a typical two-page, lessee-drafted oil and gas lease, such as the various Producer's 88 forms promulgated over the years, which are found at issue in the cases described above. As the court noted in *London*, "[b]ecause of its pooling clause, the standard form Producer's 88 lease . . . is ill-equipped to handle the complexities inherent in multi-tract and multi-royalty situations."[294]

This picking and choosing of what lease terms the nonexecutive interest owner will ratify descends to nonsensical depths if one goes another step and considers the situation (as seen in the large-lease ligation described above) of an owner of multiple NPRIs within one large lease (possibly a community lease) or a pool of leases. As we have seen, NPRI owners on non-well tracts ratify leases (to get apportioned royalties instead of nothing),[295] while NPRI owners on well tracts do not ratify leases (to get unapportioned royalties instead of apportioned royalties).[296] What if the same party owns both NPRIs in the same community lease or pool of leases? Can the NPRI owner choose which interest ratifies? Even though it seems remarkably opportunistic to allow such a ploy, the identity of the owner of a particular NPRI relative to other NPRIs seems not make a difference under the current state of Texas law.

2. *Ratification Status and Timing*

Another step to consider beyond selective ratification among an inventory of NPRIs owned by one party in a lease is whether or not an NPRI owner can *change* the status of a particular ratification. It appears that an NPRI owner could ratify at any time, meaning that if the first production unit covers all or a portion of its NPRI, an NPRI owner likely won't ratify now but will later if the production from the lease shifts off the extent of its NPRI.[297] The reverse of this process is only possible if revocation of a lease ratification is allowed. Because ratification necessarily recognizes a lease as a conveyance in Texas and revocation is a statement saying that an agreement or contract is no longer in effect, it follows that a mere revocation should not reverse the conveyance of rights found in an unconditional ratification. Given the creeping ascendancy of the NPRIs' power over pooling and other terms of a lease, however, revocation of lease ratification could be lurking in future case law. For example, while a court might not allow revocation in general, what if the NPRI holder ratifies but "reserves" the right to revoke prospectively? Is this a real property right, and if so, what is its nature and extent?

Ratification is sometimes the result of a judicial opinion that arises from other actions considered, in the circumstances, to be de facto ratification as a matter of law for some other reason—not the result of express

294. *London*, 756 S.W.2d at 740 n.3.

295. *See, e.g.*, Verble v. Coffman, 680 S.W.2d 69, 70 (Tex. App.—Austin 1984, no writ).

296. *See, e.g.*, Brown v. Getty Reserve Oil, Inc., 626 S.W.2d 810, 814 (Tex. App.—Amarillo 1981, writ dism'd w.o.j.).

297. *See, e.g.*, Montgomery v. Rittersbacher, 424 S.W.2d 210, 214 (Tex. 1968) (holding that ratification of the NPRI occurred when the royalty owner filed suit).

adoption by the nonexecutive interest owner, such as the filing of a lawsuit in *Montgomery*.[298] Although a less clear-cut situation than when all the terms of a lease are expressly ratified and recorded, here, too, the judicially ordered ratification should be considered to apply to all of the terms of the lease. This will not only reflect that the ratifying interest is truly nonexecutive and is either included in the terms of the lease (as is properly done in Louisiana) or not (as is still found in Texas) but also ease the interpretation of the ratification for the benefit of subsequent title analysts.

The progression of case law in Texas has led to NPRI owners being cagey about ratification and waiting for the outcome of wells in a pool to be known before pulling the trigger—or not—on ratification. Case law in Texas is murky about what, if any, time limits for ratification exist. One opinion established that the right to ratify could be lost to laches after, in that case, the passage of merely three years.[299] On the other hand, in *Montgomery*, the well located on the Crutchfield tract was completed in October 1956, shut in, then put on production in May 1958.[300] The dry hole drilled on land pooled with the First Tract was plugged in 1961.[301] By the supreme court's ruling, Montgomery ratified the lease on May 12, 1964.[302] Rittersbacher might have successfully argued that Montgomery should have ratified within a reasonable time, as Montgomery might have then lost that right on the grounds of laches.[303] Laches was not argued in the case. By waiting to ratify, Montgomery was able to wait until a well was drilled on the First Tract. If the well had been a much more prolific producer than the well drilled on the Crutchfield tract, Montgomery would not have ratified the entireties clause.

Any time limit, such as the statute of limitations, must have a beginning point. Many times, NPRI owners are unaware of production on a particular lease and the spatial relationship of such production to their interests. Is the spatial extent of pooled acreages "inherently undiscoverable" by affected NPRI owners in such a way as to prevent the clock's running under the relevant statute of limitations? For example, in *Montgomery*, prior to ratification, when Montgomery claimed to be unaware of the unauthorized production, he lost any royalties paid on production from the Crutchfield tract.[304] Therefore, the timing of ratification may lead back to the duty of executives to notify owners of nonoperating interests of their right to ratify community leases or pooling agreements, even if the executive would rather let sleeping dogs lie.[305] Without giving such notice, it

298. *Id.* at 214.
299. Nugent v. Freeman, 306 S.W.2d 167 (Tex. App.—Eastland, 1957, writ ref. n.r.e.).
300. *Montgomery*, 424 S.W.2d at 212.
301. *Id.*
302. *Id.* at 215 (Calvert, J., dissenting).
303. *See id.*
304. *Id.* at 215 (majority opinion).
305. *See* De Benavides v. Warren, 674 S.W.2d 353, 360 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.) (an executive's duty requires notification be given to the nonexecutive of the execution of a lease allowing for the creation of a pooled unit that may include the

could be argued that the executive is prevented by estoppel from claiming that the nonexecutive failed to ratify the pooling within a reasonable time.[306] In some cases, however, the nonexecutive will be placed on record notice by the recordation of pooling or even the recordation of a lease with a pooling clause. Certain knotty factual situations may raise questions of whether the nonexecutive had actual notice of the leasing and pooling. What should the statute of limitations be in those situations? The direction of case law in Texas suggests a forgiving attitude toward NPRI owners, but should the NPRI owner be given a pass on "discovering" a lease with a recorded pooling provision or a recorded pooling when the NPRI owner actually knew—or should have known—of the pooling? These litigious questions are mooted in a regime where an executive, acting with necessary regard toward the nonexecutives, may execute a lease granting pooling authority on behalf of royalty owners.

G. Interest Creation and Defensive Measures

Can opportunistic ratification by nonexecutive interests be entirely avoided? Such a remedy may require a time machine for most, but when a nonexecutive interest is created, the parties could specifically authorize the executive to pool the property on the nonexecutive's behalf, to execute a lease that contains an entireties clause, or both.[307] The Texas Supreme Court, in *Montgomery*, suggested that if the executive wishes to prevent the NPRI from potentially falling within the operation of an entireties or pooling clause, the executive should take "affirmative steps" to exclude the interest from the operation of an entireties or pooling clause.[308]

1. Leasing and Lease Terms

Protective leasing measures may be helpful to lessors and lessees concerned about opportunistic ratifications by freestanding royalty owners. If title is known, separate leases could be taken on each tract over which the royalty ownership varies with its neighbor(s). Of course, the state of title may be unknown as to any varying degree of royalty burdens across the desired acreage.[309] In addition, smaller leases may not be large enough to either individually permit drilling wells in spacing units that satisfy state conservation laws or to prevent drainage across lease boundaries, and implied covenant obligations may follow.[310]

nonexecutive interest). *See generally* Ernest E. Smith, *The Standard of Conduct Owed by Executive Right Holders and Operators to the Owners of Nonparticipating and Nonoperating Interests*, 32 Inst. on Oil & Gas L. & Tax'n 241, 252–55 (1981).

306. *Warren*, 674 S.W.2d at 359–60 (nonexecutives were permitted to retroactively ratify back to the date of first production—*thirteen years before*—in a unit that was later dissolved seven years prior to ratification).

307. *See Montgomery*, 424 S.W.2d at 213.

308. *Id.*

309. Lowe et al., *supra* note 22, at 683.

310. *See* 2 Smith & Weaver, *supra* note 2, § 9.1(A).

Despite a footnote in *London* noting that one prominent commentator had promoted the idea that "the lessor of a non-producing tract cannot exclude the non-executive's interest from a pooled unit without the non-executive's consent,"[311] protective lease drafting measures may provide solace—or at least provide evidence of intent when the litigation starts. For example, the court in *Standard Oil Co. v. Donald* suggested that the express exclusion of the mineral estate of other interest owners from the lease could prevent the possibility of ratification or the execution of separate leases.[312] The *French* court held that royalties should be paid in the proportion that any particular lessor's acreage bears to the entire lease but noted that the parties could certainly agree otherwise.[313] Optimistic executives have drafted pooling clauses expressly excepting any nonexecutive from their coverage in the leased acreage.[314] Despite the discouraging state of case law, hopeful practitioners may try drafting entirety clauses for multi-tract leases that expressly provide that the lessor has not apportioned royalties and that the lessee has no authority to do so.

Post-leasing, one way for lessees to protect themselves from opportunistic NPRI ratification is to seek ratification before exploration and production activities begin. This will allow the lessee/producer at least to have an idea what of royalty burdens exist before making a final determination on whether to drill. Such a protective option may not be available, however, if the royalty interests burdening a tract are unknown to the lessee and lessor. This is a very real possibility if the leased tract is large, the exact total extent of the leased acreage is unsure, and the NPRIs are located far from the tract targeted for development. In such a circumstance, title to each interest over the entire leased region would have to be examined and calculated, a potentially perilous and definitely expensive and time-consuming task made impracticable by the economic realities of the business.[315]

Even if title and burdens across the entire leased tract are determined with relative surety and the lessee has not yet lost its bargaining leverage with NPRIs because it waited to drill until after seeking ratification, the haggling now begins.[316] "Ratify this lease," the lessee demands. NPRI owners on the drill tract refuse while those not on the drill tract rush to ratify. "Ratify this lease, or I won't drill, and no one gets royalties," the lessee demands again. The drill tract NPRIs may now acquiesce—or

311. London v. Merriman, 756 S.W.2d 736, 740 n.3 (Tex. App—Corpus Christi–Edinburg 1988, writ denied) (citing Ernest E. Smith, *Implications of a Fiduciary Standard of Conduct for the Holder of the Executive Right*, 64 TEX. L. REV. 371, 391–95 (1985)).

312. Standard Oil Co. v. Donald, 321 S.W.2d 602, 606 (Tex. App.—Fort Worth 1959, writ ref'd n.r.e.) ("No intention to communitize the royalties would have been manifested had appellees excluded from the lease the mineral estate of the other parties, or had they executed a separate lease . . . .").

313. French v. George, 159 S.W.2d 566, 569 (Tex. App.—Amarillo 1942, writ ref'd).

314. Interview with Randall Sadler, Title Attorney & Managing Partner, Sadler Bieber Law Grp. PLLC in Hous., Tex. (June 15, 2019).

315. *See* LOWE ET AL., *supra* note 22, at 683, 686.

316. *See* Holliday, *supra* note 285, at 794 n.147, 802.

not—but this all takes time, the lease is possibly counting down to expiration, and the lessor wants development now, possibly because of high prices or drainage from the lease caused by proximal drilling.[317]

2. Allocation Wells

Many—if not most—oil and gas wells being drilled in Texas today are horizontal wells.[318] As such, the use of allocation wells may be considered a way around the problem of pooling clauses and NPRI ratification woes, although this confidence may be misplaced in some circumstances. Allocation wells are horizontal wells that cross the boundary of two or more unpooled leases where no agreement has been made as to how production will be portioned.[319] Allocation wells have some appeal as a means of confronting opportunistic NPRI ratification because no representation of pooling would need to be made.[320]

When considering a pool composed of several discrete leased tracts, unleased minerals interests, and NPRIs within the pool but not in tracts with any portion of a horizontal well (or in large tracts within the pool that only contain a small portion of the horizontal well), those interests will likely ratify the lease.[321] If pooling never occurs, however, and the horizontal well is instead drilled as an allocation well, there will be no pooling to ratify and such non-drill tract interest owners would not participate in the well.[322] This phenomenon may prove favorable to lessors and NPRI owners on the drill tracts that do not want the royalties apportioned over an entire pool to include non-drill tract interest owners.

While allocation and production sharing agreement (PSA) wells[323] may seem like salvation regarding non-drill tract interests, such wells do come with disadvantages that may limit their utility. Pooling allows for the division of interests on a tract basis, whereas allocation and PSA wells derive their payment obligations on a well-by-well basis.[324] Further, absent pooling, lessors have not bound themselves to the payment allocation formula for pooled interests.[325] This potentially leads to challenges of the lessee's allocation methodology. And, of course, allocation and PSA wells do not

317. *See id.* at 812 n.279.

318. *See generally* Bret Wells, *Allocation Wells, Unauthorized Pooling, and the Lessor's Remedies*, 68 Baylor L. Rev., 1, 2 n.1 (2016).

319. Clifton A. Squibb, *The Age of Allocation: The End of Pooling as We Know It?*, 45 Tex. Tech L. Rev. 929, 930 (2013).

320. *Id.* at 931.

321. *Id.* at 933.

322. *Id.* at 931.

323. A production sharing agreement is an agreement when the mineral interest owner(s) and the lessee agree in writing on an allocation methodology for production from a particular well, as that well relates to the tract in which the mineral interest owner(s) owns an interest. 1 Martin & Kramer, *supra* note 227, § 17.05. In contrast, an allocation well involves no agreement with the mineral interest owner(s). Squibb, *supra* note 319, at 947.

324. Squibb, *supra* note 319, at 933.

325. *Id.*

maintain non-drill-site leases, as pooling does.[326]

More generally, relying on allocation or PSA wells presents legal risks simply because case law has not conclusively established that they are even allowed under "typical" oil and gas leases.[327] It is also unclear what exactly a lessee must show to prove that its production allocation scheme is reasonable so as to avoid lawsuits by interest owners who believe they are being shortchanged.[328]

In some cases, allocation and PSA wells may not help in any event. When considering one large lease, no property boundaries may end up being crossed by a particular horizontal well.[329] In such a circumstance, no application for an allocation or PSA well is likely to be seen as necessary. Indeed, the Railroad Commission will probably look askance at such an application, as no lease boundaries would be crossed, and no Rule 37, 38, or 86 exceptions would likely be necessary. Such a maneuver might even suggest that the lessee or lessors were attempting to avoid ratifications from NPRIs located a significant distance from the horizontal well under a misbegotten notion of bad faith by the executive and his lessee. Given the case law and the favorable treatment given to NPRI owners described above, relying on allocation or PSA wells within a single lease or community lease to avoid ratification of pooling clauses by NPRI owners may be challenged by NPRI owners.

VI. CONCLUSION

Steps, both small and large, should be considered to improve the operation of law on nonexecutive interests. When an NPRI owner files ratifications of leases in which the NPRI owner expressly agrees to make its NPRI subject to the terms of the leases, including terms providing for tract-basis payment of royalty and clauses establishing separate leases for each proration unit, the NPRI is subject to all terms of the ratified leases. Judicial determinations that an NPRI owner has acted in a way to constructively ratify a lease should carry the same weight. If leases are deemed community leases, they are communitized at the time of execution by the lessors and not later, when an NPRI owner within the leased acreage files ratifications of said leases in the public property records. Another small step would be requiring NPRI claimants for royalty to prove dubious title assertions instead of just presenting speculative acreage calculations and expecting a check.

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326. *Id.*

327. Andrew Zeve et al., *PSA and Allocation Wells—The Current State of Play*, ENERGY LEGAL BLOG (Oct. 13, 2016), https://www.energylegalblog.com/blog/2016/10/13/psa-and-allocation-wells-%E2%80%93-current-state-play [https://perma.cc/UY93-CZ9J].

328. *See id.* For an idea of the conflicting views regarding the legal nature of allocation and PSA wells, compare Wells, *supra*, note 318, with Ernest E. Smith, *Applying Familiar Concepts to New Technology: Under the Traditional Oil and Gas Lease, a Lessee Does Not Need Pooling Authority to Drill a Horizontal Well That Crosses Lease Lines*, 12 TEX J. OIL GAS & ENERGY L. 1 (2017).

329. Smith, *supra* note 328, at 555.

Another step in the direction of sounder oil and gas jurisprudence will avail itself the next time a Texas appellate court is asked to consider one or more leases that, with unambiguous language, exclude from the coverage of the pooling powers granted in the lease any nonexecutive interest within the leased acreage. In this circumstance, the author hopes the court would recognize that the nonexecutive had no pooling power to ratify in the lease. Although this might lead to a subsequent claim by the nonexecutive that the executive had violated its duty of utmost good faith and fair dealing by disallowing the NPRI from participating in pooling and collecting royalty derived from non-tract production even if the nonexecutive ratified the lease,[330] it might also ultimately push Texas courts to recognize that nonexecutive interests are, in fact, nonexecutive.

The fundamental failure that introduced the detrimental landscape regarding nonexecutive interests seen today in Texas is the inability of lessees to voluntarily pool NPRIs unless the severing instrument creating the NPRI allows it.[331] This permits nonexecutive interest owners to exercise executive powers.[332] Texas jurisprudence needs to recognize, as in Louisiana and West Virginia, that nonexecutive interests should not wield executive powers and that nonexecutive interests are already protected by a robust and modern line of case law establishing both a duty of good-faith pooling by the lessee and a duty of utmost good faith and fair dealing.[333] Recourse is available to nonexecutives if those duties are not met, in addition to equitable remedies through implied covenants and possibly through compulsory pooling.[334]

As things stand, not only can an NPRI owner choose whether a pooling clause affects the interest, it can also seemingly choose what other terms of the lease may apply to the interest. Further, it is likely the owner can choose which NPRIs it owns in a leased tract or pool will ratify the lease and which will not. To make matters more difficult for lessors and lessees, express ratifications recorded in the official public records are not even necessary to ratify leases; rather actions such as suing for royalties can suffice.[335]

Allowing NPRIs to pool and conduct other executive actions leads to negative practical effects. Large tracts burdened by NPRIs in places miles from production will breed litigation sown by opportunistic ratification. This will hinder production, as royalty calculations in areas with imprecise title data will be expensive, time-consuming, and potentially inaccurate, leading to still more litigation. With ratification now allowed by other means besides a recorded notice, woe to the title examiner who must con-

330. *See* MCZ, Inc. v. Triolo, 708 S.W.2d 49, 54 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.).

331. *See* Shade & Blackwell, *supra* note 12, at 138.

332. *See* Montgomery v. Rittersbacher, 424 S.W.2d 210, 215 (Tex. 1968).

333. *See* 6 Martin & Kramer, *supra* note 227, § 925.1.

334. *See* Mineral Interest Pooling Act, Tex. Nat. Res. Code §§ 102.001–102.112 (1977).

335. *See Montgomery*, 424 S.W.2d at 214.

sider what actions by the NPRI owner may have tripped the ratification switch and what terms of the lease were accepted. All this dampens incentives for development. Yes, the lessee can seek ratifications from all NPRIs before development, but this costs time and money and may not help in situations where the NPRIs are located far from production and title is far from settled.

Finally, maybe the bottom hasn't even been reached, and worse is to come. Texas has not yet seen a case in which the lessors of a community lease were paid on a spacing-unit basis, as provided for in the lease, while a ratifying NPRI owner was paid on a lease-wide basis or a unit-wide basis, as if the NPRI owner were in a unit even if no unit existed. However, such an injudicious result could occur in the case of large leases burdened with relatively small NPRIs or other nonexecutive interests—interests that are perhaps miles away from the productive spacing units. This would put nonexecutive interests in an even *better* position than that of the executives themselves. Recognizing the sensible limits on nonexecutive rights proffered above would help prevent taking this misguided last step.