

NON-CONSENTING MINERAL INTERESTS

**DALLAS ASSOCIATION OF PROFESSIONAL LANDMEN
DALLAS PETROLEUM CLUB
SEPTEMBER 10, 2007**

**George A. Snell, III
Attorney at Law
Herring Bank Building, Suite 508
2201 Civic Circle
Amarillo, TX 79109
Ph: 806-359-8611
Fax: 806-355-3339
gasiii@nts-online.net**

TABLE OF CONTENTS

Page

I. SCOPE 1

II. TENANTS IN COMMON (CO-TENANCY)

A. GENERAL RULES

 1. What is a Tenant in Common? 1

 2. What Rights Does a Non-Consenting Tenant in Common Have? 2

 a. Generally 2

 b. Production in Kind 3

 3. What Rights Does the Drilling Cotenant Have? 3

B. WHAT COSTS ARE RECOUPABLE BY THE DRILLING COTENANT? 4

 1. What Costs Are Included and What Costs Are Not? 4

 a. Generally 4

 b. Dry Holes after Production Established on the Tract 4

 2. What Does “Reasonable and Necessary Costs” Mean? 5

 3. Allocation of Costs in Drilling to Non-Productive Depths
 Before Establishing Production at a Shallower Depth 5

C. WHAT MARKETING DUTIES DOES A DRILLING COTENANT OWE
HIS NON-CONSENTING COTENANT? 6

D. IS PAYOUT OF A NON-CONSENTING COTENANT’S INTEREST
DETERMINED ON A LEASE BASIS OR A PER WELL BASIS? 6

III. RIGHTS OF UNDIVIDED, NON-DRILLSITE TRACT OWNERS TO
PARTICIPATE IN PRODUCTION 7

A. GENERALLY 7

B.	LEASE DESCRIBING NON-DRILLSITE OWNER’S TRACT	7
1.	Unleased Mineral Interest Owners	7
2.	Community Leases	8
3.	Subdivision After Lease	8
C.	POOLED UNIT DESCRIBING NON-DRILLSITE OWNER’S TRACT	9
IV.	REMEDIES OF NON-DRILLSITE TRACT OWNERS	9
A.	GENERALLY	9
B.	REGULATORY REMEDIES	10
1.	Spacing Exceptions	10
a.	Property Line	10
b.	Standing	11
2.	Density Exceptions	11
3.	Allowable Considerations	12
4.	Force Pooling	12
a.	Legal Restrictions	13
(I)	Discovery date of the field	13
(ii)	Special field rules	13
(iii)	State lands	13
(iv)	Common reservoirs	13
(v)	Productive acreage	13
(vi)	Voluntary offer to pool	13
b.	Practical Considerations	14
(I)	Effective date of the MIPA order	14
(ii)	Complexity of the proceeding	14
(iii)	Costs	15

C.	RATIFICATION AS A REMEDY FOR A NON-DRILLSITE INTEREST OWNER	15
1.	Generally	15
2.	Non Cost-Bearing Interest	15
a.	Royalty Owners With Executive Rights	15
b.	Non-Participating Royalty Interests	18
3.	Cost-Bearing Interests	24
V.	HORIZONTAL WELLS - NEW ISSUES	
A.	Browning Oil Co., Inc. v. Luecke	
1.	The Facts	27
2.	The Issues	29
3.	The Result	30
a.	The Charge to the Jury Concerning Damages	28
b.	The Pre-Judgment Interest Issue	31
B.	Paying Royalty	
1.	Pay Royalty on a Surface Acreage Basis	32
2.	Pay Royalty on Percentage of the Horizontal Drain Hole	32
3.	Pay Royalty on a Productive Acreage Basis Along the Horizontal Drain Hole	32
4.	Confusion of Goods	32
VI.	INDEX OF CASES AND ARTICLES	

HOW TO DEAL WITH NON-CONSENTING MINERAL INTERESTS

I. SCOPE

The ownership of minerals is becoming increasingly fragmented. This fragmentation causes numerous problems concerning the rights, obligations and remedies of the numerous competing interests. The purpose of this article is to summarize the basic legal considerations applicable to both unleased mineral owners and lessees of undivided mineral interests in the same tract of land. I assume that the parties are unable to reach agreement as to the contractual terms necessary to allow them to participate in production and, where applicable, the payment of the costs attendant to obtaining such production. We will discuss both the common law rules as to co-tenancy and pooling as well as the applicable regulatory considerations.

II. TENANTS IN COMMON (CO-TENANCY)

A. GENERAL RULES

1. **What is a Cotenant?** A co-tenancy is not an estate in land but a relationship between persons. *Bradshaw v. Holmes*, 246 S.W.2d 296 (Tex. Civ. App.--Amarillo 1952, writ ref'd n.r.e.); *Meadors v. Moore*, 113 S.W.2d 689 (Tex. Civ. App.--Texarkana 1938), aff'd 134 Tex. 127, 132 S.W.2d 256. The primary characteristic of a co-tenancy is the common right of several different owners to possess and use the same property. *Republic Production Co. v. Collins*, 7 S.W.2d 187 (Tex. Civ. App.--Eastland 1928, writ ref'd). Although the term typically includes both joint tenancies and tenancies in common, any distinctions between the two are not material to this paper. As used herein, the terms "drilling cotenant" and "operating cotenant" refer to a cotenant who is drilling and/or operating on the land, whether that cotenant is the mineral owner himself or is the lessee of a mineral owner. "Non-consenting cotenant" refers to a cotenant who has not agreed to participate in the operations of the operating cotenant. Occasionally, the interest held by a non-consenting cotenant is referred to as the "non-consenting interest."

A present right of possession is an essential element of a co-tenancy. *Reed v. Turner*, 489 S.W.2d 373, 381 (Tex. Civ. App.--Tyler 1972, writ ref'd n.r.e.). Thus, the relationship between life tenants and remaindermen is not one of co-tenancy. *Cline v. Henry*, 239 S.W.2d 205, 208 (Tex. Civ. App.--Dallas 1951, writ ref'd n.r.e.). The present owners of undivided portions of oil and gas rights in and under real estate, however, are usually tenants in common. *Willson v. Superior Oil Co.*, 274 S.W.2d 947, 950 (Tex. Civ. App.--Texarkana 1954, writ ref'd n.r.e.). Further, the lessee of such a cotenant becomes a cotenant with the co-tenants of his lessor. *Id.* Additionally, the relationship between a contract operator of producing properties who owns a non-leasehold interest and a working (cost-bearing) interest owner may be governed by principles of co-tenancy law under the theory that the operator is acting as the agent of the participating co-tenants, i.e., the co-tenants who hired the operator. See *Neeley v. Intercity Management Corp.*, 732 S.W.2d 644, 646 (Tex. App.--Corpus Christi 1987, no writ).

Holders of non-participating royalty interests are also co-tenants of those mineral interest owners who do have the right to lease. *Eternal Cemetery Corp. v. Tammen*, 324 S.W.2d 562, 564 (Tex. Civ. App.--Fort Worth 1959, writ ref'd n.r.e.). Owners of separate lands embracing a common reservoir of oil and gas, however, do not own the reservoir as co-tenants; instead, each owns the oil and gas within the portion of the reservoir underlying such party's tract. *Texon Drilling Co. v. Elliff*, 210 S.W.2d 553, 556 (Tex. Civ. App.--San Antonio 1977), rev'd on other grounds, 146 Tex. 575, 210 S.W.2d 558.

A cotenant usually is neither the partner nor the agent of another cotenant and generally, without express authorization, cannot act for another cotenant. *Horlock v. Horlock*, 614 S.W.2d 478, 485 (Tex. Civ. App.--Houston [14th Dist.] 1981, writ ref'd n.r.e.). But, see *Tammen*, 324 S.W.2d at 564 (stating the co-tenancy between non-participating royalty owners and other mineral owners holding leasing rights partook the nature of a partnership.) Thus, in the absence of an agreement, there is no fiduciary or agency relationship between co-tenants. *Donnan v. Atlantic Richfield*, 732 S.W.2d 715, 717 (Tex. App.--Corpus Christi 1987, writ denied); *Zimmerman v. Texaco*, 409 S.W. 2d 607, 614 (Tex. Civ. App.--El Paso 1966, writ ref'd n.r.e.). In *Zimmerman*, the El Paso Court of Appeals held that the drilling cotenant had no duty or obligation to drill or produce for the benefit of the non-operating cotenant to prevent the alleged drainage by adjacent operators. There is also no duty of any cotenant to join with other co-tenants in leasing the jointly owned property for mineral development. *Hamman v. Ritchie*, 547 S.W.2d 698, 706 (Tex. App.--Fort Worth 1977, writ ref'd n.r.e.).

A cotenant of the mineral estate holding executive rights, however, may owe a fiduciary duty to the non-executive co-tenants and may breach that duty by leasing the property and extracting special benefits which the non-executives do not receive. See *Manges v. Guerra*, 673 S.W.2d 180, 183-84 (Tex. 1984); see also *Smith, Implications of a Fiduciary Standard of Conduct for the Holder of the Executive Right*, 64 Texas L. Rev. 371, 372-80 (1985).

2. What Rights Does a Non-Consenting Cotenant Have?

a. **Generally.** A cotenant of a mineral interest has the same remedies as are available to co-tenants of real property in disputes among co-tenants or between co-tenants and third parties. See *Taylor v. Higgins Oil & Fuel Co.*, 2 S.W.2d 288, 295 (Tex. Civ. App.--Beaumont 1928, writ dism'd w.o.j.). For instance, a mineral cotenant has the right to seek partition. *Goodloe & Meredith v. Harris*, 127 Tex. 583, 94 S.W.2d 1141, 1144 (Tex. Comm. App. 1936, opinion adopted); *Gilbreath v. Douglas*, 388 S.W.2d 279, 282 (Tex. Civ. App.--Amarillo 1965, writ ref'd n.r.e.). The principal right of non-consenting co-tenants against operating co-tenants is to receive their proportionate share of the oil and gas produced, less their proportionate part of the costs of discovery and production without sharing in the risk of unsuccessful development. *White v. Smyth*, 147 Tex. 272, 214 S.W.2d 967, 978 (1948). The non-consenting co-tenants may also be able to adopt an operating cotenant's lease as their own and receive their pro rata share of the royalty. See *Hamman v. Ritchie*, 547 S.W.2d at 707; see also *Cox v. Davison*, 397 S.W. 200, 201 (Tex. 1965).

These non-consenting owners have the absolute right to develop their own property by producing or leasing their interest. See id. The operating cotenant's corresponding right to develop the property does not allow the property to be occupied to the exclusion of the non-consenting cotenant. *Willson v. Superior Oil Co.*, 274 S.W.2d at 950. A non-consenting cotenant may therefore obtain an injunction against the denial by the operating cotenant of the non-consenting cotenant's physical entry to the premises. *Garcia v. Sun Oil Co.*, 300 S.W.2d 724, 734 (Tex. Civ. App.--Beaumont 1957, writ ref'd n.r.e.).

In view of the foregoing principles, a cotenant who refuses to join in the development of minerals by another cotenant is nevertheless entitled to a proportionate share of the proceeds of the development less a proportionate share of the reasonable and necessary costs of the development and production. *White v. Smyth*, 147 Tex. 272, 214 S.W.2d 967, 978 (1948). The non-consenting cotenant, however, is under no obligation to pay for any costs apart from having such costs deducted from his share, if any, of the development's proceeds. See Cox v. Davison, 397 S.W.2d at 201. In short, the law implies an obligation on the non-consenting cotenant to pay for his proportionate share of expenses only when the non-consenting cotenant shares in the benefits arising from those expenses. See Shaw & Estes v. Texas Consol. Oils, 299 S.W.2d 307, 313-14 (Tex. Civ. App.--Galveston 1964, writ ref'd n.r.e.).

b. Production in Kind. No Texas court has directly addressed the issue of whether a non-consenting cotenant may opt to take his share of production in kind rather than receive monetary proceeds from the production. The courts discussing a non-consenting cotenant's right to share in the production, however, consistently use language indicating that the non-consenting cotenant has only a right to share in the monetary proceeds, but not the production itself. See, e.g., Cox v. Davison, 397 S.W.2d at 202 (operating cotenant is accountable to the other co-tenants "on the basis of value of minerals taken less necessary and reasonable costs of producing and marketing . . ."); *White v. Smyth*, 214 S.W.2d 97__ (non-consenting co-tenants are entitled to their proportionate share of the proceeds of development); *Willson v. Superior Oil Co.*, 274 S.W.2d at 950 (producing co-tenants must account to the non-consenting cotenant for his pro rata share of net profits.) Moreover, the theory of co-tenancy suggest that co-tenants do not have rights to specific property but instead have a right only to the profits made off the common property by their fellow co-tenants. Thus, although the issue has not been squarely decided, non-consenting co-tenants do not appear to have a right to take their share of production in kind rather than sharing in the proceeds.

3. **What Rights Does the Drilling Cotenant Have?** Texas law is clear that a cotenant has the right to develop the land, either himself or by leasing to others, without the consent of his co-tenants. See Hamman v. Ritchie, 547 S.W.2d at 707; *Burnham v. Hardy Oil Co.*, 147 S.W. 330, 335 (Tex. Civ. App.--San Antonio 1912 aff'd 208 Tex. 555, 195 S.W. 1139 (1917)). The rationale for this principle is that if consent of all co-tenants was required before the land could be developed, a cotenant holding only a small interest could arbitrarily destroy the value of the land by refusing to consent to development. See id.; *Burnham v. Hardy Oil Co.*, 147 S.W. at 335. As noted above, a drilling cotenant does not owe his other co-tenants a

fiduciary duty (*Donnan v. Atlantic Richfield*, 715 S.W.2d at 717; *Zimmerman v. Texaco*, 409 S.W.2d at 614), may pool his interests in a jointly owned tract of land without the consent or joinder of the other co-tenants (*Donnan*, 732 S.W.2d at 717) and has the right to be reimbursed for the non-consenting cotenant's pro rata share of costs from proceeds otherwise due the non-consenting co-tenants. *Cox v. Davison*, 397 S.W.2d at 201. The only limitation upon the drilling cotenant's rights to develop the jointly owned land is that the non-consenting co-tenants may not be excluded from their mutually owned tract by the drilling operations. See *Willson v. Superior Oil Co.*, 274 S.W.2d at 950.

B. WHAT COSTS ARE RECOUPABLE BY THE DRILLING COTENANT?

1. What Costs Are Included and What Costs Are Not?

a. **Generally.** The general rule is that the drilling cotenant may recoup from the proceeds the non-joining cotenant's proportionate share of the reasonable and necessary costs of development and production. *White v. Smyth*, 214 S.W.2d at 978. In short, "all reasonable expenses incurred in the production and marketing . . . have to be deducted from the gross value before a division of the proceeds between co-tenants." *Burnham v. Hardy Oil Co.*, 147 S.W. at 334; see also *Willson*, 274 S.W.2d at 950 (the non-consenting cotenant is entitled to "his pro rata share of net profits, that is, the market value of the oil and gas produced, less necessary and reasonable expenses incurred in producing and marketing. . ."). Although entitled to recoup the non-consenting co-tenant's share of costs, the drilling cotenant may not receive interest on the monies advanced to pay the non-consenting cotenant's share of the expenses for the period when these expenses were paid to the date they are recouped from the non-consenting cotenant's share of the proceeds. *Cox*, 397 S.W.2d at 202-03.

b. **Dry Holes After Production Established on the Tract.** Texas law apparently prevents recovery of costs for dry holes or otherwise non-productive wells even if there is other production by the operating cotenant and the proceeds are being shared by the non-consenting co-tenants. See H. Williams & c. Meyers, *Oil and Gas Law*, § 504.3, at p. 586.1 n. 2 (1988), citing *Burnham*, 147 S.W. 330, as denying reimbursement for the cost of drilling a dry hole when the developing cotenant has production from other operations. In *Burnham*, the court held that expenses connected with non-producing wells drilled on the land are not chargeable to the non-consenting co-tenants but should be borne solely by the development co-tenants who incurred them. 147 S.W. at 335. Similarly, the court in *Willson*, concluded that if a cotenant drills a dry hole, he does so at his own risk and without a right to reimbursement from non-consenting co-tenants for the drilling costs. 274 S.W.2d at 950,. The Galveston appellate court held in *Shaw v. Texas Consolidated Oils* that non-consenting co-tenants are not liable for "speculative expenses" in connection with exploration and development of oil, gas and minerals. 299 S.W.2d at 313. The developing cotenant is entitled to be reimbursed out of production only, if and when production results. *Id.* In *Shaw*, the court found that production that kept the leases alive was necessary and beneficial to the estate and therefore gave rise to a right for reimbursement; however unsuccessful reworking operations were not necessary and beneficial

and thus the cost of such operations was borne solely by the developing cotenant. *Id.* at 314. In short, the *Shaw* opinion suggests that any reworking of an existing well or drilling of a new well is a speculative venture and the developing cotenant will therefore bear the risks until and unless production results.

These same principles were applied in the context of a contract operator's attempt to recover certain expenses from several working interest owners who had not executed a joint operating agreement. *Neeley v. Intercity Management Corp.*, 732 S.W.2d 644 (Tex. App.--Corpus Christi 1987, no writ). The Corpus Christi Court of Appeals remanded the case because the issue submitted to the jury, which asked what sum of money was reasonably and necessarily expended by the operator to pay gauger costs, overhead and operating expenses, was erroneous. *Id.* At 647. Such issue, the court ruled, allowed the jury to consider expenditures which were not allowed; the operator was not entitled to recover for speculative, but unsuccessful, efforts to preserve the leasehold. *Id.*

2. **What Does "Reasonable and Necessary Costs" Mean?** There is no Texas decision directly defining the meaning of reasonable and necessary costs in the context of co-tenancy. The *Burnham v. Hardy Oil Co.* court offered that a reasonable expense would include the cost of machinery and appliances and other means "necessary and proper to the production," 147 S.W. at 335 (emphasis added), but this rephrasing adds little insight for determining specifically what costs are included. As seen above, the *Shaw* court referred to reimbursement for "monies necessarily and beneficially spent for benefit of the common estate." 299 S.W.2d at 313 (citing *Stephenson v. Luttrell*, 107 Tex. 320, 179 S.W.2d 260, 261). The *Shaw* court held that unsuccessful reworking operations were not necessarily and beneficially spent for the benefit of the common estate and accordingly were not chargeable against the non-consenting cotenant's interest. *See id.* at 313-14.

In short, Texas law offers no clear test for determining whether a particular cost will be deemed "reasonable and necessary." Noted commentators, in fact, recognize that the "burden on the concurrent owner or his lessee who wish to develop the land ... is increased by uncertainty about the various costs which he may apply against the production from a successful well." Williams & Meyers, *supra*, § 504.1, at p. 584. This burden, however, may be offset, at least in part, by the drilling cotenant's initial control of the money proceeds.

3. **Allocation of Costs in Drilling to Non-Productive Depths Before Establishing Production at a Shallower Depth.** Apparently no Texas case has considered the problem of how to allocate to a non-consenting cotenant the costs of a well which is initially drilled to non-productive depths but ultimately completed in shallower producing horizons. This situation raises the issue of whether the non-consenting co-tenants should share in all of the drilling costs or only in those costs of drilling to the productive depth.

One Louisiana court has considered the issue and rejected the non-consenting cotenant's claim that it should only contribute a share of the cost of drilling to the productive depth. Instead

the court held the non-consenting cotenant responsible for its pro rata part of the entire well's drilling costs. See *Martell v. Hunt*, 197 La. 701, 197 So. 402, 408-09 (1940), cited in Williams & Meyers, *supra*, § 504.3, at page 586 n. 1. The *Martell* court relied on a provision of the Louisiana Civil Code and Louisiana case law requiring the non-consenting co-tenants to reimburse the operating co-tenants for expenses of producing oil if the non-consenting co-tenants sought to share in the production. See 197 So. at 409. In holding the plaintiff responsible for a share of all drilling expenses, the court noted that “[i]t cannot be said that the drilling of the well to the greater depth was an act of bad faith . . . [or the result of] poor judgment. . . .” *Id.* The court therefore may implicitly be suggesting a good faith and/or reasonably prudent operator standard; if the operator acts in good faith and as a reasonably prudent operator, he should recover the non-consenting cotenant's share of all drilling costs.

Whether a Texas court would adopt this approach remains unclear. Although a non-consenting interest could argue that drilling to the deeper depths was not necessary and beneficial to the estate, the ultimate decision on this issue may turn on such questions as whether the well would have been drilled at all absent the deep prospect, whether the shallower producing zone was prospective at the time the well was spudded and the court's attitude toward encouraging further development of jointly owned lands.

C. WHAT MARKETING DUTIES DOES A DRILLING COTENANT OWE HIS NON-CONSENTING COTENANT? No Texas case has directly addressed the marketing duties, if any, a drilling cotenant owes to a non-consenting cotenant. The courts' language in exonerating non-consenting co-tenants from costs incurred for unsuccessful operations, however, suggest that the drilling cotenant may be required to market the non-consenting cotenant's share along with its own mineral production. As previously pointed out, the general rule is that a drilling cotenant must account to the non-consenting co-tenants “on the basis of value of minerals taken, less necessary and reasonable costs of producing and marketing minerals.” *Cox vs. Davison*, 397 S.W.2d at 201; *see also Burnham v. Hardy Oil Co.*, 147 S.W.2d at 334 (the non-consenting cotenant had to share in the “cost of producing and marketing the product”) (emphasis added).

In *White v. Smyth*, the Texas Supreme Court held that the operating cotenant who mined and processed rock asphalt had to account to the non-participating co-tenants for the “net profits realized from mining, smelting, crushing, processing or marketing the solid minerals taken from the land.” 214 S.W.2d at 979 (emphasis added). The operating cotenant could not merely account for the value of the minerals in place, even though he had not produced more than his fair share and did not exclude the other co-tenants from the premises. *Id.* At 976-79. The *White* opinion accordingly implies that the producing cotenant may be required not only to market the minerals for the benefit of the other co-tenants but also to process the minerals as needed to make them marketable.

Given that the consistent rationale of the mineral co-tenancy cases appears to be that the developing cotenant must account for the non-consenting cotenant's share of the proceeds, a

developing cotenant may not be able to deny his non-consenting co-tenants the marketing services which he himself uses on the common property. As discussed earlier, the theory of mineral co-tenancy apparently holds that the non-consenting cotenant has a right to share in the profits or proceeds of production, not a right to share of the production itself. If so, the non-consenting co-tenants would probably be entitled to the same marketing services but charged with their pro rata share of these marketing costs.

D. IS PAYOUT OF A NON-CONSENTING COTENANT'S INTEREST DETERMINED ON A LEASE BASIS OR A PER WELL BASIS? Certain Texas decisions have indicated that reimbursement from the non-consenting cotenant's share of proceeds for development and production expenses is on a per well rather than a per lease basis. The *Burnham v. Hardy Oil Co.* opinion implies accounting for costs should be on a per well basis. The opinion states:

. . . the expenses and appliances connected with non-producing wells sunk on the land by defendants are not chargeable to plaintiffs, but should be borne by those who incurred them. With reference to the producing wells, what is allowed the working co-tenant when called to account by another co-tenant, is all expenses necessarily incurred by him in good faith in producing and rendering the product available.

147 S.W. at 335. Thus, in holding that the costs of prior dry holes are not recoupable out of production from a later producing well on the tract, the court may be implying that accounting is to be done on a well-by-well basis. The *Burnham* court was not, however, confronted by a situation in which there were several producing wells which would pay out at different times. In such a situation, the issue would be whether the non-consenting cotenant is entitled to a share of the proceeds when the first well pays out or only after the drilling cotenant recovers costs on all producing wells drilled at that time.

The authors of the Williams & Meyers treatise suggest that a leasehold accounting rule is preferable. See Williams & Meyers, *supra*, § 504.3, at pp. 586.2-89. These commentators base their opinion upon the public interest of encouraging drilling and development and the difficulties of accounting on a per well basis. See *id.* Apparently no Texas court has considered the policy justifications behind a leasehold basis and no case has addressed the question of the date payout occurs when several producing wells on the same lease reach such status at different time.

III. RIGHTS OF UNDIVIDED, NON-DRILLSITE TRACT OWNERS TO PARTICIPATE IN PRODUCTION

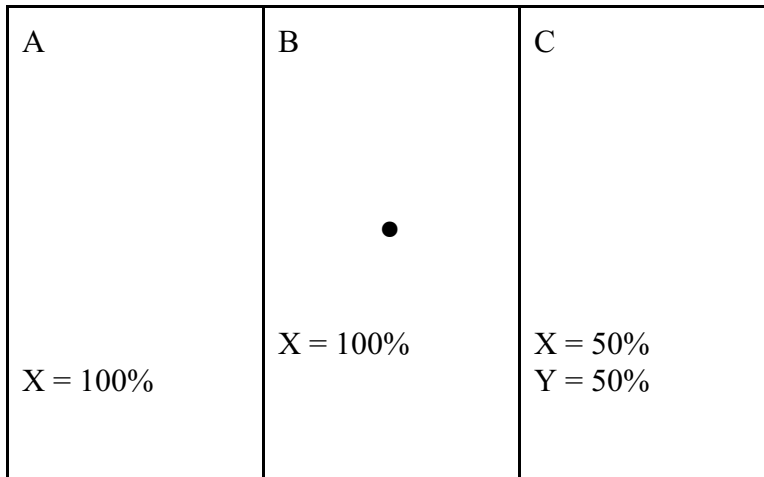
A. **GENERALLY.** Co-tenancy principles provide protection to non-consenting interest owners only when the well is drilled on the specific tract in which the owners have an interest. *The Superior Oil Company v. Roberts*, 398 S.W.2d 276, 278 (Tex. 1966); *Donnan v.*

Atlantic Richfield, 732 S.W.2d 715 (Tx. App.--Corpus Christi 1987, writ denied). This result is applicable whether the interest owner's tract is described by a lease, *Roberts* at 278, or pooled unit *Donnan* at 717, that includes the producing well. *Hunt Oil Co. V. Moore*, 656 S.W.2d 634, 642 (Tex. App.--Tyler 1983, writ ref'd n.r.e.).

B. LEASE DESCRIBING NON-DRILLSITE OWNER'S TRACT

1. **Unleased Mineral Interest Owners.** An unleased owner of an undivided mineral interest whose tract is described by lease or pooled unit declaration does not automatically participate in production from a well located within the leased premises but outside such owner's tract. *Roberts* at 278; *Moore* at 642.

Figure 1



**X leases 100% of minerals in Tracts A and B, 50% in Tract C;
Y owns remaining 50% in Tract C.**

In the foregoing example, Y would not automatically share in production from the well on Tract B even though X's lease describes Tracts A, B and C. The remedies which Y may have available to participate in production under this situation are discussed below. See *Hamman v. Ritchie*, 547 S.W.2d 698, 707 (Tex. App.--Fort Worth 1977, writ ref'd n.r.e.); *Roberts* at 279.

2. **Community Leases.** Texas law is well established that if all owners of separate tracts of land execute the same lease, the royalties are communitized and the royalty is divided among all such owners in the proportion that each owner's tract bears to the total leased acreage, even though the lease contains no entirety or pooling clause. *Parker v. Parker*, 144

S.W.2d 303 (Tex. Civ. App.--Galveston 1940, writ ref'd); *French v. French*, 159 S.W.2d 566 (Tex. Civ. App.--Amarillo 1942, writ ref'd). This result is not changed if all parties execute separate copies of the same lease instrument. *Veal v. Thomason*, 159 S.W.2d 742 (Tex. 1942).

3. **Subdivision After Lease.** The royalty owners of a tract that was subdivided and conveyed during the existence of a lease are precluded from sharing in production from a well drilled on a different part of the same lease. *Japhet v. McRae*, 276 S.W.2d 699 (Tex. Comm. App. 1925, judgment adopted). This non-apportionment rule, although criticized by several respected commentators, Huie, "Apportionment of Oil & Gas Royalties," 78 Harv. L. Rev. 1113 (1965); Stayton, "Apportionment and the Ghost of a Rejected View," 32 Texas L. Rev. 682 (1954), remains the law in Texas, having been applied to voluntary partitions, *Garza v. DeMontalvo*, 217 S.W.2d 988 (Tex. 1949), judicial partitions, *Coates v. DeGarcia*, 286 S.W.2d 691 (Tex. Civ. App.--San Antonio 1956, no writ), and divorce decrees, *Lehew v. Lehew*, 314 S.W.2d 146 (Tex. Civ. App.--Eastland 1958, writ ref'd).

C. **POOLED UNIT DESCRIBING NON-DRILLSITE OWNER'S TRACT.**

The pooling of separate leases and tracts of land does not enable an unpooled, non-drillsite interest to participate in the production from the unit well merely because the pooled unit includes the interest owner's tract within the boundaries of such unit. *Donnan v. Atlantic Richfield*, 732 S.W.2d 715 (Tex. App.--Corpus Christi 1987, writ denied). This result conflicts with several Mississippi decisions that had established the concept of "equitable pooling." See *Superior Oil Co. v. Barry*, 216 Miss. 664, 63 So.2d 115, 64 So.2d 357 (1953); *Humble Oil & Refining Co. v. Hutchins*, 217 Miss. 636, 64 So.2d 733, 65 So.2d 825 (1953); *Superior Oil Co. v. Foote*, 216 Miss. 728, 63 So.2d 137, 64 So.2d 355 (1953). These cases held that the spacing regulations, which were based upon general conservation statutes, had the legal effect of pooling the land included in a drilling unit, even though there were no compulsory pooling laws at the time. Such judicially created units, as distinguished from voluntary (by agreement) or compulsory (by statute) pooling, were labeled equitable units by at least one noted commentator. See Williams & Meyers, *Manual of Oil & Gas Terms* (2d ed. 1987), citing Hoffman, *Voluntary Pooling and Unitization*, Ch. 5 (1954).

Texas courts have emphatically refused to acknowledge the validity of equitable units for the reason that such relief is inconsistent with the rule of capture. *Ryan Consolidated Petroleum Corp. v. Pickens*, 155 Tex. 221, 285 S.W.2d 201 (1955). In this case, Ryan and Pickens each owned two of the four lots which together made up a 4/10 acre legal subdivision entitled to one drilling permit. After each applied for a permit on his respective acreage, the Railroad Commission denied Ryan's application but granted Pickens'. When his appeal of the Pickens' permit proved unsuccessful, Ryan sought to participate in the Pickens' well because the Railroad Commission permit was granted on the basis of all four lots (including Ryan's two lots) and such lands were being attributed to the Pickens' well for allowable purposes. The court held that, despite such Railroad Commission benefits to Pickens and the "equitable" considerations involved, the rule of capture prevailed and no equitable unit was recognized. Ryan was accordingly denied participation in production from Pickens' well.

The advantages derived by the drilling cotenant's use of the undivided non-drillsite interest owner's tract for Railroad Commission permitting and allowable purposes have not been sufficient to provide such non-drillsite owner with the right to participate in production from the unit well. In *Brown v. Getty Reserve Oil, Inc.*, 626 S.W.2d 810 (Tex. App.--Amarillo 1982, writ dismissed), the court refused to allow non-drillsite non-participating royalty owners to participate in unit production even though their non-drillsite acreage had been used by the lessee to comply with Railroad Commission rules for permitting the unit well and for allowable purposes. Similarly, the San Antonio Court of Civil Appeals declined to impose a constructive trust that would have allowed non-drillsite lessors to participate in production on the ground that lessors' attorney had breached the attorney-client relationship and specifically held that "equitable pooling is not recognized in Texas." *Waters v. Bruner*, 355 S.W.2d 230, 235 (Tex. Civ. App.--San Antonio 1962, writ refused n.r.e.).

IV. REMEDIES OF NON-DRILLSITE TRACT OWNERS

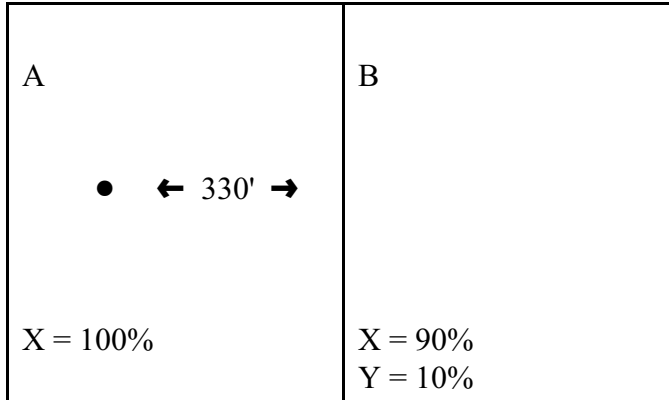
A. **GENERALLY.** As noted above, Texas law prevents unpooled mineral interest owners in a non-drillsite tract from automatically sharing in production from a well located outside such interest owner's tract. These non-sharing interest owners must therefore take some affirmative action to establish their right to receive their pro rata share of the production proceeds. The remedies available for achieving this objective may be broadly described as regulatory action and ratification. The advantages and disadvantages of these two approaches are determined by the nature of the non-participating interest and the facts in question.

B. **REGULATORY REMEDIES.** Although the force pooling statute, Chapter 102 of the Texas Natural Resources Code, referred to herein as the Mineral Interest Pooling Act or "MIPA," is the most obvious regulatory remedy to enable a non-participant to share in production, there are several other agency actions which, if available, may be more practical and efficient in attaining the desired objective.

1. Spacing Exceptions.

a. **Property Line.** The Railroad Commission has now firmly established that unpooled mineral fee or leasehold interests within a pooled unit create a "property line" for Rule 37 spacing exception purposes. This ruling has been specifically upheld by the Austin Court of Appeals in an unpublished decision. *Humble Exploration Co. v. Railroad Commission*, Cause No. 13,999, Austin Court of Appeals, Oct. 3, 1984, decision unreported.

Figure 2

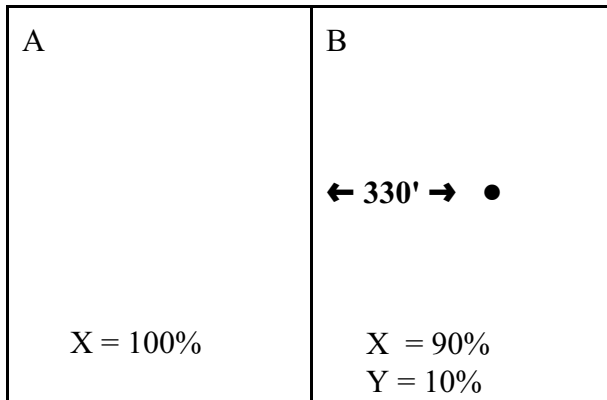


Assumes 467' spacing.

The location of the unit well closer to the unpooled mineral fee or leasehold owner's tract than the applicable Railroad Commission property line spacing rule may provide the incentive necessary for the participating interests to allow such unpooled owner to share in production on a voluntary basis. The operator's failure to observe such spacing rule could result in the Commission's declaration that the producing well had no valid drilling permit and subject the parties participating in production to court liability for "illegal production" to the extent the party being drained could quantify his damages. See *Phillips Petroleum Co. v. American Trading and Production Corp.*, 361 S.W.2d 942 (Tex. Civ. App.--El Paso 1962, writ ref'd n.r.e.).

Although no final decision has yet been made in any contested case involving the question, the Railroad Commission has ruled informally that no spacing exception results if the well site is located on the non-pooled interest's tract and crowds a different tract in which the operator has pooled 100% of the minerals.

Figure 3



While this result may be difficult to square in a strict rational sense with the Austin Court of Appeals' holding, the ruling is certainly defensible from a practical perspective because the protections afforded through Rule 37 appear unnecessary in those instances where the unpooled or non-joining interest may invoke Texas co-tenancy law.

b. **Standing.** There is no clear rule concerning which undivided, non-pooled interests have standing to complain and protest a well located closer to their tract than prescribed by the applicable spacing rules. Unleased mineral owners whose interests would be materially affected by the well in question have the right to be heard before the Railroad Commission. *Railroad Commission v. Graford Oil Corp.*, 557 S.W.2d 946, 953 (Tex. 1977). The Commission appears to be more receptive in recent years as to the standing of a royalty owner to oppose a spacing exception. The enunciated test is whether the royalty owner can show a separate and distinct interest that cannot be protected by the lessee and/or the lessee is not obligated to protect. Railroad Commission Docket No. 95,934 (Nov. 12, 1984).

2. **Density Exceptions.** A drilling permit for a well located in compliance with applicable Commission lease line and between-well spacing rules as to the non-pooled interest's tract may not be successfully challenged as requiring a density exception, even though the "net acreage" available to the well for permitting or proration purposes is less than the prescribed well density for the producing reservoir. The Commission's Statewide Rule 40(b) requires that gross, not net, acreage be used in situations involving non-pooled interests. The ability of an operator to utilize gross acreage is conditioned upon the operator's disclosure, on commission Form P-12, that a certain undivided interest is outstanding in the tract. Statewide Rule 40(b). This requirement is presumably to enable the Railroad Commission's permitting staff to determine if a Rule 37 spacing exception is required. The operator does not accordingly have to pool outstanding, undivided interests in any tract within the pooled unit to remove the threat that a density exception may be necessary for the drilling permit.

3. **Allowable Considerations.** The Railroad Commission is also concerned with gross acreage in the assignment of lands for allowable purposes. Statewide Rule 40(b). An operator with only a small, undivided interest in a non-drillsite tract may assign the entire, gross acreage for allocation. Because the Commission strictly prohibits the dual assignment of acreage to different wells that are producing in the same reservoir [Statewide Rule 40(d)], such practice would preclude the unpooled interest owner from obtaining allowable credit for his undivided interest in the same tract of land. Only by drilling on the tract containing his unpooled interest may such party receive allowable credit for his well. In that event, the operator originally assigning the tract for allowable purposes would lose it. Because the Commission grants allowable credit to the first operator assigning acreage for proration purposes, there may be a "race to the Commission" between competing operators to claim the benefit of the split-interest tract.

Figure 4

A	B	C
●		●
X = 100%	X = 90% Y = 10%	Y = 100%

X and Y each lease 100% of minerals in Tracts A and C, respectively. X and Y also lease undivided percentages of minerals in Tract B. All leases provide pooling authority to form units for both Tracts A and B and for Tracts B and C. Assuming Y drills first and files a P-12 covering Tracts B and C, then X can only attribute Tract A to his well on Tract A.

4. **Force Pooling.** Chapter 102 of the Texas Natural Resources Code provides a statutory remedy that may be available for an undivided interest owner who is not sharing in production even though other interest owners in his same tract are participating. While a detailed discussion of the force pooling remedy is beyond the scope of this paper, there are a number of limitations, both practical and legal, which may preclude the invocation of the MIPA.

a. **Legal Restrictions.** Several of the preconditions for bringing a force pooling action may prevent the outstanding interest owner from using this remedy. These legal restrictions may be summarized as follows:

(i) **Discovery date of the field.** The provisions of the MIPA do not apply to any reservoir discovered and produced before March 8, 1961 which is the date the Texas Supreme Court decided *Atlantic Refining Co. v. Railroad Commission*, 346 S.W.2d 801 (Tex. 1961). This limitation is specifically set forth in Section 102.003 of the Texas Natural Resources Code, Mineral Interest Pooling Act (Vernon 1978).

(ii) **Special field rules.** The Commission must have adopted special field rules, on either a temporary or permanent basis, for the reservoir from which the well in question produces before the Commission may consider the force pooling application. Section 102.011 of the MIPA. Therefore, force pooling is not yet available if the well in question produces from a field that is operated pursuant to statewide rules or is proposed for a wildcat reservoir.

(iii) **State lands.** The provisions of the MIPA do not apply to land owned by the State of Texas or to land in which the State has either a direct or indirect interest. Section 102.004 of the MIPA. This obstacle may be overcome with the approval of the Commissioner of the General Land Office or any board or agency having jurisdiction of the State lands in question. If the force pooling application would result in a reduction in the State's interest in the producing well, then such approval would not likely be granted.

(iv) **Common reservoirs.** The MIPA requires that a force pooling application involve two or more separately owned tracts of lands that are embraced in a "common reservoir." If the producing reservoir in question contains multiple stratigraphic or lenticular accumulations of hydrocarbons which have been combined for production and proration purposes pursuant to Sections 86.012 and 86.081 of the Texas Natural Resources Code, then recent court decisions may preclude the application of the MIPA to such reservoirs. See *Railroad Commission v. Bishop Petroleum, Inc.*, 736 S.W.2d 724 (Tex. App.--Waco 1987), rev'd and remanded in part, aff'd in part, 751 S.W.2d 485 (Tex. 1988).

(v) **Productive acreage.** The force pooling applicant must demonstrate that the acreage to be force pooled is productive in the producing reservoir. Section 102.018 of the MIPA. The non-sharing interest owner must accordingly be prepared to demonstrate that there are movable hydrocarbons in the reservoir from which the well in question produces underlying applicant's tract.

(vi) **Voluntary offer to pool.** The MIPA requires, as a jurisdictional prerequisite to invoking Commission jurisdiction, that the force pooling applicant make a fair and reasonable voluntary offer to pool to all interest owners within the unit. Section 102.013 of the MIPA. Decisions by both the Railroad Commission and Texas courts have demonstrated that making a "fair and reasonable voluntary offer" is sometimes difficult.

Carson v. Railroad Commission, 669 S.W.2d 315 (Tex. 1984)
(where an offer to pool unpooled drillsite royalty interest in an existing proration unit on the same basis as other owners in the unit were then participating was held not to be fair and reasonable);

Windsor Gas Corp. v. Railroad Commission. 529 S.W.2d 834
(Tex. App.--Austin 1975, dism'd as moot) (where an offer to participate in eight proposed wells on an all-or-none basis was held not to be a fair and reasonable offer);

Application by W. H. Mengden, Oil & Gas Docket No. 3-75, 677-78 and 3-76, 031-32 (where an operating agreement, attached to a voluntary offer, containing 32 unfilled-in blanks was held not fair and reasonable for a proposed unit);

Application of Frank Thurmon, Oil & Gas Docket No. 3-79, 532-33 (where an offer to pool made at the MIPA hearing and conditioned upon participation from the date of first production was held not fair and reasonable).

b. **Practical Considerations.** There are other important considerations which may make the force pooling remedy unattractive even though otherwise available. Some of these concerns are as follows:

(i) **Effective date of the MIPA order.** A recent appellate decision has established that a force pooling order may not become effective until it is signed by the Railroad Commissioners. *Buttes Resources Co. v. Railroad Commission*, 732 S.W.2d 675 (Tex. App.--Houston [14th Dist.] 1987, writ ref'd n.r.e.). This decision will undoubtedly have a chilling effect upon future force pooling applications. By preventing the participation of the force pooling applicant until the order is signed, the court's decision has encouraged parties to avoid the overriding objective of the MIPA—to promote voluntary pooling. Force pooling proceedings are generally lengthy because they require the Railroad Commission to determine the productive acreage for the unit in question. The longer such a proceeding can be strung out, the more benefit the participating interest owners receive. Such delay normally involves the initial stages of production from the well when the producing rate is highest. That the force pooling application process requires from six months to a year to complete may be a significant deterrent to a proposed applicant. The Commission has attempted to remedy this result by signing interim orders shortly after the hearing but before the proceeding has been finally adjudicated.

(ii) **Complexity of proceeding.** A force pooling application is normally complicated, both technically and legally, with numerous opportunities for an applicant to have his application denied.

(iii) **Costs.** Because force pooling applications involve a determination of productive acreage and because they are nearly always bitterly contested, the consequent costs to pursue this remedy may be significant. These costs are, however, normally much less than the expenses incurred by parties seeking to resolve these participation and production issues in the courthouse.

The most prudent course of action can obviously be determined only by weighing all the alternatives and the risks associated with each. Despite its burdens, the MIPA is a well established, proven means by which an undivided mineral interest owner can protect his correlative rights and share in production from a well on a different tract.

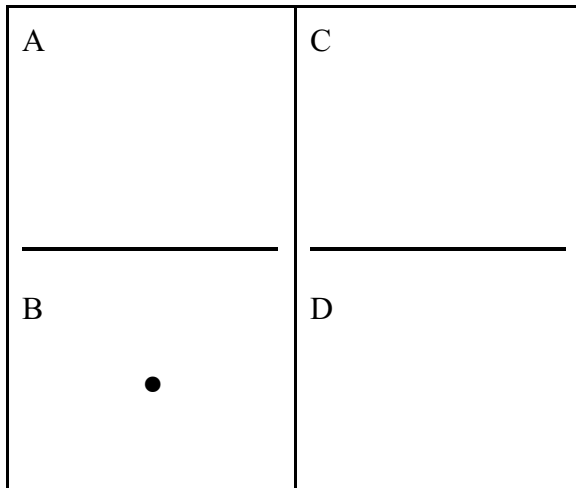
C. **RATIFICATION AS A REMEDY FOR A NON-DRILLSITE INTEREST OWNER**

1. **Generally.** The Texas Supreme Court has indicated that the right of a mineral interest owner to share in production from wells located outside such owner's tract may only be created by contract. *The Superior Oil Co. v. Roberts*, 398 S.W.2d 276, 278, 279 (Tex. 1966). The contractual instruments through which such non-participant may be allocated production are normally the lease, pooled unit declaration and joint operating agreement. The question therefore arises whether the non-drillsite owner, as an alternative to the force pooling remedy discussed above, may ratify one or more of these contracts and share in production.

2. **Non Cost-Bearing Interests.**

a. **Royalty Owners with Executive Rights.** As pointed out above, the owners of separate tracts of land, absent an agreement to the contrary, who execute a single oil and gas lease communitize or unitize their lands into a single tract for royalty payment purposes, thereby enabling non-drillsite tract owners to share in production from wells within the area described by the lease. *Parker v. Parker*, 144 S.W.2d 303 (Tex. Civ. App.--Galveston 1940, writ ref'd); *French v. George*, 159 S.W.2d 566 (Tex. Civ. App.--Amarillo 1942, writ ref'd).

Figure 5



One lease covers A-D and all mineral/royalty owners are contracted.

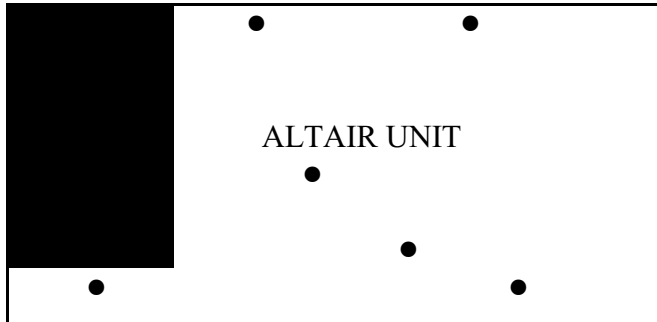
In this situation, the royalties must be divided among the lessors in the proportion that the area of the tract owned by each bears to the total area covered by the lease; the drillsite location of the producing well is immaterial as long as it is within the lands described by the lease. *French* at 569.

Once a successful well has been completed a mineral owner cannot ratify the lease or a pooled unit. *Fletcher v. Ricks Exploration*, 905 F. 2d 890 (5th Cir. 1990) held that a lessee of a fractional mineral interest in a non-drillsite tract within a pooled unit could not join the unit by ratifying the pooling agreement after a successful well was drilled. In *Neugent v. Freeman*, 306 S.W.2d 167 (Tex. Civ. App. - Eastland 1957, writ refused n.r.e.) the Court held that a mineral owner within a community lease who waited two years before attempting to ratify the community lease had waited too long to accept the pooling offer.

In *The Superior Oil Co. v. Roberts*, 398 S.W.2d 276 (Tex. 1966), the Texas Supreme court confronted the claims by unleased mineral owners that they were entitled to participate in production from wells located within the Altair Fieldwide Unit because their co-tenants' interest in such unleased owners' tract had been pooled with and were sharing in production from such secondary recovery unit. In rejecting these arguments, the court pointed out that plaintiffs had no contractual relationship with either Superior or the owners of interests in the unitized lands and that these unleased owners "had made no attempt to ratify (their co-tenants') leases or the Altair Field Unitization Agreement." *Roberts* at p. 279.

Figure 6

The Superior Oil Co. v. Roberts



↓

Roberts Tract; partial undivided interest leased to Superior and pooled; Roberts' interest unleased.

The Fort Worth Appellate Court, in dicta, may have affirmed the right of an unleased cotenant to adopt his co-owner's lease and thereby participate in production as a royalty owner. Using less than precise language, this court held as follows:

Where (a cotenant leases his land) . . . and production of oil and/or gas is obtained, the other co-tenants are privileged to either recognize and adopt the lease as to their interest as well, so as to be entitled to their fractional interest in the royalty, or to reject it and be entitled to their fractional part of oil and/or gas produced, less a proportionate part of the cost of discovery and production.

Hamman v. Ritchie at 707. Because no well had been drilled in this case and the court was reversing the trial court's award of damages for the defendant's "malicious refusal to join" in the execution of a lease, the applicability of the above language is unclear. Whether such dicta addresses only situations where the well is located on the unleased cotenant's tract or also applies to production from wells located outside the unleased cotenant's tract may be subject to argument. In any event, based upon these decisions and the practical effect of the NPRI cases discussed below, a reviewing Texas court would likely confirm the right of an unleased mineral interest owner to ratify a lease describing his tract and thereby share in production as a royalty owner from a well located outside the ratifying owner's lands.

b. **Non-Participating Royalty Interests.** There are a number of Texas cases addressing the legal right of a NPRI to ratify a lease and pooled unit declaration unilaterally and thereby receive a pro rata share of production from a well located on other lands. The definition of a NPRI which has been cited by several respected practitioners, is as follows:

It may be defined as an interest in the gross production of oil, gas and other minerals carved out of the mineral fee estate as a free royalty, which does not carry with it the right to participate in the execution of the bonus payable for, or the delay rentals to accrue under, oil, gas, and mineral leases executed by the owner of the mineral fee estate.

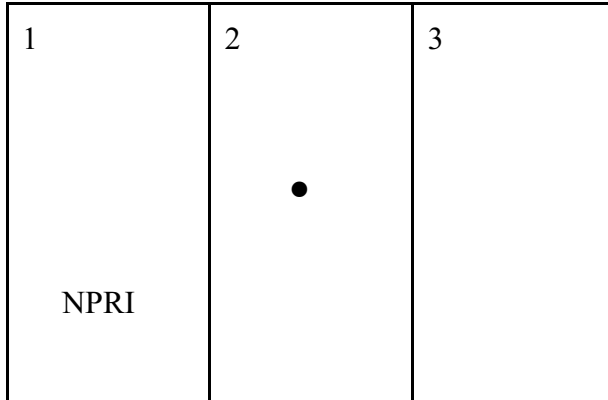
Jones, “Non-Participating Royalty,” 26 Texas L. Rev. 569 (1948); Battle, An Update of Some Basic Oil and Gas Agreements: Division Orders, Transfer Orders and Ratifications, Advanced Oil, Gas & Mineral Law Course, State Bar of Texas (Sept. 1986), hereinafter cited as the “Battle Article.” An important element of a NPRI not emphasized by the above definition is that such owner has no right to execute oil and gas leases covering his property. A close reading of these NPRI cases indicates that (1) Texas courts have not been entirely consistent in their application of the law, (2) the results turn on extreme subtleties of both fact and contractual language, or (3) the NPRI currently enjoys a preferential status which the appellate courts believe worthy of protection. See Battle Article at p. M-12.

Several decisions have held that the executive has no power to pool a NPRI without such non-executive’s consent. *Montgomery v. Rittersbacher*, 424 jS.W.2d 210, 213 (Tex. 1968); *Minchen v. Fields*, 345 S.W.2d 282 (Tex. 1961). The rationale for such law appears to be that the conveyances reserving or granting the NPRI evidence no intention to vest such power with the executive. See *Minchen v. Fields*, 330 S.W.2d 683 (Tex. Civ. App.--Houston[1st Dist.] 1959), aff’d in part and rev’d in part, 345 S.W.2d 282. As noted below, the absence of authority to bind a NPRI’s interest by pooling is used in several NPRI decisions to support the holding of the court.

A survey of these NPRI decisions is useful in determining the current state of Texas law. In *Standard Oil Co. of Texas v. Donald*, 321 S.W.2d 602 (Tex. Civ. App.--Fort Worth 1959, writ ref’d n.r.e.), the executive leased three different tracts of land by one lease instrument containing an entirety clause. The NPRI owned an interest in one of these tracts. Prior to drilling, all parties, including the NPRI, executed instruments entitled “Division Order and Ratification.” The producing well was drilled on one of the lease tracts but outside the lands in which the NPRI owned an interest.

Figure 7

Standard Oil Co. of Texas v. Donald

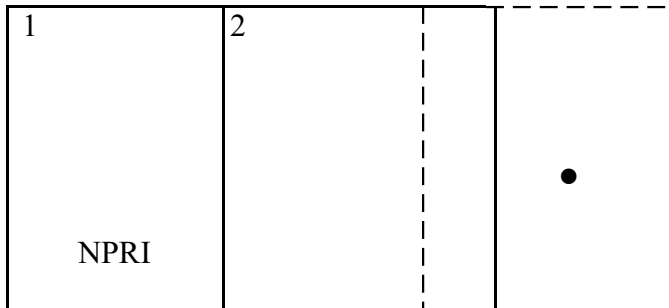


Tracts 1, 2 and 3 covered by a single lease with entirety clause.

The court held that the executives evidenced an intention to communitize the royalties of all three tracts and the ratification by the NPRI was effective to enable them to share in the production. *Donald* at 606.

Montgomery v. Rittersbacher, 424 S.W.2d 210 (Tex. 1968), decided nine years later, is one of the few cases involving the ability of an NPRI to ratify a lease and participate in a pooled unit. The lessor, pursuant to a lease containing both entirety and pooling clauses, leased Tract 1 (NPRI) and 2. A portion of the acreage in Tract 2 was pooled with an adjacent tract where the well was located.

Figure 8



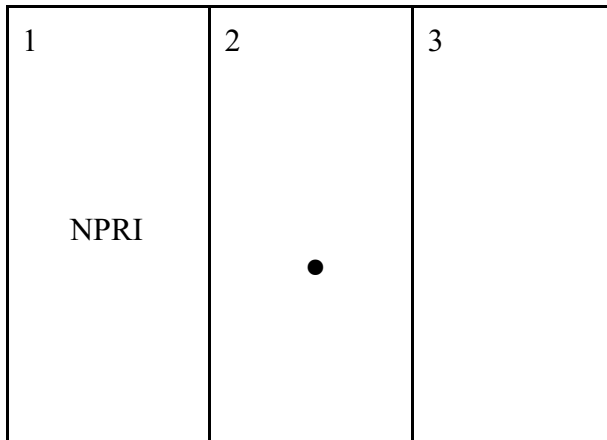
— — — — = pooled unit; Tracts 1 and 2 covered by a single lease with entirety and pooling clauses.

The NPRI brought suit contending he was entitled to share in production from the unit well. The Texas Supreme Court agreed, holding that although the executive had no authority to bind the NPRI as to the pooling or entirety clause (id. at 213), such NPRI has the option to ratify or repudiate the lease containing these provisions as to his interest (id. at 214) and that the filing of the lawsuit was sufficient to exercise this option to ratify as a matter of law. Id.

The San Antonio Court of Appeals expanded the *Rittersbacher* holding in *Ruiz v. Martin*, 559 S.W.2d 839 (Tex. App.--San Antonio 1977, writ ref'd n.r.e.). The lease in question covered three tracts of land, including the tract in which the NPRIs owned an interest and contained a pooling clause but no entirety clause. A producing well was drilled within the lease but off the NPRIs' tract.

Figure 9

Ruiz v. Martin



Tracts 1, 2 and 3 covered by a single lease with pooling clause.

In the interpleader action brought by the gas purchaser, the court refused to distinguish between an entirety and pooling clause (id. at 842-3) and held the lease amounted to an offer by the executive to create a community lease and pool all the royalties of the tracts described in the lease instrument. id. at 843. The ratification executed by the NPRIs one month after the successful completion of the producing well was therefore held sufficient to enable them to share in the production from the well off their tract.

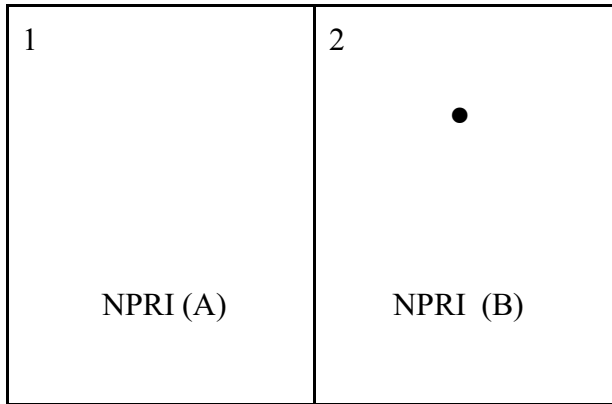
The *Ruiz* decision apparently enables an NPRI to wait until a well is drilled before deciding whether to ratify the lease if the well is located off the NPRI's tract or refuse such ratification if the well is drilled on his tract. See Hoffman, Pooling and Unitization, Advanced Oil, Gas & Mineral Law Course, State Bar of Texas (Oct. 1981) at p. D-3, hereinafter cited as the "Hoffman Article;" Battle Article at p. M-13. This option of the NPRI to await the drilling of a

well has been confirmed by more recent appellate decisions. *MCZ, Inc. v. Triolo*, 708 S.W.2d 49 (Tex. App.--Houston [1st Dist.] 1986, writ ref'd n.r.e.); *London v. Merriman*, 756 S.W.2d 736 (Tex. App.--Corpus Christi 1988, writ denied).

Four years after the *Ruiz* decision, the Amarillo Appellate Court reached a different result in *Brown v. Getty Reserve Oil, Inc.*, 626 S.W.2d 810 (Tex. App.--Amarillo 1981, writ dism'd). Lessor granted an oil and gas lease containing a pooling clause but not an entirety clause. Significantly, there were different NPRI in each of the two tracts described by the lease.

Figure 10

Brown v. Getty Reserve Oil, Inc.



Tracts 1 and 2 covered by a single lease with pooling clause; different NPRI in each tract.

In this interpleader action brought by the working interest lessee, the court held that the non-drillsite NPRI could not force the pooling of the NPRI in the drillsite tract who had refused to ratify the lease, distinguishing *Rittersbacher* on the basis of the different NPRI in the drillsite tract. *Id.* at 814.

In a decision which arguably conflicts with *Brown* and the contractual basis for these NPRI ratification cases, the Austin Court of Appeals held that non-drillsite NPRI were entitled to share in the production from a well located on another tract within the area described by the base lease in which different NPRI owned an interest. *Verble v. Coffman*, 680 S.W.2d 69 (Tex. App.--Austin 1984, no writ). The lease in question, which was ratified before any drilling, described two tracts with different NPRI and included a pooling clause. Importantly, the lease also contained an anti-entirety or anti-communitization clause which specifically refuted any pooling “merely by the inclusion of . . . separate tracts within this lease.” Separate tracts were defined to mean different royalty ownership. *Id.* at 70.

The Corpus Christi court noted that, although the lessor had no authority to pool the NPRIs, the lease pooling provision resulted in an offer to the NPRIs to create a community lease by ratification. *id.* at 739. The court rejected the lessor's argument that the anti-communitization clause precluded the NPRIs from sharing in production by ratifying the lease, holding that no pooling resulted "merely from" the inclusion of the two tracts in one lease. *id.* at 740. The court concluded that such pooling instead resulted from the pooling provisions in the lease that authorize the unitization of royalties and the non-unitization clause "expressly does not detract from this authorization." *Id.* The court further supported its conclusion by pointing out in footnotes (1) that while it may be possible to negate expressly unauthorized pooling of the non-executive's interest, the anti-communitization clause in question was not sufficient to do so, and (2) Dean Ernest Smith's theory that the executive may not exclude a non-executive's interest from a pooled unit without the non-executive's consent. *Id.*

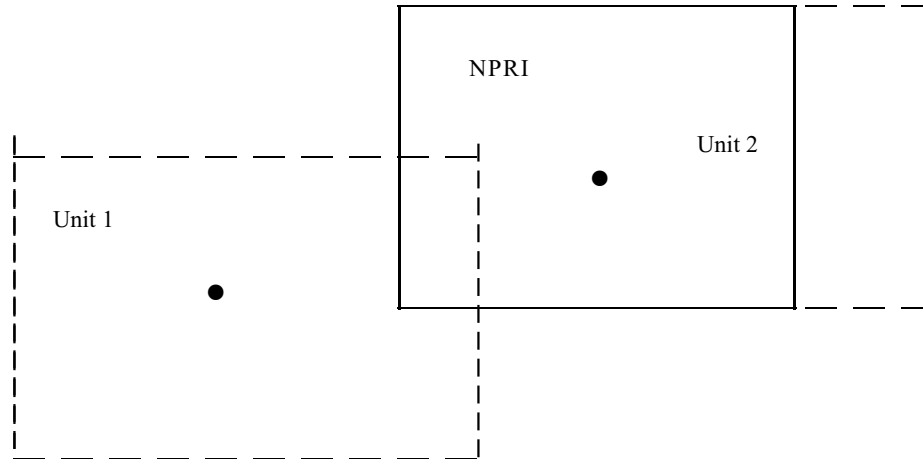
Dean Smith's law review article may indeed be the most reasonable explanation of the *Verble* and *London* decisions. Smith, "Implications of a Fiduciary Standard of Conduct for the Holder of the Executive Rights," 64 Texas L. Rev. 371, 391-95 (1985). The non-unitization provision in the leases interpreted by the *Verble* and *London* reviewing courts would appear on its face to be sufficient to refute an intent by the lessor to pool a NPRI. Texas courts, however, may have signaled a new duty and standard which the executive/lessor owes the non-executive. In *DeBenavides v. Warren*, 674 S.W.2d 353 (Tex. App.--San Antonio 1984, writ ref'd n.r.e.), the court held that the lessor had a duty to inform the non-executives that the leases executed by lessors permitted the creation of units including the non-executive's lands and that the lessors must provide the non-executive an opportunity to ratify these leases. Such a standard obviously goes beyond prior Texas law.

A number of Texas decisions, including *Donald*, *Rittersbacher* and *London*, have indicated that the lessor could have excluded NPRIs from ratifying by executing separate leases or otherwise expressly so providing in their lease instruments. Dean Smith suggests that a lessor may be legally unable to prevent communitization of royalty if separate parts of the leased lands are subject to royalties owned by different persons. 64 Texas L. Rev. at 393. Such result may indeed now be the law if the results in *Verble* and *London* are any indication. Since the Texas Supreme Court denied the writ in *London*, we must wait for another case to resolve this question.

Finally, the court in *MCZ, Inc. v. Triolo*, 708 S.W.2d 48 (Tex. App.--Houston [1st Dist.] 1986, writ ref'd n.r.e.) addressed the issue of whether a NPRI in a lease could selectively ratify the pooled units involving different portions of such lease depending upon the location of the producing well. The lease, which contained a pooling clause, described a 150 acre tract that was subject to a 1/16 NPRI. The NPRI (Turner) executed a pooling agreement for Unit 1 which pooled 27 acres of the base lease with other lands containing a producing well. When a second well was drilled on the remainder of the 150 acre lease and pooled with outside lands, the NPRI refused to ratify Unit 2 and took the position that his interest in the second unit was not diluted by pooling.

Figure 13

MCZ, Inc. v. Triolo



— — — = pooled unit line; NPRI in single lease containing pooling clause;

Unit 1 includes a portion of lease with well on outside lands; Unit 2 includes balance of lease pooled with outside lands.

The Supreme Court had stated in *Rittersbacher* that the NPRI, having ratified his lease, is not free to claim his NPRI under his tract as long as the lease remained in effect. *Rittersbacher*, 424 S.W.2d at 215. Despite this holding, the Houston Appellate Court concluded in *Triolo* that the NPRI ratified only Unit 1, not the lease, and expressly provided that such consent did not apply to the remainder of the lease tract. The court distinguished *Rittersbacher* on the basis that the NPRI (Turner) never ratified the lease as the NPRI (Montgomery) had done in such prior case. *Triolo*, 708 S.W.2d at 53. The court explicitly denied that the NPRI's actions involved "selective ratification" but stated instead that they concerned "two distinct transactions." *Id.* The results of this decision provide NPRIs with another means by which "to have their cake and eat it too." By carefully distinguishing between ratifying leases, as distinguished from pooled units, NPRIs apparently have the option to maximize their participation in the production from a well at the expense of the executive.

3. **Cost-Bearing Interests.** There are virtually no reported decisions in Texas addressing the issue of a cost-bearing interest owner's ratifying a pooled unit declaration and joint operating agreement as a means of participating in production from a well outside the ratifier's tract. The dicta in *The Superior Oil Co. v. Roberts* could be argued as support for an unleased mineral owner's ratification of a pooled unit declaration and consequent participation in production as a working interest owner:

Plaintiffs have made no attempt to ratify the . . . lease (of their co-tenants) or the Altair Field Unitization Agreement.

398 S.W.2d at 279 (emphasis added). The ratification of the Unitization Agreement, as distinguished from the leases, may give rise to a working interest owner participation. The court, however, did not mention ratification of the Altair Field Unit Operating Agreement which was undoubtedly also in effect and would specifically set out the procedures for cost-bearing interests to operate the unit and define the basis upon which costs would be allocated. In addition, the court in *Roberts* goes on to add some clarification of its ratification suggestion:

Claiming an interest in such mineral interest, plaintiffs in effect seek to claim the beneficial provisions of such contracts and repudiate the unfavorable portions thereof which would limit their claim to the same rights as those held by their co-tenants who joined in their Superior lease, namely, royalty rights only. In our opinion, this position is untenable.

Id. at 279 (emphasis added). This language may mean that the Supreme Court did not feel the unleased mineral owner plaintiffs' attempt to participate as working interest owners was authorized at all, even under a ratification approach.

The assumption that ratification, as a means to participate in production from outside lands, is premised upon contract law is now more open to question in view of the *Verble* and *London* decisions. Even so, a necessary step for sharing in production as a cost-bearing interest would appear to be the ratification of the pooled unit agreement/declaration. Whether such an instrument could be ratified may turn upon the specific terms of the instrument itself and whether it could be construed as an offer by the pooled interests to other non-sharing mineral interests within the unit boundaries to join in such production by ratification. If so, then these non-pooled interests may be able to "accept" such "offers" and thereby participate in unit production by contract. See *Ruiz v. Martin*, 559 S.W.2d at 843; Hoffman Article at p. D-3. If, on the other hand, the unit agreement declaration clearly refutes its being construed as an "offer," then there may be no ratification remedy. See *Standard Oil Co. of Texas v. Donald*, 321 S.W.2d at 606, where the court inferred that a NPRI had the right to ratify or repudiate if the lease contract is properly drafted.

Even if the would-be working interest owner is able to clear the unit agreement/declaration hurdle with an "acceptance" of the "offer" by the participating interests, two significant questions remain that no Texas court has apparently faced in reported decisions. One such issue is simply whether the existing joint operating agreement ("JOA") may also be ratified unilaterally by the non-participant and, if not, whether the lack of guidance as to cost allocation and operating procedures would prevent a court from enabling a party to share as a working interest owner. The MIPA expressly authorizes the Railroad Commission to determine the proper costs and their allocation among working interest owners of the actual and reasonable drilling, completion and operating expenses applicable to producing wells within the force pooled unit. Section 102.052 of the MIPA. In addition, this statute appears broad enough to authorize the Commission to establish other terms and conditions in its final order that would

govern operations within the force pooled unit other than disputes involving “reasonable” costs. Whether a court would authorize a no-sharing working interest owner to ratify the existing JOA or could impose special terms and conditions addressing operations between such ratifying interest owner and the working interests already participating in production remains an open question.

A reviewing court could hold that, even if a JOA could not be ratified, the ratifying working interest owner and his participating partners are governed by the same common law applicable to working interest co-tenants who operate without joint operating agreements. See *Neeley v. Intercity Management Corp.*, 732 S.W.2d 644 (Tex. App.--Corpus Christi 1987, no writ). While the policy and wisdom of such a holding involving obviously antagonistic interests in a complicated and ill-defined area of the law is subject to serious question, practitioners must await court guidance before there is any certainty on this issue. Until such judicial decisions are reported, the more certain, and probably more efficient, remedy for excluded lease interest and unleased mineral owners desiring to share as a cost-bearing interest is force pooling under the MIPA.

V. HORIZONTAL WELLS - NEW ISSUES

The Browning case is the first appellate decision discussing horizontal pooling issued from an oil and gas producing state. It is the author’s opinion that the case was incorrectly decided because the Texas appellate court interpreted the pooling authority contained in the lease too strictly. However, the case is discussed in detail to illustrate the importance of clear leasehold language and the difficulty/expense of litigating these issues.

A. *Browning Oil Co., Inc. v. Luecke*, 38 S.W.3d 625 (Tex. App. - Austin 2000, pet. denied.), 149 OGR 127

1. THE FACTS

Jimmie Luecke and his mother, Leona Luecke executed three oil and gas leases in 1979 to Humble Exploration Company, Inc. which were later assigned to Browning Oil Co., Inc. Each lease covered a separate tract of land in Fayette County as follows:

Tract 1 -	150 acres
Tract 2 -	88.12 acres
Tract 3 -	193.735 acres
	431.855 acres

and provided for a 1/8 royalty. The Plaintiffs owned all of the minerals in Tracts 1 and 3 and ½ of the minerals in Tract 2. The leases contained a standard pooling provision which was limited by a “anti-dilution provision” which required that a pooled unit must include at least 60% of the acreage from each tract included within the pooled unit. In 1984, the anti-dilution paragraph was

amended to provide that if a pooled unit was too large for the covered tract to constitute 60% of the unit, the unit must be filled “only [with] other lessor owned land” - that is, exclusively with other land owned by the Lueckes - until the adjacent Lueckes-owned land is exhausted. Other restrictions were:

1. Lessees could include non-Luecke land in the pooled units only to the extent necessary to satisfy the Railroad Commission Field Rules.
2. If the applicable Railroad Commission Field Rules offer a choice between spacing requirements of different sizes, lessees must choose the “lesser” units to be formed, minimizing the chances that any unit will ever need to be include non-Luecke land to satisfy the spacing rules.

There is no language specifically limiting the applicability of the anti-dilution provisions to vertical wells, probably because the surge of horizontal drilling in the Austin-Chalk area was still in the future.

On November 2, 1994 representatives from Marathon, recognizing the benefits of horizontal drilling in the Austin Chalk formation, attempted to amend the leases by adding a amendment which would nullify the anti-dilution provisions, allowing lessees the sole discretion to pool any portion of the Luecke’s land to create a unit with a horizontal well utilizing the greatest acreage allowable. The Lueckes refused to amend their leases.

Nevertheless, lessees completed two horizontal wells that crossed the Luecke’s land:

1. On February 13, 1995 the lessee completed the Jennifer #1 well as a horizontal well that crossed seven separate tracts of land, only one of which belonged to the Lueckes. The vertical portion of the well and a part of the horizontal drain hole are physically located on the Luecke’s Tract 2. The lessees attempted to pool 839.18 acres, 268.68 acres which was owned by the Lueckes - 115.82 acres from Tract 1, 87.68 acres from Tract 2, and 65.18 acres from Tract 3 - constituting 32% of the entire unit. Tract 2, the only Luecke tract crossed by the well, comprises 10.44% of the total unit, far less than the 60% specified in the anti-dilution provision.
2. Later in 1995 the lessees completed a second horizontal well, the Hayes #1. The vertical portion of the well is not located on the Luecke’s land, but portions of the horizontal drain hole crossed Tracts 1 and 3. The well was drilled on a purported pooled unit consisting of 346.625 acres. Of those acres, 114.86 are attributable to the Lueckes - 78.62 acres from Tract 3 and 36.24 acres from Tract I - totaling approximately 30% of the purported unit. The two tracts contain 10.45% and 22.68%, respectfully, of the entire unit.

Contending that the two horizontal wells violated the pooling provisions in their leases, the Lueckes filed suit in October, 1995. The case was tried to the court, and the trial court ruled that the lessees had breached the pooling provisions of the leases. The issue of damages was tendered to the jury.

The plaintiffs claimed that because their tracts were not validly pooled, they were entitled to royalty on all production resulting from the two purportedly pooled units. And because the Hayes well crossed two separate tracts of the Luecke's land, they argued that they were entitled to a double full royalty for the total production on that well. Based on these calculations, the total royalty sought by the plaintiffs totaled \$1,283,242.

The lessees/defendants proposed to allocate royalties to the plaintiffs based upon the shared production from the wells that could be attributed to the well plaintiffs' tracts. Plaintiff's expert witness testified as to how production could be allocated to the plaintiffs' land based upon the fractures underlying their land. According to this expert, the Luecke's share of production would result in royalties totaling \$202,421.05, less than the plaintiffs would have received if they had ratified the purported pooled units.

The court's charge did not expressly adopt either of the proposed theories but generally instructed the jury to assess damages and to consider royalties that "plaintiffs would have received under the terms of the leases if defendants had performed under the leases." The jury assessed total damages of \$833,256.00, attributing the following damages to each tract:

Tract 1 - \$374,965.00
Tract 2 - \$108,323.00
Tract 3 - \$349,968.00

Total - \$833,256.00.

Based on the amounts ordered by the jury, it is clear that the jury rejected the lessees' proposed calculations of royalties due. While the jury may have adopted the plaintiffs' theory of damages, the jury awarded the plaintiffs less than the total royalties sought by the plaintiffs.

The trial court found Browning and Marathon jointly and severally liable to the plaintiffs for the total amount found by the jury. The court further rewarded the plaintiffs \$237,964.20 in pre-judgment interest and \$75,000.00 in attorney's fees.

2. THE ISSUES

Upon appeal, the appellants/defendants/lessees argued that:

1. The trial court erred in concluding as a matter of law that the lessees failed to comply with the pooling provisions.

2. The trial court erred in failing to submit to the jury the proper measure of damages.
3. The trial court erred in awarding pre-judgment interest.

The Austin court had no trouble concluding that the lessees' pooling violated the pooling provisions of the leases. Resolving the proper measure of damages and the jury charge issues were more difficult.

3. THE RESULT

- a. The charge to the jury concerning damages.

The court held that the lessees non-compliance with the pooling provisions did not subject them to the damages awarded by the jury. The court held that:

“The proper remedy for a breach of the pooling provisions may not ignore or exceed the ownership interest conveyed under the leases. The Lueckes contracted for a share in royalties based on total production *from their land.*”

An oil and gas lease is both a contract and a conveyance of an interest in real property. See *Amoco Prod. Co. v. Alexander*, 622 S.W.2d 563, 571 (Tex. 1981)(Rights and duties of lessor and lessees are contractual.); *Hitzelberger v. Samedan Oil Corp.*, 948 S.W.2d at 503 (Oil and gas lease is a contract); *W. T. Waggoner Estate v. Sigler Oil Co.* 118 Tex. 509, 19 S.W.2d 27, 28-29 (1929)(Oil and gas involves property rights of lessor and lessee.)

The trial court erred in not instructing the jury as to which of the damage models was an appropriate basis to calculate royalties due the lessors. The trial court only asked the jury to award as damages the royalties the lessors would have been entitled to if the lessees had performed under the leases. As the lessees complained, the jury charge allowed, and perhaps encouraged, the jury to award the Lueckes royalties on oil and gas produced from lands the Lueckes do not own. The charge did not clarify the confusion between awarding breach of contract damages and calculating the royalties due under the lease. Thus, the court held that the charge was fatally defective. The court declined to apply, as the lessors urged, legal principles appropriate to vertical wells that are so “blatantly inappropriate” to horizontal wells and would discourage the use of horizontal well technology. The better remedy, the court stated, was to allow the offended lessors to recover royalties as specified in the lease, compelling a determination of what production can be attributed to their tracts with reasonable probability. See *Ortiz Oil Co. v. Luttes*, 141 S.W.2d 1050, 1053, (Tex. Civ. App. - Texarkana 1940, writ dism'd by agr.) (Fact that exact amount of oil produced cannot be precisely determined is no reason for denying recovery based on jury's approximation.) The court stated that the lessors/Lueckes were entitled to the royalties for which they contracted, no more and no less.

The court also rejected the lessees proposal that royalties should be calculated based upon a hypothetical 80 acre unit. Lessees relied upon the following cases in support of their theory: ***Southeastern Pipeline Co. v. Tichacek***, 997 S.W.2d 166 (Tex. 1999), as well as ***Amoco Prod. Co. v. Alexander***, 594 S.W.2d 467 (Tex. Civ. App. - Houston [1st Dist.] 1979), *aff'd as modified*, 622 S.W.2d 563 (Tex. 1981) and ***Shell Oil Co. v. Stansbury***, 401 S.W.2d 623 (Tex. Civ. App. - Beaumont), *aff'd per curiam*, 410 S.W.2d 187 (Tex. 1966). The court pointed out that these three cases involved breach of the implied duty to protect against drainage, not breach of express contract terms. The parties in these cases were not relying upon provisions in the lease to determine calculation of royalties. The claims in these cases were based upon the fact that there was no production from the lessor/plaintiff's land and the allegation was that the lessees/defendants had either failed to pool the plaintiffs' land, or failed to drill an offset well to recover minerals that may underline the lessor's land. The court noted that, in these cases, where there was no producing well on the plaintiffs' land from which to measure production, it was logical to use a hypothetical well to measure damages. In contrast, this case involved the determination of royalties for production from horizontal wells that actually crossed the lessors' land. It was undisputed that the lessors' land contributed to the total production from the horizontal drain hole. Therefore, it was not necessary to speculate concerning production from a hypothetical 80 acre well unit. Also, there was no authority under the leases in question to form an 80 acre unit in order to calculate damages. See ***Grimes v. LaGloria Corp.***, 251 S.W.2d 755, 761 (Tex. Civ. App. - San Antonio 1952, no writ) (Courts cannot create new well units if not found within agreement of parties).

b. The prejudgment interest issue.

Lessee/Browning argued that Section 91.402 of the Natural Resources Code prohibited prejudgment interest in this type of dispute. See Tex. Nat. Res. Code Ann §91.402(b)(West Supp. 2000). The statute provides that payment of proceeds may be withheld without interest when there is:

“A reasonable doubt that the payee: ...(b.) Has clear title to the interest in the proceeds of production.” *id.*

Because this dispute concerned the Luecke's royalty share in production, Browning argued that this exception should apply in this case. The court disagreed stating that the purpose of the statute was to protect royalty owners from intentional payment delays while permitting delays that result from legitimate title disputes. See ***Concord Oil Co. v. Pennzoil Exploration & Prod. Co.***, 966 S.W.2d 451, 461, (Tex. 1998)(citing bill analysis.) The primary issue in this case is whether the lessors are entitled to a pro rata share of royalties under the pooling provisions or royalties from all production from their own land. The lessor's entitlement to royalties has never been in dispute. All parties agree that the Luecke's right to receive some royalty is valid. Thus, since there is no legitimate title dispute, there is no excuse to lessee's statutory duty to pay prejudgment interest.

All parties agreed that prejudgment interest, if any, should be computed as simple interest. See *Johnson & Higgins v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 532 (Tex. 1998). The nature of the underlying dispute determines whether a court should apply prejudgment interest under general principals of equity, or under Section 301.002 of the Finance Code. See *Southeastern*, 977 S.W.2d at 401-402, *rev'd on other grounds*, 997 S.W.2d 166 (Tex. 1999). The two sources for prejudgment interest provide different accrual periods and different interest rates. Acknowledging that on remand the nature of the dispute might change, the court elected to not comment on the appropriate manner of calculating prejudgment interest, except to agree with lessees that prejudgment interest should not be assessed to funds that were deposited into the registry of the court. See *Pegasus Energy Group, Inc. v. Cheyenne Petroleum Co.*, 3 S.W.3d 112, 125 (Tex. App. - Corpus Christi 1999, pet. denied); *Edwin M. Jones Oil Co. v. Pend Oreille Oil & Gas Co.*, 794 S.W.2d 442, 450 (Tex. App. - Corpus Christi 1990, writ denied).

B. PAYING ROYALTY

1. PAY ROYALTY ON A SURFACE ACREAGE BASIS.

Pooling clauses as presently drafted require royalty payment on this basis. I understand that this is the basis attorneys presently use to calculate net revenue for horizontal wells.

2. PAY ROYALTY ON PERCENTAGE OF THE HORIZONTAL DRAINHOLE

This would require a calculation of the length of the horizontal drainhole and a determination of the portion of the horizontal drainhole which, between the penetration point and the terminus, is located within the tracts pooled. This is the method suggested by the court in *Browning* based upon Rule 86.

3. PAY ROYALTY ON A PRODUCTIVE ACREAGE BASIS ALONG THE HORIZONTAL DRAINHOLE.

Obtaining evidence as to productive acreage requires expert testimony. In the *Browning* case, there was expert testimony by the lessees as they offered evidence to support the royalty owed on both a percentage of the horizontal drainhole basis and a productive acreage upon the horizontal drainhole basis. Obtaining this type of evidence in order to distribute royalty from a horizontal well that is not involved in litigation would probably be prohibitive.

4. CONFUSION OF GOODS

The court in *Browning* did not go into detail as to the legal basis for the lessor's/plaintiff's claim that they be paid 100% of 200% of the royalty. The theory that the plaintiff's claim and the *Browning* court denied is called the "confusion of goods doctrine". The concept provides that if the operator cannot determine with reasonable certainty the amount of production coming from each of the tracts penetrated by a horizontal wellbore, then the operator

may be required to account to each of the owners of each tract penetrated as if all of the production is allocable to each tract penetrated by the wellbore. Under the confusion of goods doctrine, where goods similar in nature and value, but owned by different parties, are so confused that the property of each owner cannot be distinguished, then the burden is on the party commingling the goods to properly identify the share of each owner. *Humble Oil & Refining v. West*, 508 S.W.2d 812, 818 (Tex. 1974). To meet this burden, the operator would have to show by a preponderance of the evidence and with reasonable certainty the amount of oil and gas produced from each of the tract penetrated by the horizontal wellbore. See *Exxon Corp. v. West*, 543 S.W.2d 667, 673 (Tex. Civ. App. - Houston [1st Dist.] 1976, writ ref'd n.r.e., cert. denied 434 U. S. 875); *Humble Oil & Refining v. West*, 508 S.W.2d 812, 819 (Tex. 1974). In the absence of such showing, the owners in each of the separate tracts will be entitled to receive their ownership share in production from the total oil and gas produced from the well. *Mooers v. Richardson Petro. Co.*, 146 Tex. 1974, 204 S.W.2d 606, 608 (1947). An important question is whether the computation of the production allocable to each tract is capable of being established with reasonable certainty. The burden of proof shifts to the operator after proof by the tract owners of their ownership in an unpooled tract together with proof that they did not consent to the commingling of production in the horizontal wellbore.

Pooling solves the allocation of production as it relates to payment of royalty, because the pooling clause normally provides that royalty will be allocated to each tract in the proportion that the surface acreage included in each tract bears to the total surface acreage included in the unit. However, pooling of the tracts penetrated by the horizontal drainhole does not solve the problems arising from the existence of unleased owners, non-participating royalty interest owners, and non-consenting co-tenants. The rights of these parties are not affected by the pooling and, therefore, they continue to pose the same problem for the operator as discussed above, regardless of the existence of pooling. Under the confusion of goods doctrine, the operator could be required to account to each of the separate tract owners as if 100% of the production came from each tract, unless the operator can show "with reasonable certainty" how much production is obtained from each tract.

I have read the briefs by both parties in the *Browning* case prepared both for the Court of Appeals and the Supreme Court. The lessors, in their petition to the Supreme Court, complained bitterly of the fact that the appellate court's decision requires them to have the burden of proof upon remand to explain how much oil and gas is produced from each of the tracts they own. I am surprised that they believe they have the burden of proof because, as I understand the confusion of goods doctrine, that burden should still be with the lessee.

INDEX OF CASES AND ARTICLES

Cases

Amoco Prod. Co. v. Alexander, 622 S.W.2d 563, 571 (Tex. 1981) 30

Amoco Prod. Co. v. Alexander, 594 S.W.2d 467 (Tex. Civ. App. - 30
Houston [1st Dist.] 1979), *aff'd as modified*, 622 S.W.2d 563 (Tex. 1981)

Application by W. H. Mengden, Oil & Gas Docket No. 3-75, 677-78 and 3-76, 031-32 15

Application of Frank Thurmon, Oil & Gas Docket No. 3-79, 532-33 15

Atlantic Refining Co. v. Railroad Commission, 346 S.W.2d 801 (Tex. 1961) 14

Bradshaw v. Holmes, 246 S.W.2d 296 (Tex. Civ. App.--Amarillo 1952, writ ref'd n.r.e.) 2

Brown v. Getty Reserve Oil, Inc., 626 S.W.2d 810 (Tex. App.--Amarillo 1982, 10,22
writ dism'd)

Burnham v. Hardy Oil Co., 147 S.W. 330, 335 4,5,6,7,8
(Tex. Civ. App.--San Antonio 1912 *aff'd* 208 Tex. 555, 195 S.W. 1139 (1917))

Buttes Resources Co. v. Railroad Commission, 732 S.W.2d 675 (Tex. App.-- 15
Houston [14th Dist.] 1987, writ ref'd n.r.e.)

Carson v. Railroad Commission, 669 S.W.2d 315 (Tex. 1984) 15

Cline v. Henry, 239 S.W.2d 205, 208 (Tex. Civ. App.--Dallas 1951, writ ref'd n.r.e.) 2

Coates v. DeGarcia, 286 S.W.2d 691 (Tex. Civ. App.--San Antonio 1956, no writ) 10

Concord Oil Co. v. Pennzoil Exploration & Prod. Co., 966 S.W.2d 451, 461, 31
(Tex. 1998)

Cox v. Davison, 397 S.W. 200, 201 (Tex. 1965). 3,4,5,7

DeBenavides v. Warren, 674 S.W.2d 353 (Tex. App.--San Antonio 1984, writ ref'd n.r.e.) ... 24

Donnan v. Atlantic Richfield, 732 S.W.2d 715, 717 (Tex. App.-- 3,4,8,10
Corpus Christi 1987, writ denied)

Eternal Cemetery Corp. v. Tammen, 324 S.W.2d 562, 564 (Tex. Civ. App.-- 3
Fort Worth 1959, writ ref'd n.r.e.)

<i>Exxon Corp. v. West</i> , 543 S.W.2d 667, 673 (Tex. Civ. App. - Houston [1 st Dist.] 1976, writ ref'd n.r.e., cert. denied 434 U. S. 875)	32
<i>Fletcher v. Ricks Exploration</i> , 905 F. 2d 890 (5 th Cir. 1990)	17
<i>French v. French</i> , 159 S.W.2d 566 (Tex. Civ. App.--Amarillo 1942, writ ref'd)	9
<i>French v. George</i> , 159 S.W.2d 566 (Tex. Civ. App.--Amarillo 1942, writ ref'd)	16,17
<i>Garcia v. Sun Oil Co.</i> , 300 S.W.2d 724, 734 (Tex. Civ. App.--Beaumont 1957, writ ref'd n.r.e.)	4
<i>Garza v. DeMontalvo</i> , 217 S.W.2d 988 (Tex. 1949), judicial partitions	10
<i>Gilbreath v. Douglas</i> , 388 S.W.2d 279, 282 (Tex. Civ. App.--Amarillo 1965, writ ref'd n.r.e.)	3
<i>Goodloe & Meredith v. Harris</i> , 127 Tex. 583, 94 S.W.2d 1141, 1144 (Tex. Comm. App. 1936, opinion adopted)	3
<i>Grimes v. LaGloria Corp.</i> , 251 S.W.2d 755, 761 (Tex. Civ. App. - San Antonio 1952, no writ)	31
<i>Hamman v. Ritchie</i> , 547 S.W.2d 698, 706 (Tex. App.--Fort Worth 1977, writ ref'd n.r.e.)	3,4,9,18
<i>Hitzelberger v. Samedan Oil Corp.</i> , 948 S.W.2d at 503	30
<i>Horlock v. Horlock</i> , 614 S.W.2d 478, 485 (Tex. Civ. App.--Houston [14th Dist.] 1981, writ ref'd n.r.e.)	3
<i>Humble Oil & Refining Co. v. Hutchins</i> , 217 Miss. 636, 64 So.2d 733, 65 So.2d 825 (1953);	10
<i>Humble Oil & Refining v. West</i> , 508 S.W.2d 812, 818 (Tex. 1974)	32
<i>Humble Exploration Co. v. Railroad Commission</i> , Cause No. 13,999, Austin Court of Appeals, Oct. 3, 1984, decision unreported	11
<i>Hunt Oil Co. V. Moore</i> , 656 S.W.2d 634, 642 (Tex. App.--Tyler 1983, writ ref'd n.r.e.)	8
<i>Japhet v. McRae</i> , 276 S.W.2d 699 (Tex. Comm. App. 1925, judgmt. adopted)	9

<i>Johnson & Higgins v. Kenneco Energy, Inc.</i> , 962 S.W.2d 507, 532 (Tex. 1998)	31
<i>Edwin M. Jones Oil Co. v. Pend Oreille Oil & Gas Co.</i> , 794 S.W.2d 442, 450 (Tex. App. - Corpus Christi 1990, writ denied).	32
<i>Lehew v. Lehew</i> , 314 S.W.2d	10
<i>London v. Merriman</i> , 756 S.W.2d 736 (Tex. App.--Corpus Christi 1988, writ denied)	22,23,24,26
<i>Manges v. Guerra</i> , 673 S.W.2d 180, 183-84 (Tex. 1984)	3
<i>Martell v. Hunt</i> , 197 La. 701, 197 So. 402, 408-09 (1940)	6
<i>MCZ, Inc. v. Triolo</i> , 708 S.W.2d 49 (Tex. App.--Houston [1st Dist.] 1986, writ ref'd n.r.e.)	21,24,25
<i>Meadors v. Moore</i> , 113 S.W.2d 689 (Tex. Civ. App.--Texarkana 1938), <i>aff'd</i> 134 Tex. 127, 132 S.W.2d 256.	2
<i>Minchen v. Fields</i> , 345 S.W.2d 282 (Tex. 1961)	19
<i>Montgomery v. Rittersbacher</i> , 424 jS.W.2d 210, 213 (Tex. 1968)	19,20,25
<i>Mooers v. Richardson Petro. Co.</i> , 146 Tex. 1974, 204 S.W.2d 606, 608 (1947)	33
<i>Neeley v. Intercity Management Corp.</i> , 732 S.W.2d 644, 646 (Tex. App.--Corpus Christi 1987, no writ)	2,6,27
<i>Neugent v. Freeman</i> , 306 S.W.2d 167 (Tex. Civ. App. - Eastland 1957, writ refused n.r.e. . . .	17
<i>Ortiz Oil Co. v. Luttes</i> , 141 S.W.2d 1050, 1053, (Tex. Civ. App. - Texarkana 1940, writ dism'd by agr.)	30
<i>Parker v. Parker</i> , 144 S.W.2d 303 (Tex. Civ. App.--Galveston 1940, writ ref'd)	9,16
<i>Pegasus Energy Group, Inc. v. Cheyenne Petroleum Co.</i> , 3 S.W.3d 112, 125 (Tex. App. - Corpus Christi 1999, pet. denied)	31
<i>Phillips Petroleum Co. v. American Trading and Production Corp.</i> , 361 S.W.2d 942 (Tex. Civ. App.--El Paso 1962, writ ref'd n.r.e.).	12
<i>Railroad Commission v. Bishop Petroleum, Inc.</i> , 736 S.W.2d 724 (Tex. App.-- Waco 1987), <i>rev'd and remanded in part, aff'd in part</i> , 751 S.W.2d 485 (Tex. 1988).	14

<i>Railroad Commission v. Graford Oil Corp.</i> , 557 S.W.2d 946, 953 (Tex. 1977)	12
<i>Reed v. Turner</i> , 489 S.W.2d 373, 381 (Tex. Civ. App.--Tyler 1972, writ ref'd n.r.e.)	2
<i>Republic Production Co. v. Collins</i> , 7 S.W.2d 187 (Tex. Civ. App.-- Eastland 1928, writ ref'd)	2
<i>Ruiz v. Martin</i> , 559 S.W.2d 839 (Tex. App.--San Antonio 1977, writ ref'd n.r.e.)	21,22,23,26
<i>Ryan Consolidated Petroleum Corp. V. Pickens</i> , 155 Tex. 221, 285 S.W.2d 201 (1955)	10
<i>Shaw & Estes v. Texas Consol. Oils</i> , 299 S.W.2d 307, 313-14 (Tex. Civ. App.--Galveston 1964, writ ref'd n.r.e.).	4
<i>Shell Oil Co. v. Stansbury</i> , 401 S.W.2d 623 (Tex. Civ. App. - Beaumont), <i>aff'd per curiam</i> , 410 S.W.2d 187 (Tex. 1966).	30
<i>Southeastern Pipeline Co. v. Tichacek</i> , 997 S.W.2d 166 (Tex. 1999)	30,31
<i>Standard Oil Co. of Texas v. Donald</i> , 321 S.W.2d 602 (Tex. Civ. App.-- Fort Worth 1959, writ ref'd n.r.e.)	19,20,26
<i>Superior Oil Co. v. Barry</i> , 216 Miss. 664, 63 So.2d 115, 64 So.2d 357 (1953)	10
<i>Superior Oil Co. v. Foote</i> , 216 Miss. 728, 63 So.2d 137, 64 So.2d 355 (1953)	10
<i>The Superior Oil Company v. Roberts</i> , 398 S.W.2d 276, 278 (Tex. 1966)	8,9,16,17,18,25
<i>Taylor v. Higgins Oil & Fuel Co.</i> , 2 S.W.2d 288, 295 (Tex. Civ. App.-- Beaumont 1928, writ dism'd w.o.j.)	3
<i>Texon Drilling Co. v. Elliff</i> , 210 S.W.2d 553, 556 (Tex. Civ. App.-- San Antonio 1977), <i>rev'd on other grounds</i> , 146 Tex. 575, 210 S.W.2d 558.	3
<i>Veal v. Thomason</i> , 159 S.W.2d 742 (Tex. 1942).	9
<i>Verble v. Coffman</i> , 680 S.W.2d 69 (Tex. App.--Austin 1984, no writ)	22,23,24,26
<i>W. T. Waggoner Estate v. Sigler Oil Co.</i> 118 Tex. 509, 19 S.W.2d 27, 28-29 (1929)	30
<i>Waters v. Bruner</i> , 355 S.W.2d 230, 235 (Tex. Civ. App.--San Antonio 1962, writ ref'd n.r.e.).	11

White v. Smyth, 147 Tex. 272, 214 S.W.2d 967, 978 (1948) 3,4,5,7

Willson v. Superior Oil Co., 274 S.W.2d 947, 950 (Tex. Civ. App.-- 2,4,5
Texarkana 1954, writ ref'd n.r.e.)

Windsor Gas Corp. v. Railroad Commission. 529 S.W.2d 834 (Tex. App.-- 15
Austin 1975, dism'd as moot)

Zimmerman v. Texaco, 409 S.W. 2d 607, 614 (Tex. Civ. App.-- 3,4
El Paso 1966, writ ref'd n.r.e.)

Articles

Battle, An Update of Some Basic Oil and Gas Agreements: Division Orders, 19
Transfer Orders and Ratifications, Advanced Oil, Gas & Mineral Law Course, State Bar of
Texas (Sept. 1986)

Hoffman, Pooling and Unitization, Advanced Oil, Gas & Mineral Law Course, 21
State Bar of Texas (Oct. 1981) at p. D-3

Jones, “Non-Participating Royalty,” 26 Texas L. Rev. 569 (1948) 19

Manual of Oil & Gas Terms (2d ed. 1987), citing Hoffman, 10

Section 102.003 of the Texas Natural Resources Code, **Mineral Interest Pooling Act** 14
(Vernon 1978).

Smith, Implications of a Fiduciary Standard of Conduct for the Holder 3
of the Executive Right, 64 Texas L. Rev. 371, 372-80 (1985).

Oil and Gas Law, § 504.3, at p. 586.1 n. 2 (1988) 5

Voluntary Pooling and Unitization, Ch. 5 (1954). 10

* * * * *

Learn by experience - preferably other people's.

Maturity doesn't come with age; it comes with acceptance of responsibility.

Don't be discouraged; everyone who got where he is, started where he was.

Never ask a barber if he thinks you need a haircut.

It don't take a genius to spot a goat, in a flock of sheep.

A well-spent day brings happy sleep. Leonardo Da Vinci

I do not pray for a lighter road, but for a stronger back. Phillips Brooks

Hope sees the invisible, feels the intangible, and achieves the impossible. Anonymous

Make your life a mission - not an intermission. Arnold Glasgow

You can't stop the waves, but you can learn to surf. Dr. Jon Kabat-zinn

A faith that hasn't been tested can't be trusted. Adrian Rogers

It is difficult to steer a parked car, so get moving. Henrietta Mears

No one is rich enough to do without a neighbor. Danish Proverb

Worry is the interest paid by those who borrow trouble. George Lyons

It is a greater compliment to be trusted than to be loved. George MacDonald

Wisdom is the quality that keeps you from getting into situations where you need it.

A man never discloses his own character so clearly as when he described others.

The future belongs to those who see possibilities before they become obvious.

You must have long-range goals to keep you from being frustrated by short-range failures.

Don't be discouraged; everyone who got where he is, started where he was.

If people knew how hard I have to work to gain my mastery, it wouldn't seem wonderful at all. **Michaelangelo**

It has been my observation that most people get ahead during the time the others waste. **Henry Ford**

The next best thing to a friend is someone to blame.

Our main business is not to see what is lying dimly in the distance, but to do what lies clearly at hand.

You cannot hold a man down without staying down with him. **Booker Washington**

Every miracle is an idea that outgrew its doubts.

Of all the awkward people in your house there is only one whom you can hope to improve very much.

SECRET OF LIFE: Find the thing you like to do best, then find someone who will pay you to do it. **Henry Longhurst**

When pilgrims landed in this country, there were no taxes, no depression, no foreign aid. The men hunted and fished. The women did all the work. Then, the white man thought he could improve on that system. **Blackie Sherrod**

Middle age is when you want to see how long your car will last instead of how fast it will go.

I accomplish by plodding and persistence what those who are brilliant accomplish immediately. **George Snell**

One of the most difficult things in the world is to argue without passion and to meet arguments without wounding. To be utterly convinced of one's own beliefs without at the same time being bitter to those of others is no easy thing. **William Barclay**

A rumor is about as hard to unspread as butter.

Worry is like a rocking chair; it will give you something to do, but it won't get you any where.

It isn't what you earn, its what you don't spend.

.\articles\Non-Consenting Mineral Interests