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Rights of Nonleasing Fractional Mineral Interest Owners

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RIGHTS OF NONLEASING FRACTIONAL MINERAL INTEREST OWNERS

I. INTRODUCTION

Diversified ownership of the mineral estates under North Dakota and other western lands is now so common as to be considered the rule rather than the exception. For various reasons — including problems in identifying and locating fractional mineral interest owners, differing opinions on the best way to manage the common property, and mistake on the part of a mineral interest lessee — owners of fractional mineral interests may find that a portion of the mineral interest has been leased without their knowledge or participation.

This Note will examine the relative rights of nonleasing and leasing mineral interest owners. It will first look at the rights of mineral owners to lease, enter, and develop their mineral properties. The responsibilities of mineral owners who develop the common estate without their co-owner's participation will also be examined. Finally, the way that oil and gas conservation statutes alter and supplement the rights of mineral interest owners will be discussed.

While an effort has been made to locate and use North Dakota law when appropriate, many of the questions addressed in this Note have not been litigated in North Dakota. As a result, North Dakota practitioners will have to look to other jurisdictions for guidance in answering oil and gas questions. This Note was prepared to facilitate this effort.

II. RIGHTS OF MINERAL INTEREST OWNERS PRIOR TO PRODUCTION

Owners of fractional mineral interests enjoy equal rights to commonly owned minerals, including the rights to explore and develop the minerals, in proportion to their undivided share of the whole.[1] From this it follows that a nonleasing mineral interest owner can not force another cotenant or that cotenant's lessee to explore or develop minerals. For example, in the Kansas case of *Krug v. Krug,*[2] owners of nine-elevenths of the mineral estate attempted to compel exploration for oil by suing their lessee, the owner of the other two-elevenths and his lessee.[3] The court ordered defendant Ray Krug to allow plaintiff's lessee to explore, develop, and produce oil and gas on the common property.[4] Additionally, the court ordered that defendant Krug be carried for the expense of a test well[5] and that he be given his proportionate share of the oil and gas produced, less his proportionate share of the expenses.[6]

The court in *Krug* applied the general rules of law set out in *Prairie Oil & Gas Co. v. Allen.*[7] In *Prairie Oil & Gas* development of the mineral estate by one tenant in common was held not to constitute waste because the extraction of oil from an oil well is the use not the destruction of the estate.[8] As a result, a tenant in

1. 2 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW § 502 (1981) [hereinafter cited as WILLIAMS & MEYERS]. This statement represents the view held in most oil and gas producing states and is a modification of the common law rule of waste established by the statute of Westminster II, ch. 22 (1285) adopted by the several states either as a part of the common law or by statute. *Id.* § 502 n.3.

2. 5 Kan. App. 2d 426, 618 P.2d 323 (1980).

3. Krug v. Krug, 5 Kan. App. 2d 426, _____, 618 P.2d 323, 324 (1980). James H. Norris owned a lease on defendant Ray R. Krug's two-elevenths interest. At the time of trial, Norris released his lease, removing himself from the lawsuit and leaving Ray Krug's two-elevenths unleased. *Id.*

4. *Id.* at _____, 618 P.2d at 324.

5. *See* H. WILLIAMS & C. MEYERS, MANUAL OF OIL AND GAS TERMS 84 (5th ed. 1981) [hereinafter cited as OIL & GAS TERMS]. A carried interest is defined as follows:

> A fractional interest in oil and gas property, usually a lease, the holder of which has no personal obligation for operating costs, which are to be paid by the owner or owners of the remaining fraction, who reimburse themselves therefor out of production, if any. The person advancing the costs is the carrying party and the other is the carried party.

Id.

6. 5 Kan. App. 2d at _____, 618 P.2d at 324. The trial court's order, quoted in the appellate opinion, emphasized that Ray Krug would not be charged with or obligated to pay any costs of drilling a dry hole. If production were obtained, however, Cities Service Company, the drilling operator, would be entitled to withhold a part of Krug's share of production equal to his share of the reasonable costs of development and production. *Id.*

On appeal Krug did not contest the right of plaintiff's lessee to go on the land and drill or the order enjoining him from interfering with that right. Rather, Krug complained that the order created a contractual relationship between him and the drilling operator without his consent. The court expressed its opinion that the relationship was only quasi-contractual. *Id.* at _____, 618 P.2d at 324-25.

7. 2 F.2d 566 (8th Cir. 1924).

8. Prairie Oil & Gas Co. v. Allen, 2 F.2d 566, 571 (8th Cir. 1924). In his opinion Judge Phillips cited cases from England, California, Kansas, Kentucky, Pennsylvania, Texas, and Virginia to

common may develop and produce oil and gas from the common property even without the consent of his cotenant so long as he does not exclude that cotenant.[9] If a cotenant does not wish to develop the property himself, he may lease only his share.[10] The lease of this portion will be valid; therefore, no trespass will be committed against any other tenant in common.[11]

The principles enumerated in *Prairie Oil & Gas Co.* suggest that the remedy for a nonleasing mineral owner who thinks that a leasing mineral owner and his lessee are not properly managing the common interest is to find a lessee of his own.[12] Additional support for this proposition is found in the rule that the right to develop the common property is nonexclusive.[13] Relying on this rule of nonexclusion, in *Garcia v. Sun Oil Co.*[14] the Texas Court of Civil Appeals affirmed the granting of a temporary injunction to protect the interest of a petitioner who shows a probable right to recovery and a probable recovery.[15] Sun Oil Company was allowed to enter and drill on property involved in a title dispute because it could show with sufficient certainty that it was the plaintiff's cotenant.[16] Thus, the court affirmed the right of a cotenant to enter common property even in the face of a title dispute.[17]

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support the rule of nonwaste, and from Illinois, Louisiana, and West Virginia for contrary authority. *Id.*

Another rule which seeks to deal with the special nature of oil and gas is the rule of capture. The rule of capture has been expressed as follows: "The owner of a tract of land acquires title to the oil and gas which he produces from wells drilled thereon, though it may be proved that part of such oil or gas migrated from adjoining lands." Hardwicke, *The Rule of Capture and Its Implications as Applied to Oil and Gas,* 13 TEXAS L. REV. 391, 393 (1935). The rule of capture has the legal effect of precluding liability for causing oil or gas to migrate across property lines or for producing oil or gas originally in place under the land of another, so long as the well itself does not trespass. The remedy for the injured landowner under this rule has generally been that of self-help — "go and do likewise." Barnard v. Monongahela Natural Gas Co., 216 Pa. 362, 365, 65 A. 801, 802 (1907). *See generally* 1 E. KUNTZ, LAW OF OIL & GAS §§ 4.1-3, 4.6 (1962); 1 W. SUMMERS, THE LAW OF OIL & GAS §§ 61-63 (1954); 2 WILLIAMS & MEYERS, *supra* note 1, §§ 204.4-.5; Shank, *Present Status of the Law of Capture,* 6 INST. ON OIL & GAS L. & TAX'N 257, 268 (1955).

9. 2 F.2d at 571. *See also* Burnham v. Hardy Oil Co., 147 S.W. 330 (Tex. Civ. App. 1912), *aff'd,* 108 Tex. 555, 195 S.W. 1139 (1917). In *Burnham* the court said that due to the fugacious nature of oil and gas, it must be promptly taken from the land. Were one cotenant allowed to block development by withholding consent he could arbitrarily destroy the value of the land. 147 S.W. at 335.

10. 2 F.2d at 572.

11. *Id.* The *Prairie Oil & Gas* court in reaching this rule distinguished the case of Howard v. Manning, 79 Okla. 165, 192 P. 358 (1920), in which the Oklahoma Supreme Court had expressed a contrary rule. The court in *Prairie Oil & Gas* concluded that the earlier case referred to a lease by one tenant in common of the entire common property, and occupancy by the lessee to the exclusion of other cotenants. *Id.*

12. 2 F.2d at 572.

13. *See, e.g.,* Earp v. Mid-Continent Petroleum Corp., 167 Okla. 86, _____, 27 P.2d 855, 858 (1933). This statement appears in a listing of undisputed principles of law applied to *Mid-Continent* and recognized or announced in *Prairie Oil & Gas Co. v. Allen.*

14. 300 S.W.2d 724 (Tex. Civ. App. 1957).

15. Garcia v. Sun Oil Co., 300 S.W.2d 724, 734 (Tex. Civ. App. 1957).

16. *Id.* at 736. Sun Oil Company had cross-claimed in a quiet title action, seeking the right to enter and develop a portion of the property involved in the suit. *Id.* at 725. The trial court granted the injunction allowing Sun Oil to go forward with its development. *Id.* at 733.

17. *Id.* at 736. The court's opinion quotes in great detail from the parties' pleadings. In making its decision the court did not examine the record title introduced at trial, but did find that Sun Oil

In addition to injunctive relief, damages have been found appropriate where one cotenant excludes another. In *Humble Oil & Refining Co. v. Kishi*[18] a lessee entered and drilled after his right to do so had terminated.[19] Kishi protested the entry, but Humble Oil claimed the exclusive right to the leasehold.[20] Oil had been found on adjoining land prior to the entry, and as a result, the market value of the leasehold was $1,000 an acre.[21] Humble Oil, however, completed a dry hole causing the leasehold interest to have no value.[22] Even though the oil company had entered the common property in the good faith belief that its lease had not terminated, the court held the company liable for the loss in value to the leasehold as a consequence of its exclusion of Kishi.[23]

As a last remedy, a tenant in common may ratify the lease and sue as a party to the contract.[24] Such a suit could be based on the implied covenants to explore and to develop.[25] These covenants impose a duty on the lessee to commence drilling of an initial well within a reasonable time[26] and upon securing production of oil or

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had established its position as a cotenant and that the relationship was secure even if appellants Garcia won their suit in trespass to try title. *Id.* This case shows the willingness of the trial and appellate courts to enforce the right of a cotenant to enter common property to develop the mineral estate even though the exact terms of the cotenancy are in dispute. *Id.*

18. 276 S.W. 190 (Tex. 1925).

19. Humble Oil & Refining Co. v. Kishi, 276 S.W. 190, 190 (Tex. 1925). Kishi and Lang, owners of three-fourths and one-fourth undivided interests in oil and mineral rights respectively, leased their interests to Humble Oil and Refining Company for a three year period beginning December 23, 1919. Lang, however, did not acknowledge the lease until January 29, 1920. Humble Oil entered and began drilling on January 23, 1923. Kishi protested this entry, but Lang consented. *Id.*

20. *Id.* Humble Oil claimed that the lease had not expired and that under its terms it would not expire until three years after it was signed and acknowledged by Lang. Since they began drilling before January 29, 1923, the anniversary date of Lang's signing, Humble claimed to have extended the lease under its own terms. *Id.*

21. *Id.* at 190-91.

22. *Id.* at 190. Humble Oil remained in possession under its January 23 entry until May 10, 1923, when having completed drilling a dry hole it abandoned its efforts. *Id.* Because of this failure to find oil on the tract the leasehold interest was found to be of no value. *Id.* at 191.

23. *Id.* In the suit by Kishi against Humble Oil for damages, the district court awarded damages of one dollar, holding that the amount of damages sustained was unascertainable. *Id.* The court of civil appeals held that Kishi was entitled to recover the actual loss suffered as a result of the wrongful entry and exclusion, but that proof of the market value of the leasehold interest was a legally insufficient basis for the amount of the recovery. Kishi v. Humble Oil & Refining Co., 261 S.W. 228, 232-33 (Tex. Civ. App. 1924). The Commission of Appeals recommended that the court of appeals be reversed and that the trial court's judgment be retained allowing Kishi three-fourths of the market value of the leasehold interest and that the proof offered was sufficient to establish this market price. 276 S.W. at 191. The supreme court entered its judgment in accordance with these recommendations. *Id.*

24. OIL & GAS TERMS, *supra* note 5, at 616. Ratification of a lease has been defined as an agreement ratifying and confirming a lease executed by a concurrent owner other than the original lessor, and an act by such person which by implication ratifies and confirms the lease. *See* Humble Oil & Refining Co. v. Clark, 126 Tex. 262, 87 S.W.2d 471 (1935) (lessor's execution after an oil and gas lease had allegedly terminated for failure to pay rentals of a mineral deed but the oil and gas lease was treated as still subsisting constitutes ratification sufficient to revive it).

25. *See* Martin, *A Modern Look at Implied Covenants to Explore, Develop, and Market Under Mineral Leases,* 27 INST. ON OIL & GAS L. & TAX'N 177 (1976) (implied covenants). *See also* 2 E. BROWN, THE LAW OF OIL & GAS LEASES §§ 16.01-.05 (2d ed. rev. 1973); 5 E. KUNTZ, LAW OF OIL & GAS, §§ 54.1-62.5 (1978); 2 W. SUMMERS, THE LAW OF OIL & GAS §§ 395-416 (1959); 5 WILLIAMS & MEYERS, *supra* note 1, §§ 801-878.

26. 5 WILLIAMS & MEYERS, *supra* note 1, § 811.

gas from the leasehold, to drill such additional wells to develop the premises as is reasonably prudent.[27] Some commentators suggest, however, that the covenants to explore and to drill an initial well have been replaced or rendered insignificant because an oil and gas lease typically terminates automatically if a well is not drilled or if delay rentals are not paid within a fixed period.[28] Although this suggestion may be true during the primary term of an oil and gas lease,[29] there is strong authority refuting the argument that exploration, accompanied or unaccompanied by production, of a portion of a lease under all circumstances satisfies completely the implied covenants of exploration and development.[30] As a result, it is arguable that the implied covenants to explore and to develop may provide an additional remedy for a nonleasing cotenant.

Thus, nonleasing mineral interest cotenants have no special status in the period prior to development and production; that is, they have no right, privilege, or remedy greater than any other mineral interest owner. A nonleasing cotenant can neither block nor compel development by a leasing cotenant.[31] This results from the rule that the right to develop is nonexclusive.[32] A nonleasing cotenant has no right to exclude a cotenant[33] and may enter and develop his own interest at any time.[34] Should a cotenant exclude or be excluded by another cotenant, injunctive relief ensuring entry[35] and damages[36] are available as remedies. If he so chooses he may

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27. 5 WILLIAMS & MEYERS, *supra* note 1. § 832.

28. Martin, *supra* note 25, at 179; *see also* Moses, *The Evolution and Development of the Oil and Gas Lease,* 2 INST. ON OIL & GAS L. & TAX'N 1 (1951). Moses traces the history of oil and gas leases to the present point where the drilling clause used in most oil and gas leases is the "unless" clause, generally construed as a conveyance on common law limitation. Such a conveyance provides for the automatic termination upon the happening of the limitation, nondrilling or nonpayment of proper delay rentals. *Id.* at 23.

29. OIL & GAS TERMS, *supra* note 5, at 570-71. The primary term of an oil and gas lease has been defined as follows:

> The period of time, typically five or ten years, during which a lease may be kept alive by a lessee even though there is no production in paying quantities by virtue of drilling operations on the leased land or the payment of rentals. After the expiration of the primary term, the lease usually can be kept alive only by [production in paying quantities], absent some savings clause in the lease. . . .

Id.

30. *See* Sauder v. Mid-Continent Petroleum Corp., 292 U.S. 272 (1934) (lessee could not hold entire 360 acre leasehold indefinitely by production from 40 acre spacing unit). *See also* Sinclair Oil & Gas Co. v. Masterson, 271 F.2d 310 (5th Cir. 1959) (trial court's order requiring Sinclair to drill 30 exploratory wells within five years, to surrender the lease acreage, or to pay money penalties upheld).

31. Krug v. Krug, 5 Kan. App. 2d at _____, 618 P.2d at 325.

32. Earp v. Mid-Continent Petroleum Corp., 167 Okla. at _____, 27 P.2d at 858; Burnham v. Hardy Oil Co., 147 S.W. at 335.

33. Prairie Oil & Gas Co. v. Allen, 2 F.2d at 573.

34. *Id.*

35. Garcia v. Sun Oil Co., 300 S.W.2d at 734.

36. Humble Oil & Refining Co. v. Kishi, 276 S.W. at 191.

ratify the lease made by his cotenant[37] and he will then have the rights of one privy to the contract.[38]

III. RIGHTS OF NONLEASING MINERAL OWNERS IN THE EVENT OF DEVELOPMENT

A. THE RIGHT OF MINERAL OWNERS TO INITIATE DEVELOPMENT

1. Concurrent Interest Owners

The law concerning cotenants begins with the proposition that each concurrent interest owner has the right to lease his interest and to explore for and develop the common mineral interest without liability for waste.[39] *Prairie Oil & Gas Co. v. Allen*[40] and its progeny[41] have established this principle. The rationale for this position is that oil and gas are a part of an estate that can be enjoyed only by removal. The taking of oil from an oil well is the use and not the destruction of the estate.[42] Additionally, the fugacious nature of oil and gas requires special treatment.[43] These rules represent the majority view.[44] Courts following the majority view have adjusted

37. OIL & GAS TERMS, *supra* note 5, at 482.

38. 2 WILLIAMS & MEYERS, *supra* note 1, § 505.2.

39. Prairie Oil & Gas Co. v. Allen, 2 F.2d 566, 573 (8th Cir. 1924).

40. 2 F.2d 566.

41. *See* Earp v. Mid-Continent Petroleum Corp., 167 Okla. 86, 27 P.2d 855 (1933) (citing Prairie Oil & Gas Co. v. Allen, 2 F.2d 566, 573 (8th Cir. 1924), as recognizing or announcing undisputed principles of law). *See also* P & N Investment Corp. v. Florida Ranchettes, Inc., 220 So. 2d 451 (Dist. Ct. App. 1964) (more recent case citing *Prairie Oil & Gas* on this point).

42. 2 F.2d at 571.

43. *Id.*

44. The three jurisdictions noted as adopting a rule of waste in *Prairie Oil & Gas* were Illinois, Louisiana and West Virginia. *Id.* Louisiana codified this position in § 31.175 of the Louisiana Revised Statutes Annotated. LA. REV. STAT. ANN. § 31.175 (West 1975). This section provides that "[a] co-owner of a mineral servitude may not conduct operations on the property subject to the servitude without the consent of the other co-owner." *Id.* The official comments to this statute suggest that the nonoperator claims his share of production subject to the obligation to account for his share of investment and operating cost. *Id.* (Official Comments) (citing Huckabay v. Texas Co., 277 La. 191, 78 So. 2d 829 (1955)).

The situation in the other two states seems to be best reflected by an observation from 2 WILLIAMS & MEYERS, *supra* note 1, § 502 n.3. It is stated as follows:

> The states which view production by a concurrent owner as waste have been quick to find that a non-joining concurrent owner has ratified a lease executed by another concurrent owner, thereby authorizing the extraction of minerals. Thus in Sommers v. Bennett, 68 W. Va. 157, 69 S.E. 690 (1910), it was held that ratification of a lease was accomplished by the filing of a suit by a non-joining cotenant for an accounting. Statutes in such states have also authorized the leasing of land under certain circumstances when concurrent owners cannot reach an agreement.

Id.

North Dakota appears to adhere to the majority position. In Schank v. North Am. Royalties, Inc., 201 N.W.2d 419 (N.D. 1972), the North Dakota Supreme Court's syllabus states the following:

> Owners of undivided fractional interests in oil and gas in and under the same land are tenants in common and each has a right to enter upon the land for the purpose of exploring for oil and gas and may drill and develop the same without the consent of the

common law rules, such as waste, to accommodate interests in minerals that may migrate to a well on neighboring land. One illustration of this effort is the following observation by the Illinois Supreme Court:

> The stern rule of liability of a cotenant, who commits waste or damage to the common property, has been relaxed where the profit taken from the land is of a fugacious nature and liable to be exhausted by adjacent operators. In such cases the rule allowing deductions for money spent in protecting, preserving and marketing applies, and where the subject matter is oil, the cotenant who takes it from the land must account to his cotenants for their respective proportions of the net value of the oil produced, which is its market value, less the cost of extracting and marketing it.[45]

In short, any concurrent interest owner may enter and develop the common mineral interest; however, the cotenant must account to his cotenants for the market value of the latter's share less reasonable and necessary expenses.[46]

Should one cotenant unsuccessfully explore the mineral estate without the consent of his cotenant, the developing cotenant bears the risk and the expense of his action.[47] Even if an agreement does exist between parties, any expenditure beyond that consented to is chargeable only against the share of production from the well for

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other. Each cotenant acts for himself, and one is not the agent of the other nor has he the authority to bind the other merely because he is a cotenant, unless he is authorized to do so.

Id. at 422. In the body of the *Schank* opinion the court listed the principles set out above as general rules established in other jurisdictions and noted that they were in harmony with the laws of North Dakota. *Id.* at 429.

45. Pure Oil Co. v. Byrnes, 388 Ill. 26, _____, 27 N.E.2d 356, 362 (1944).

46. Schank v. North Am. Royalties, Inc., 201 N.W.2d 419, 429 (N.D. 1972). *See, e.g.*, Robinson v. Southwestern Dev. Co., 130 Cal. App. 2d 1, _____, 277 P.2d 825, 827 (1954) (applying general rule in approving charges against nondeveloping cotenants for proportionate share); Petroleum Exploration Corp. v. Hensley, 284 S.W.2d 828, 830 (Ky. 1955) (finding that plaintiff was not trespasser against other cotenants); Mershon v. Essley, 204 Okla. 660, _____, 233 P.2d 293, 297 (1951) (quoting from Earp v. Mid-Continent Petroleum Corp., 167 Okla. 86, _____, 27 P.2d 855, 858 (1933)); Smith v. Sabine Royalty Corp., 556 S.W.2d 365, 367 (Tex. Civ. App. 1977) (cotenant plaintiff had right to drill and produce oil and gas without defendant's consent, but must account for expenses and profits).

47. Davis v. Sherman, 149 Kan. 104, _____, 86 P.2d 490 (1939). The parties in the *Davis* case were cotenants in an oil and gas lease. Production had been obtained from a well on the property and a division order executed. Davis drilled a second well which was completed as a dry hole. The Kansas Supreme Court held that where the defendants had neither agreed to nor ratified Davis' operations they had no personal liability for the drilling expenses. *Id.* at _____, 86 P.2d at 490. *See also* Willson v. Superior Oil Co., 274 S.W.2d 947, 950 (Tex. Civ. App. 1954) (in the absence of an agreement, a cotenant who drills a dry hole does so at his own risk and without right to reimbursement).

which the expenditure was made.[48] For example, one court denied an operating cotenant a lien against production from other wells for the expense of unsuccessfully "fracking"[49] one well.[50]

From this discussion it can be seen that any cotenant can execute a valid lease covering his interest in a mineral estate without the consent of other cotenants.[51] He may also develop the common estate without the consent of other cotenants.[52] If he does, however, he alone bears the risk of loss from unsuccessful operations.[53]

2. Successive Interest Owners

In the case of successive interests in the mineral estate, development by the life tenant alone is waste, and by the remainderman alone, trespass.[54] The rules and authority applicable to successive interests are stated in *Welborn v. Tidewater Associated Oil Co.*[55] First, a remainderman may not execute an oil and gas lease permitting immediate exploration and production without the consent of the life tenant.[56] Second, a life tenant may not drill new oil and gas wells or lease the land to others for that purpose.[57] The life tenant and remainderman together, however, may lease the land by a joint lease.[58] They may agree as to the

48. Ashland Oil & Refining Co. v. Bond, _____ Ark. _____, _____, 263 S.W.2d 74, 76 (1953) (withholding return from two different wells was wrong as colessee's pro rata responsibility for expenses was not a personal liability, but an offset against his claim to proceeds from the well for which expenditures were made).

49. OIL & GAS TERMS, *supra* note 5, at 675. Sand-fracking is an operation designed to loosen or break up tight formations which contain oil or gas by injecting a mixture or blend of crude oil and sand into the producing formation under high pressure by means of pressure pumps, followed by injections of rubberized nylon balls to seal off the fractured formation. *Id.* The purpose of the operation is to increase the permeability (or ability of fluids to flow through the rock) and production. *Id.*

50. Knight v. Mitchell, 97 Ill. App. 2d 178, _____, 240 N.E.2d 16, 18 (1968) (reversing lower court judgment awarding costs for fracking to operating cotenant because defendant had not consented to operation).

51. Prairie Oil & Gas Co. v. Allen, 2 F.2d 566, 572 (8th Cir. 1924).

52. *Id.* at 571.

53. Willson v. Superior Oil Co., 274 S.W.2d 947, 950 (Tex. Civ. App. 1954) (finding that document at issue was not a mere restatement of dates under law of cotenancy because its terms obligated Superior Oil Company to pay share of expenses even in event of dry hole).

54. Welborn v. Tidewater Associated Oil Co., 217 F.2d 509, 510 (10th Cir. 1954) (lease from remainderman alone grants only contingent right to go upon the land and develop it for oil and gas and produce oil therefrom after death of the life tenant, in the event that death occurs prior to the expiration of the primary term of the lease).

55. 217 F.2d 509.

56. *Id.* at 510. *Accord* Carter Oil Co. v. McQuigg, 112 F.2d 275, 280 (7th Cir. 1940) (deciding the validity of leases executed by the life tenants and two of five remainder interests); Bordon v. Gypsy Oil Co., 141 Kan. 147, _____, 40 P.2d 463, 468 (1935) (stating rights of life tenant and remainderman in deciding what rights survive death of life tenant).

57. 217 F.2d at 510. *Accord* Shultis v. MacDougal, 162 F. 331 (8th Cir. 1907) (stating general discussion finding lease from life tenant invalid); Barnes v. Keys, 36 Okla. 6, _____, 127 P. 261, 262 (1912) (stating general rule).

58. 217 F.2d at 510. *Accord* Union Gas & Oil Co. v. Wiedemann Oil Co., 211 Ky. 361, _____, 277 S.W. 323, 324 (1924) (finding lease, otherwise valid, conveys interest when jointly executed by life tenant and remainder interest).

division of rents and royalties,[59] but in the absence of such an agreement, the life tenant is entitled to only the income from such royalties.[60]

Rents and royalties collected without the approval of other successive interest holders are distributed according to the laws of property in the jurisdiction involved. Thirty-six jurisdictions have adopted either the 1931 or 1962 version of the Uniform Principle and Income Act, which would apply to such a situation.[61]

The law of successive interests requires that any lease must be executed jointly by the owners to be valid, so practically, there is no possibility of development without the involvement of all owners.[62] Because individual holders of successive interests possess limited authority to lease oil and gas interests and to otherwise participate in development of the mineral estate, this Note will not deal with those interests in greater detail.

B. Basis For Accounting For Minerals Removed From Property

Once production is obtained from a commonly owned leasehold, the concern of a nonleasing cotenant can easily shift from the propriety of the developer's entry and the terms governing the exploration of the mineral estate to the identification of the share that the nonleasing cotenant is entitled to as part owner of the minerals being produced. If a tenant in common produces and markets oil or gas from common land with the knowledge and consent of his cotenant, he is accountable for the amount of the royalty customarily paid in the locality where the wells are located.[63] But when one cotenant develops and sells oil or gas from

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59. 217 F.2d at 510.

60. *Id.* at 511. *Accord* Borden v. Gypsy Oil Co., 141 Kan. 147, _____, 40 P.2d 463, 468 (1935); Barnes v. Keys, 36 Okla. 6, _____, 127 P. 261, 263 (1912).

61. For the text of the uniform acts and variation notes and annotation materials for adopting jurisdictions, see 7A U.L.A. 429 (1978 & Supp. 1982).

62. 2 Williams & Meyers, *supra* note 1, § 513, at 646.1. The law of mines and minerals provides one narrow possibility for development which is described in the following passage:

> The most important exception to the general rules limiting the power of a life tenant to sever and remove minerals without the concurrence of the owner of a future interest in the land arises from the operation of the "open mine" doctrine. If a mine has been opened before the creation of a life estate and a future interest in land, the life tenant may be entitled to continue to operate the opened mine and retain the proceeds of such operation, the owner of the future interest not being entitled to have such proceeds impounded or to receive an apportioned share thereof. The basis of the open mine doctrine appears to be that a life tenant given the beneficial enjoyment of land is entitled to enjoy the land in the same manner as it was enjoyed before the creation of the life estate.

Id. (footnote omitted).

63. Zeigler v. Brenneman, 237 Ill. 15, _____, 86 N.E. 567, 601 (1908).

the common estate without the consent of his cotenant, one of several rules will apply. To determine which rule will apply one must consider the jurisdiction and the factual setting, with the central inquiry being the issue of good faith.[64] Some courts have granted nonconsenting mineral owners their proportionate share of royalties,[65] while other courts have awarded nonconsenting mineral owners the value of the oil produced, less the reasonable costs of development and production.[66]

In *McIntosh v. Ropp*[67] the Supreme Court of Pennsylvania upheld the lower court's findings that a lease granted by a life tenant and ratified by one remainderman was valid and that the lessee had acted in good faith.[68] The court first cited the general rule that compensation is the measure of damages when no facts show intentional wrong.[69] It then stated that between tenants in common, compensation may be measured by the fair market value of the minerals in place figured on the basis of the royalty to be obtained for the privilege of removing the minerals.[70] The court also discussed, but did not apply, the harsher rule that compensation is the market value of the oil minus the reasonable costs of producing and marketing the minerals.[71]

The good faith royalty rule has also been applied in Texas and Illinois. *Fyffe v. Fyffe,*[72] an Illinois case, involved a lease executed by the father, step-brother, and step-sister of three unsigned fractional interest owners. In an earlier decision the Illinois Supreme Court stated that the lease was presumed to be made for the benefit of all cotenants.[73] This presumption and the fact that the unsigned owner

64. For general discussions of the rules applied to accounting between cotenants and cases relative to the various rules see 2 E. KUNTZ, LAW OF OIL AND GAS §§ 5.2-5.6, 8.1, 8.3, 8.4 (1962); 1 W. SUMMERS, THE LAW OF OIL AND GAS §§ 37-38 (1954); 2 WILLIAMS AND MEYERS, *supra* note 1, §§ 504-504.3.

65. Fyffe v. Fyffe, 292 Ill. App. 539, _____, 11 N.E.2d 857, 864 (1937) (applying royalty measure when lease granted by life tenant and two of five remainder interests).

66. Moore Oil v. Snakard, 150 F. Supp. 250, 259 (W.D. Okla. 1957) (cotenant had duty to account to his cotenant for its proportion of share of market value of oil and gas produced, less reasonable costs of development, production, and marketing).

67. 233 Pa. 497, 82 A. 949 (1912).

68. McIntosh v. Ropp, 233 Pa. 497, _____, 82 A. 949, 954 (1912).

69. *Id.*

70. *Id.*

71. *Id.*

72. 292 Ill. App. 539, 11 N.E.2d 857 (1937) (Fyffe II). *Fyffe II* was a suit for an accounting by Lee, Cynthia (Holsen), and Fred Fyffe. The property involved passed by the laws of intestate succession to Charles Fyffe and his four children, Grace, Roy, Pearl, and Julia. *Id.* at 542, 11 N.E.2d at 859. When Pearl and Julia died intestate they were survived by their father, brother, sister, and the three plaintiffs, children of Charles' second marriage. *Id.*

73. Fyffe v. Fyffe, 350 Ill. 620, 626-27, 183 N.E. 641, 643 (1932) (Fyffe I). Charles executed an oil and gas lease on the property in 1906, acting individually and as guardian for his minor children. The interests of the three children by the second marriage, however, were not accounted for. They brought suit to partition the property and for an accounting when in 1931 they discovered their interest in the estate. *Id.* at 642. The appeal in *Fyffe I* was by the defendants protesting the decree of partition, which was affirmed by the supreme court. *Id.* at 644. *Fyffe II* involved in part the issue of

had not protested until after twenty years of production caused the trial and appellate courts to hold that the proper basis for accounting was the one-eighth royalty provided for in the lease.[74]

Similarly, the Texas case of *Powell v. Johnson*[75] involved an heir's interest in his father's land after Powell's mother leased the entire interest.[76] The court of appeals invoked the royalty rule in its adjustment of the relative rights of the cotenants when one tenant, having the right to produce subject to the other's right to be protected to the extent and value of his interest, conveyed an undivided interest over and above her share.[77]

Under the royalty rule, however, some courts will apply a higher standard and hold a developing cotenant accountable to a nonconsenting cotenant from the time he discovers his cotenant's interest.[78] In this situation the measure of compensation is the market value of the oil minus the cost of producing and marketing the oil.[79] The Kentucky Court of Appeals, after first surveying the case law and concluding that the royalty rule was the proper one to apply to an innocent trespasser, noted the following:

> But no court . . . has gone to the extent of applying the royalty basis of accounting, either to a willful or malicious trespasser, or to a cotenant who operated the jointly owned mine with the knowledge of his cotenants' interest. From the time of acquiring such knowledge he ceases to be an innocent bona fide operator, and he must account to his joint owners upon a different basis.[80]

It thus appears that when a cotenant continues to operate the mine after learning of another cotenant's interest and the mineral involved is of a fugacious nature and liable to be exhausted by adjacent operators, the developing cotenant must account for his cotenant's share of the net value of the oil produced (market value minus the costs of extracting and marketing).

Even when an operating cotenant is found to have acted in

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the proper measure of damages to be applied in the accounting ordered in *Fyffe I*. 292 Ill. App. at 544, 11 N.E.2d at 860.

74. 292 Ill. App. at 554-55, 11 N.E.2d at 864-65.

75. 170 S.W.2d 273 (Tex. Civ. App.), *aff'd sub nom.* Rancho Oil Co. v. Powell, 142 Tex. 63, 175 S.W.2d 960 (1943).

76. Powell v. Johnson, 170 S.W.2d 273, 274 (Tex. Civ. App.), *aff'd sub nom.* Rancho Oil Co. v. Powell, 142 Tex. 63, 175 S.W.2d 960 (1943).

77. 170 S.W.2d at 276.

78. New Domain Oil & Gas Co. v. McKinney, 188 Ky. 183, _____, 221 S.W. 245, 251 (1920) (girl of eighteen who conveyed her land to her brother by deed voidable on account of her infancy cancelled her deed to him and asked for an accounting by the lessee).

79. *Id.*

80. *Id.*

good faith, some courts will use the value of the oil minus reasonable costs as the basis of accounting. In *Moore Oil v. Snakard*[81] the defendant attempted to hold his leases by continuous operations, something the court concluded he had failed to do.[82] Although drilling operations were being conducted without the benefit of a lease at the time production was reached,[83] the court concluded that the operations had been undertaken in good faith; however, the court found that the defendant had a duty to account to his cotenant for a proportionate share of the market value of the production less the reasonable costs of development, production, and marketing.[84] Likewise, the Kentucky Court of Appeals applied this rule when the plaintiff's mineral interest was asserted for the first time ten years after the mineral deed had been executed and a producing well had been drilled.[85]

Under several of the accounting formulas discussed thus far, courts allow the deduction of reasonable and necessary costs of development and production in calculating a nonleasing cotenant's share from a producing well. Use of the word reasonable, however, leaves room for advocates and courts to determine what deductions will be allowed on a case by case basis. A survey of cases interpreting this test suggests a generous standard. Courts have permitted deductions for machines,[86] appliances,[87] and other means proper for producing and marketing oil, including pumping plants and pipelines.[88] Deductions for overhead expenses,[89] or fixed charges, such as salaries[90] and other items necessary for the equipping of a company for mining purposes have also been permitted.[91] Some courts have even allowed deductions for unprofitable wells drilled as part of the development of an entire mineral estate[92] and a ten percent warehouse or handling charge for

81. 150 F. Supp. 250 (W.D. Okla. 1957).
82. Moore Oil v. Snakard, 150 F. Supp. 250, 258 (W.D. Okla. 1957).
83. *Id.*
84. *Id.* at 259.
85. Stephens v. Click, 287 S.W.2d 630, 633 (Ky. 1955) (applying rule and quoting the language of New Domain Oil & Gas Co. v. McKinney, 188 Ky. at _____, 221 S.W. at 251).
86. Burnham v. Hardy Oil Co., 147 S.W. 330, 334 (Tex. Civ. App. 1912), *aff'd,* 108 Tex. 555, 195 S.W. 1139 (1917).
87. 147 S.W. at 334.
88. *Id.*
89. New Domain Oil & Gas Co. v. McKinney, 188 Ky. 183, _____, 221 S.W. 245, 251 (1920).
90. *Id.* at _____, 221 S.W. at 251.
91. *Id.* However, the District Court of Appeals for the Fifth District of California took a contrary view, noting (in the context of solid minerals) that the costs of mining and milling should be restricted to the direct costs of the process. *See* Daly v. Smith, 220 Cal. App. 2d 592, _____, 33 Cal. Rptr. 920, 926 (1963). Overhead costs of the partnership, executive salaries, advertising, lawyer's fees, and other costs not falling directly under activities classified as "mining and milling" should not be deducted. *Id.* at _____, 33 Cal. Rptr. at 926.
92. Moody v. Wagner, 167 Okla. 99, _____, 23 P.2d 633, 636 (1933).

stockpiles gathered to guard against shortages of supplies.[93] However, some limits have been placed on allowable deductions. For example, the Supreme Court of Texas denied a developing cotenants' credit claim of six percent interest on the nonleasing mineral owners' proportionate share of the money advanced by the developing cotenants to pay for producing and selling the minerals.[94]

The usual consequence of production from a commonly owned mineral estate, then, is an accounting by the developing cotenant to the nonconsenting cotenant for his pro rata share of production computed on the basis of the market price of oil or gas produced minus the reasonable and necessary costs of production, which are separately assessed for each factual circumstance.[95] Some courts use the more generous royalty basis when the entry was in good faith.[96] But even these courts will apply the above mentioned general rule from the point that the developing cotenant becomes aware of the nonleasing cotenant's interests.[97]

C. THE RIGHT OF MINERAL OWNERS TO PARTITION

While any cotenant may enter and develop the commonly held mineral estate[98] and account to his cotenants for their pro rata share in the event of production,[99] an additional remedy is available to a cotenant who does not agree with this development. Case law and commentators strongly support the proposition that all real property is partitionable in kind or by sale as an absolute and unconditional right.[100] A clear example of this proposition can be seen in *Schnitt v. McKeller.*[101] In *Schnitt* the Supreme Court of Arkansas examined the case law of several jurisdictions and the commentary on cotenancy, partition, and oil and gas law.[102] The

93. *Id.* at _____, 23 P.2d at 636.

94. Cox v. Davison, 397 S.W.2d 200, 203 (Tex. 1965).

95. 2 WILLIAMS & MEYERS, *supra* note 1, §§ 504-504.3.

96. McIntosh v. Ropp, 233 Pa. 497, _____, 82 A. 949, 954 (1912) (damages in action by remainderman for a share of the profits under lease executed by the life tenant and ratified by one of the remaindermen determined on basis of royalty to be obtained for privilege of removing minerals).

97. Moore Oil v. Snakard, 150 F. Supp. 250, 259 (W.D. Okla. 1957) (cotenant had duty to account to his cotenant for its proportionate share of market value of oil and gas produced less reasonable costs of development, production, and marketing as operations made beyond primary term in good faith with due diligence).

98. Prairie Oil & Gas Co. v. Allen, 2 F.2d 566, 571 (8th Cir. 1924).

99. *Id.* at 572.

100. *See* 2 WILLIAMS & MEYERS, *supra* note 1, § 506.2.

101. 244 Ark. 377, 427 S.W.2d 202 (1968).

102. Schnitt v. McKellar, 244 Ark. 377, ____, 427 S.W.2d 202, 208 (1968). The commentators cited and relied on in the *Schnitt* opinion were A. FREEMAN, COTENANCY AND PARTITION (1874); C. KNAPP, KNAPP ON PARTITION (1887); E. KUNTZ, LAW OF OIL AND GAS (1964); H. WILLIAMS & C. MEYERS, OIL AND GAS LAW (1981). In its discussion of the law related to partition, the court in *Schnitt* cited cases from California, Colorado, Connecticut, Kansas, Kentucky,

result was a series of definitive statements on the subject of partition. Cotenants have an absolute and unconditional right to partition under both common law and statute.[103] Even when the property involved is an estate in minerals, the right cannot be defeated by a showing that a partition would be inconvenient, injurious, or even ruinous to a party.[104] The purpose of partition statutes that authorize the sale of the property is to avoid any hardship caused by dividing a thing of impartible nature.[105] Additionally, while a doctrine exists that vests sufficient discretion in the courts so that they may prevent the use of a partition action as a weapon of oppression, this matter is one to be pleaded and proved by the defendant.[106]

The *Schnitt* court recognized the possibility of using partition as a weapon. The 1937 Oklahoma case of *Wolfe v. Stanford,*[107] however, contains the classic statement of this concern.[108] The *Wolfe* court recognized that much of the mineral interests within the

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Louisiana, Mississippi, New York, Oklahoma, and Texas as support. 244 Ark. at _____, 427 S.W.2d at 208-10.

103. 244 Ark. 377, _____, 427 S.W.2d 202, 208-09 (1968). The court quoted from Dall v. Confidence Silver Mining Co., 3 Nev. 531, 93 Am. Dec. 419 (1867), to express the basis of this right:

> As the law deems it against good morals to compel joint owners to hold a thing in common, a decree of partition . . . is not necessarily founded upon any misconduct of the cotenants or part owners. Hence, in decreeing a partition, the rights and equities of all the parties are respected, and the partition decreed so as to do the least possible injury to the several owners; and "courts of equity," says Mr. Story, "may, with a view to the more convenient and perfect partition or allotment of the premises, decree a pecuniary compensation to one of the parties for owelty or equality of partition, so as to prevent any injustice or unavoidable inequality."

244 Ark. at _____, 427 S.W.2d at 208-09 (citation omitted). *See also* Holland v. Shaffer, 162 Kan. 474, 178 P.2d 235 (1947) (discussing and applying general rules of partition in context of oil and gas interests).

104. 244 Ark. at _____, 427 S.W.2d at 209.

105. *Id.* at _____, 427 S.W.2d at 209-10.

106. *Id.* at _____, 427 S.W.2d at 210.

107. 179 Okla. 27, 64 P.2d 335 (1937).

108. Wolfe v. Stanford, 179 Okla. 27, _____, 64 P.2d 335, 338 (1937). The court stated as follows:

> At this point, it is well to recognize that much of the royalty in this state has been divided into small fractional interests and that many of those interests are now owned by persons of limited financial means. It is at once apparent that the right to coercive judicial partition through sale and division of the proceeds may, if wholly unqualified, become a weapon of oppression and fraud in the hands of the financially fortunate. Thus upon the approach of development, the right to partition might be used as a means of foreclosing through sale the interest of the royalty owner of limited means. Greatly enhanced value might place the property beyond his ability to elect to purchase or bid. In the absence of disagreement between the parties rendering the co-ownership of the property impracticable, the courts should not be impotent to prevent themselves from becoming an instrument of fraud and oppression under the circumstances suggested. They must, therefore, be recognized to be vested with sufficient discretion in awarding or denying relief to avoid the evil herein anticipated. Of course, inability of a cotenant to purchase should not constitute a defense under ordinary circumstances, that is, in the absence of approaching development or rapidly increasing values.

Id.

state had been divided into small fractional interests, often held by people of limited means. If the right to compel partition were wholly unqualified, partition could be used as a weapon; this would be true, for example, when upon the approach of development the value of property became greatly enhanced, thus placing repurchase beyond the means of a poorer owner.[109] The *Wolfe* court stated that in the absence of a disagreement between the parties rendering the co-ownership of the property impracticable, courts should not be powerless to prevent themselves from becoming an instrument of fraud and oppression under the circumstances suggested.[110] The inability of a cotenant to repurchase his interest should not constitute a defense in the absence of approaching development or rapidly increasing values.[111]

The *Wolfe* court went on to say that fraud or oppression is not to be presumed and that if these grounds are asserted as a defense they must be pleaded and proved.[112] In addition, *Wolfe* overruled the rule of pleading announced in *Clark v. Mercer Oil Co.*[113] and held that the plaintiff need not plead facts showing circumstances other than cotenancy, including loss of value in the property, mismanagement, or irreconcilable differences, before partition of oil and gas properties is warranted.[114] While this suggests an exception to the absolute rule expressed in *Schnitt,* it is an exception so limited by special facts as to be rarely invoked with success.[115]

Moseley v. Hearrell[116] is a case in which the defendant attempted to raise oppression as a defense. Mrs. Hearrell claimed that her cotenant sought partition in order to acquire her interest and that partition would be unfair, because she would neither be financially

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109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at _____, 64 P.2d at 339.

113. 139 Okla. 48, 281 P. 283 (1929) (involving partition of producing oil and gas lease, stated as a rule of pleading that defendant in partition must plead facts showing peculiar circumstances such as loss of value of the property, mismanagement, or irreconcilable differences as to disposition or control of the property, in addition to diversity of ownership).

114. 179 Okla. at _____, 64 P.2d at 337. In its syllabus the *Clark* court announced a rule of pleading based on the Kansas case of Beardsley v. Kansas Natural Gas Co., 78 Kan. 571, 96 P. 859 (1908). Clark v. Mercer Oil Co., 139 Okla. 48, ____, 281 P.283, 284 (1929). In *Beardsley* the court found that a petition that did not state facts indicating loss in the value of the property, mismanagement, irreconcilable differences as to the management of the property, or other peculiar circumstances justifying equitable relief could survive a demurrer. 78 Kan. at _____, 96 P. at 860. In *Clark* the Supreme Court of Oklahoma found that an amended petition which contained the allegations absent in *Beardsley* stated a proper cause of action. 139 Okla. at _____, 281 P. at 285. Finally, the *Wolfe* court overruled the *Clark* rule of pleading, and found that a petition seeking partition is sufficient if the trial court can see that the parties are cotenants. 179 Okla. at _____, 64 P.2d at 339.

115. A survey made for this Note of cases citing *Wolfe* showed none successfully blocking partition of oil and gas interests on equitable grounds. *See, e.g.,* Sadler v. Public Nat'l Bank & Trust Co., 172 F.2d 870 (10th Cir. 1949); Erwin v. Hines, 190 Okla. 99, 121 P.2d 612 (1942); Collier v. Collier, 184 Okla. 38, 84 P.2d 603 (1938).

116. 141 Tex. 280, 171 S.W.2d 337 (1943).

able to buy the property at a receiver's sale nor realize the full value of the property if it were sold by that method.[117] Additionally, she alleged that she would have to pay a large federal income tax on the money she received from the sale.[118] The Supreme Court of Texas held that once partition is granted, equitable rules apply in determining how the property is to be partitioned; however, equitable principles are not material in determining whether the right to partition may be exercised.[119] It should be noted that although Mrs. Hearrell alleged many inequities, she did not allege the facts that the *Wolfe* court said would evidence oppression — the approach of development or rapidly increasing property values.[120]

Therefore, because partition is expressed as an absolute right, the issue in partition cases is not whether partition will occur, but whether it will be made in kind or by sale.[121] Commentators report that a number of considerations have been urged upon those courts asked to choose the method of partition, with each case providing its own criteria. Among the "rules of thumb" suggested by these commentators are the common law preference for partition in kind[122] and the rule that producing or potentially producing lands should be partitioned by sale.[123] Analysis of the cases dealing with the question also suggests that when the estate to be partitioned is the mineral fee estate the court will partition in kind,[124] and when it is the leasehold estate it will partition by sale.[125]

While an action in partition remains one that a nonleasing mineral interest owner may use to resolve disputes between himself and his cotenants, it is not likely to be a satisfactory method. A

117. Moseley v. Hearrell, 141 Tex. 280, 281, 171 S.W.2d 337, 337-38 (1943). Mrs. Hearrell alleged the following:

> Moseley, in seeking the partition of the property, was endeavoring to acquire her interest therein; that she would be financially unable to buy in the property at a receiver's sale; and that if her interest should be sold by the receiver it would not bring its full value, and in addition she would be compelled to pay a large Federal income tax out of her receipts from the sale.

Id. at 281, 171 S.W.2d at 337-38.

118. *Id.* at 281, 171 S.W.2d at 338.

119. *Id.* at 283, 171 S.W.2d at 338-39.

120. *Id.*; 179 Okla. at ____, 64 P.2d at 338.

121. For discussions on partition see 1 E. KUNTZ, LAW OF OIL AND GAS ch. 6 (1962); 3 OIL & GAS REP. 21 (1954) (discussion notes); 3 W. SUMMERS, THE LAW OF OIL AND GAS §§ 535-538 (1958); 2 WILLIAMS & MEYERS, *supra* note 1, §§ 506-507.

122. 3 OIL & GAS REP. 22 (1954).

123. 2 WILLIAMS & MEYERS, *supra* note 1, § 506.3.

124. *See, e.g.*, Union Gas & Oil Co. v. Wiedemann Oil Co., 211 Ky. 361, 277 S.W. 323 (1924) (leasehold interest partitioned by sale); Sweeney v. Bay State Oil & Gas Co., 192 Okla. 28, 133 P.2d 538 (1943) (producing oil and gas leasehold interest partitioned by sale).

125. *See* Blake v. St. Catherine Gravel Co., 218 Miss. 713, 67 So. 2d 712 (1953) (order for sale of mineral fee reversed; partition in kind proper); Amerada Petroleum Corp. v. Massad, 239 S.W.2d 730 (Tex. Civ. App. 1951) (town lot in proven oil field partitioned in kind); Humble Oil & Refining Co. v. Lasseter, 95 S.W.2d 730 (Tex. Civ. App. 1936) (land in east Texas oil field, subject to existing leases, partitioned in kind).

cotenant may partition the property as a matter of right,[126] but in most jurisdictions the appropriateness of partition in kind is a question of fact to be decided with reference to the circumstances of each case.[127] While the common law and American cases seem to prefer partition in kind,[128] partition by sale may be held the appropriate method. If partition by sale is held appropriate, a cotenant of limited means may be unable to buy his share of the common estate.[129] Absent a showing of oppression evidenced by approaching development or rapidly rising values, a cotenant cannot block a partition action.[130]

The utility of partition is further minimized by the existence of minimum acreage requirements for drilling units under state regulatory schemes.[131] A mineral owner might successfully separate his interest in a partition action only to have it combined with the same or other interests under a compulsory pooling order.[132]

IV. RIGHTS AND STATUS OF MINERAL INTEREST OWNERS AS ESTABLISHED BY OIL AND GAS CONSERVATION STATUTES

A wealth of cases has defined the rights of mineral interest owners and has provided the common law remedies discussed in the first part of this Note to protect those rights. Because of the breadth of the statutory schemes usually referred to as oil and gas conservation statutes, mineral interest owners will probably find little cause to resort to the common law remedies. By first setting out the law effectively replaced but not repealed by the conservation statutes of the several states, it is hoped that an appreciation of the importance of these statutes to oil and gas law will be realized.

A. THE PURPOSE AND VALIDITY OF CONSERVATION STATUTES

The stated objective of conservation statutes are to encourage

126. Schnitt v. McKellar, 244 Ark. 377, _____, 427 S.W.2d 202, 208 (1968).
127. Moseley v. Hearrell, 141 Tex. 280, 283, 171 S.W.2d 337, 338 (1943).
128. Blake v. St. Catherine Gravel Co., 218 Miss. at _____, 67 So. 2d at 714.
129. 141 Tex. at _____, 171 S.W.2d at 338.
130. Wolfe v. Stanford, 179 Okla. 27, _____, 64 P.2d 335, 338 (1937).
131. *See* N.D. CENT. CODE § 38-08-04 (Supp. 1981) (North Dakota Industrial Commission to set spacing unit size and shape such as will result in the efficient and economical development of the oil and gas pool); N.D. ADMIN. CODE § 43-02-03-18 (1981) (setting governmental quarter-quarter section as basic spacing unit for oil and 160 acres for gas).
132. *See* N.D. CENT. CODE § 38-08-08 (1980). Section 38-08-08 provides that in the absence of voluntary pooling and upon application of an interested person, the Commission shall order "pooling of all interests in the spacing unit for the development and operations thereof." *Id.*

the efficient development of oil and gas within a pool[133] or field,[134] to protect the correlative rights[135] of the owners[136] of the interests thus joined, and to assure the greatest possible use of vital natural resources.[137] One way to accomplish these objectives is through the use of compulsory pooling statutes. Compulsory pooling statutes bring "together, as required by law or a valid order or regulation, . . . separately owned small tracts sufficient for the granting of a well permit under applicable spacing rules, in order to prevent the drilling of unnecessary and uneconomical wells, which will result in physical and economic waste."[138] Pooling seeks to provide the greatest ultimate recovery of the reservoir energy within the spaced tract while balancing the rights and interests of those in the pooled area.[139] The objective is to establish an area which may effectively be drained by one well.

Compulsory pooling statutes typically require the appropriate authority to issue an order upon just and reasonable terms and conditions.[140] The order must allow the owner of a tract or an interest in the spacing unit the opportunity to recover or receive his just and equitable share of production without unnecessary expense.[141]

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133. *Id.* § 38-08-02(11). Section 38-08-02(11) of the North Dakota Century Code defines pool as "an underground reservoir containing a common accumulation of oil or gas or both; each zone of a structure which is completely separated from any other zone in the same structure is a pool. . . ." *Id.*

134. *Id.* § 38-08-02(3). North Dakota Century Code § 38-08-02(3) defines field as "the general area underlaid by one or more pools." *Id.*

135. OIL & GAS TERMS, *supra* note 5, at 150. Correlative rights is defined as follows:

> "[T]he opportunity afforded, so far as it is practicable to do so, to the owner of each property in a pool to produce without waste his just and equitable share of the oil or gas, or both, in the pool; being an amount, so far as can be practically determined, and so far as can practicably be obtained without waste, substantially in the proportion that the quantity of recoverable oil or gas, or both, under such property bears to the total recoverable oil or gas, or both, in the pool, and for such purposes to use his just and equitable share of the reservoir energy." . . .
>
> There appear to be two aspects of the doctrine of correlative rights: (1) as a corollary of the rule of capture, each person has a right to produce oil from his land and capture such oil or gas as may be produced from his well, and (2) a right of the land owner to be protected against damage to a common source of supply and a right to a fair and equitable share of the source of supply.
>
> When a legislature or administrative body regulates production practices to protect against waste, it may also regulate to insure an equitable distribution of the source of supply.

Id. (citing NEV. REV. STAT. § 522.020(1)(1981)).

136. N.D. CENT. CODE § 38-08-02(9) (1980). Section 38-08-02(9) of the North Dakota Century Code defines owner as "the person who has the right to drill into and produce from a pool and to appropriate the oil or gas he produces therefrom either for himself or others or for himself and others." *Id.*

137. *Id.* § 38-08-01 (declaration of policy). For similar statements of policy in the context of unitization statutes see N.D. CENT. CODE § 38-08-09.1 (1980) and OKLA. STAT. ANN. tit. 52, § 287.1 (West 1969).

138. Gee, *Comparative Study of Compulsory Pooling—Enforcement Against Owners of Divided Interests in the Spaced Tract*, 3 ROCKY MTN. MIN. L. INST. 241 (1957).

139. 6 WILLIAMS & MEYERS, *supra* note 1, § 901.

140. *See* N.D. CENT. CODE § 38-08-08(1)(1980).

141. Professors Williams, Maxwell, and Meyers provided the following introduction to compulsory pooling and unitization in their casebook on oil and gas law:

In some states a nonoperating owner may be able to compel pooling.[142] One commentary, however, states that this power is not clearly available under all statutory schemes.[143] The Colorado statute[144] allows "any interested person" to petition the Conservation Commission for a pooling order.[145] This can be contrasted with the Texas statute as it existed at the time of *Railroad Commission v. Coleman.*[146] That statute, as interpreted by the Texas Supreme Court, provided that only owners who had drilled or

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> There has been a fairly substantial legislative response to the felt need for compulsive process to deal with the situation where persons having minority interests in premises overlying a producing formation refuse to unitize their premises with others despite the public interest in maximum recovery of hydrocarbons. Statutes providing for compulsory unitization under specified circumstances have been enacted in the states of Alabama, Alaska, Arizona, Arkansas, California, Colorado, Florida, Georgia, Kansas, Louisiana, Maine, Michigan, Mississippi, Montana, Nebraska, Nevada, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Tennessee, Utah, Washington, West Virginia, and Wyoming, and in the Canadian Provinces of Alberta, Manitoba and Saskatchewan. In general, under these statutes a regulatory agency is authorized to require unitization of a pool or some part thereof despite the objection of minority interests therein if a proposed plan has been approved by a requisite majority of the owners of interests in the premises to be unitized. . . .
>
> The Oklahoma and Arkansas statutes, along with a model statute proposed by the Interstate Oil Compact Commission, have served as models for the several compulsory unitization statutes enacted since the midpoint of this century. Thus the Alaska and Nevada statutes are substantially identical with the Oklahoma statute, and the other unitization statutes are based in large part upon the Oklahoma, Arkansas, and model statutes.

H. WILLIAMS, R. MAXWELL, & C. MEYERS, OIL AND GAS 794-95 (4th ed. 1979).

Provisions for compulsory pooling may be found in the following statutes: ALA. CODE § 9-17-13 (1980); ALASKA STAT. § 31.05.100(c) (1962); ARIZ. REV. STAT. § 27-505 (1976); ARK. STAT. ANN. § 53-115 (1971 & Supp. 1981); CAL. PUB. RES. CODE § 3608 (West 1972); COLO. REV. STAT. § 34-60-116 (1973 & Supp. 1981); FLA. STAT. ANN. § 377.27 (West 1974); GA. CODE ANN. § 43-706 (1978); IDAHO CODE § 47-322 (1977); ILL. ANN. STAT. ch. 96-½, § 5436 (Smith-Hurd 1979); IND. CODE ANN. § 13-4-7-14 (Burns 1981); IOWA CODE ANN. § 84.8 (West 1981); KY. REV. STAT. § 353.630 (1977); LA. REV. STAT. ANN. § 30:10 (West 1975); MICH. COMP. LAWS ANN. § 319.13 (1981); MISS. CODE ANN. § 53-3-7 (1972); MO. ANN. STAT. § 259.110 (Vernon 1982); MONT. CODE ANN. § 82-11-202 (1981); NEB. REV. STAT. § 57-909 (1978); NEV. REV. STAT. § 522.060 (1979); N.M. STAT. ANN. § 70-2-17 (1981); N.Y. ENVTL. CONSERV. LAW § 23-0901 (McKinney 1973); N.C. GEN. STAT. § 113-393 (1978); N.D. CENT. CODE § 38-08-08 (1980); OKLA. STAT. ANN. tit. 52, § 87.1 (West Supp. 1981); OR. REV. STAT. § 520.220 (1979); PA. STAT. ANN. tit. 58, § 408 (Purdon 1964); S.D. COMP. LAWS ANN. § 45-9-31 (1967); TENN. CODE ANN. § 60-1-202 (1980); TEX. NAT. RES. CODE ANN. § 102.011-.018 (1978); UTAH CODE ANN. § 40-6-6(f) (1981); WASH. REV. CODE ANN. § 78.52.240 (1962); W. VA. CODE § 22-4A-7(b) (1981); WYO. STAT. § 30-5-109 (1977).

142. *See* N.D. CENT. CODE § 38-08-08 (1980). Section 38-08-08 of the North Dakota Century Code includes royalty owners among the parties who may pool their interests and provides that the Industrial Commission may order pooling upon the application of "any interested person." *Id.*

143. 6 WILLIAMS & MEYERS, *supra* note 1, § 905.2.

144. COLO. REV. STAT. § 34-60-116 (1973).

145. *Id.*

146. 460 S.W.2d 404 (Tex. 1970). The court quoted the Texas Mineral Interest Pooling Act as follows:

> When two or more separately-owned tracts of land are embraced within a common reservoir of oil or gas for which the Railroad Commission . . . has established the size and shape of proration units, . . . and where there are separately-owned interests in oil or gas embraced within an existing or proposed proration unit in the common reservoir, and the owners have not agreed to pool their interests, and where one or more of the owners have drilled or propose to drill a well on the proration unit to the common reservoir, the Commission, to avoid the drilling of unnecessary wells, or to protect correlative rights, or to prevent waste, shall, on the application to the Commission of *any such owner,* establish a unit and pool all of the interests therein within . . . such proration unit, . . .

proposed to drill could invoke the Commission's power to pool.[147] In its analysis the court compared the Texas statute with pooling statutes from other states, which contained provisions like the Colorado provision.[148] The *Coleman* court found the difference between the phrase "any interested person" in the Colorado statute and "any such owner" in the Texas provision to be crucial.[149] As practiced before the North Dakota Industrial Commission, "any interested person" means any party with an economic interest in the pool unit, including working interest owners, royalty owners, and overriding royalty owners.[150]

Courts have held that conservation statutes are a valid exercise of the state's police power.[151] This position appears to be so settled that the United States Supreme Court in the 1943 per curiam opinion of *Hunter Co. v. McHugh*[152] dealt with the question summarily. According to the Court, cases have held that "a state has constitutional power to regulate production of oil and gas so as to prevent waste and to secure equitable apportionment among landholders of the migratory gas and oil underlying their land, fairly distributing among them the costs of production and of the apportionment."[153] If an order under a conservation statute is determined to be reasonable, it will likely be upheld by the courts.[154]

Railroad Comm'n v. Coleman, 460 S.W.2d 404, 406 (Tex. 1970) (deletions made and emphasis in original) (quoting TEX. REV. CIV. STAT. ANN. art. 6008c (Vernon 1968) (repealed 1977)).

Article 6008c has been repealed since the *Coleman* decision. The current Texas statute provides that the owner of any interest in oil or gas in an existing or proposed proration unit, of any working interest, or of an unleased tract other than a royalty owner may apply for the pooling of mineral interests. TEX. NAT. RES. CODE ANN. § 102.012 (Vernon 1978).

147. 460 S.W.2d at 407.

148. *Id.* at 408.

149. *Id.* The *Coleman* court referred to an article by Professor Ernest E. Smith throughout its opinion. Smith, *The Texas Compulsory Pooling Act,* 43 TEX. L. REV. 1003 (1965). In the article Professor Smith discussed the persons who could apply for a pooling order under article 6008c, the then new Texas statute. *Id.* at 1017-34. His comparative analysis of compulsory pooling statutes placed North Dakota among the states with the most explicit statutes, which specifically include royalty owners within the class of persons who may pool their interests into a unit. *Id.* at 1028-29.

150. Telephone interview with F. E. Wilborn, Deputy Chief Enforcement Officer, North Dakota Industrial Commission, Oil and Gas Division (May 20, 1982).

151. Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 77 (1911) (quoting Ohio Oil Co. v. Indiana, 177 U.S. 190, 209-10 (1900)) (the state, consistent with due process of law, may regulate oil and gas production in a manner consistent with the rights of all who possess interests in a pool).

152. 320 U.S. 222 (1943).

153. Hunter Co. v. McHugh, 320 U.S. 222, 227 (1943) (citing Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 77 (1911)) (upholding the power of the state to prevent owner from depleting subterranean supply common to him and others by prohibiting pumping); Patterson v. Stanolind Oil & Gas Co., 305 U.S. 376, 379 (1939) (when state commission makes its findings and order after due hearing and evidence underlying its findings is not in the record, it must be assumed that the findings are valid); Thompson v. Consolidated Gas Corp., 300 U.S. 55, 76-77 (1937) (state may constitutionally prorate production in order to prevent undue drainage from reserves or waste); Champlin Refining Co. v. Corporation Comm'n, 286 U.S. 210, 232-34 (1932) (right to take oil and gas through wells on land is constitutionally subject to regulation by state so that the common supply of gas and oil may not be unreasonably and wastefully depleted); Bandini Petroleum Co. v. Superior Court, 284 U.S. 8, 22 (1931) (statute regulating the exercise of correlative rights of surface owners with respect to a common source of supply of oil or gas is valid upon its face).

154. *See* Ranola Oil Co. v. Corporation Comm'n, 460 P.2d 415 (Okla. 1969). *See also*

B. TREATMENT OF UNLEASED INTERESTS UNDER CONSERVATION STATUTES

The question of what rights an unleased fractional mineral interest owner is to be given under oil and gas conservation statutes seems to fall within the legislatures' sound discretion. Under the Oklahoma conservation statute,[155] for example, the Corporation Commission is authorized to fix the fractional mineral interest owner's proportionate share of the unit drilling and operating costs.[156] The Commission may order that fractional interest owners elect either to pay their share of the unit drilling and operating costs or to accept a fixed sum per acre as a bonus for a lease within a specified period of time; if a timely election is not made, the mineral owner is presumed to have elected to take the bonus for a lease.[157]

In *Anderson v. Corporation Commission*[158] such an order was challenged.[159] Anderson, the only owner not consenting to a plan of development, wanted to "ride the well" and have his share of the costs taken out of his share of any production.[160] The court rejected this proposal and stressed the fact that the nonconsenting cotenant had secured an interest in future production by virtue of a compulsory pooling order.[161] The *Anderson* court held that the subsequent Commission order setting the requirements for the drilling of the well was a reasonable and necessary part of the balancing of the rights of the mineral interest owners.[162] The court also held that neither Anderson nor Ellison, the operator of the well, had been subjected to a taking in any way.[163] The challenged order gave Anderson the right to participate in production from a well not located on his property.[164] Ellison received the right to drill the only well on the tract, which forced the parties to cooperate for their mutual benefit and the protection of the public in general.[165]

The California Supreme Court has held that a plan which does not give an unleased owner the option to participate as a working interest owner but does assure him at least a one-eighth royalty is

Youngblood v. Seewald, 299 F.2d 680 (10th Cir. 1961); Wood v. Citronelle Mobile Gathering System, 279 Ala. 662, 189 So. 2d 346 (1966).

155. OKLA. STAT. ANN. tit. 52, § 87.1 (West Supp. 1981-1982).

156. *Id.*

157. *Id.*

158. 327 P.2d 699 (Okla. 1957).

159. Anderson v. Corporation Comm'n, 327 P.2d 699, 701 (Okla. 1957).

160. *Id.* at 702.

161. *Id.* at 703.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

not constitutionally defective.[166] The court found no showing that the legislature's choice was arbitrary or unreasonable.[167] According to the court, such a plan may not have been the best remedy possible but it was a reasonable method to protect or provide a substitute for the right to produce from one's own property.[168]

The oil and gas conservation statutes of some states deal expressly with unleased tracts. For example, an Oklahoma statute[169] provides that owners of mineral rights within an unleased tract are to be treated as lessees to the extent of seven-eighths of their interest and lessors as to the remaining one-eighth interest.[170] New Mexico has a similar provision.[171] These statutes attempt to put the unleased owner in a position similar to other mineral owners. They assure that such an owner receives at least the customary one-eighth royalty. The handling of the remaining seven-eighths is still subject to the Corporation Commission's power to order a timely election between participating as a working interest owner through payment of well costs or selling his interest for a bonus. This puts the unleased owner in a position identical to a nonleasing fractional interest owner "pooled" with his leasing cotenants under a Corporation Commission order.[172]

The evenhanded treatment of undeveloped, unleased land

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166. *See* Hunter v. Justice's Court, 36 Cal. 2d 315, _____, 223 P.2d 465, 468 (1950). Hunter sought to enjoin the enforcement of sections of the Public Resources Code which made drilling a well in violation of its terms a nuisance. He based his attack on due process and equal protection grounds. *Id.* at _____, 223 P.2d at 468.

167. *Id.*

168. *Id.*

169. OKLA. STAT. ANN. tit. 52, § 87.1 (West Supp. 1981-1982).

170. Section 87.1(3) of Oklahoma Statutes Annotated provides the following:

> For the purpose of this section the owner or owners of oil and gas rights in and under an unleased tract of land shall be regarded as a lessee to the extent of a seven-eighths (7/8) interest in and to said rights and a lessor to the extent of the remaining one-eighth (1/8) interest therein.

Id. § 87.1(3).

171. N.M. STAT. ANN. § 70-2-17(c) (1978). Section 70-2-17(c) of the New Mexico Statutes Annotated provides the following:

> If the interest of any owner or owners of any unleased mineral interest is pooled by virtue of this act, seven-eighths of such interest shall be considered as a working interest and one-eighth shall be considered a royalty interest, and he shall in all events be paid one-eighth of all production from the unit and creditable to his interest.

Id. Other statutes with express provisions for unleased tracts include: ARK. STAT. ANN. § 53-115 (A-1)(e) (1971) (owner shall be regarded as the owner of a royalty interest to the extent of a one-eighth interest in and to said unleased mineral interest); COLO. REV. STAT. § 34-60-116 7(c) (Supp. 1981) (nonconsenting owner shall be deemed to have a landowner's royalty of 12-½ %); KY. REV. STAT. § 353.650 (1977) (the unleased mineral interest will be treated as a one-eighth royalty).

172. The current practice of the North Dakota Industrial Commission is to give a nonleasing fractional interest owner a one-eighth royalty interest and a seven-eighths working interest. The seven-eighths interest is subject to a statutory lien, N.D. CENT. CODE § 38-08-08 (1980), but the risk of a dry hole is borne by the operator. Telephone interview with F. E. Wilborn, Deputy Chief Enforcement Officer, North Dakota Industrial Commission, Oil and Gas Division (May 20, 1982).

pooled with producing land is illustrated by the Oklahoma case of *Barton v. Cleary Petroleum Corp.*[173] In *Barton,* the unleased interest owners contended that they were entitled to eight-eighths of the production in proportion to their interest in the whole.[174] The operator had drilled a gas well on a 640 acre spacing unit for a total cost in excess of $200,000; total gross production before the well was plugged and abandoned was $41,766.54.[175] The Oklahoma Court of Appeals affirmed summary judgment for the defendant, holding that the plaintiff was entitled to a one-eighth pro rata share of production from the date of the Commission's order, but to none of the production prior to that order.[176] Because the developing cotenant never recovered its cost of drilling and developing, the plaintiffs were not entitled to recover a share greater than a working interest owner.[177]

The principle of law supported but not expressly applied in *Barton* is that the right to share in production from a well located on another's property is a creation of statute.[178] The Court of Appeals of Louisiana expressed the following:

> The creation of a drilling unit modifies the rule of capture only to the extent that the Commissioner's finding indicates unitization should reasonably insure each tract will receive its just and equitable share of reservoir content. Until such time as a unit is created, no other tract is entitled to production from a well. Unitization prevents the drilling of unnecessary wells to capture the oil from the reservoir.[179]

C. Allocation of Production Among Pooled Interests

While an unleased mineral owner may choose to pay a portion of operating costs, it should be remembered that he may elect to accept a lease and relieve himself of any expenses of drilling and production.[180] Under either arrangement there is a need to allocate

173. 566 P.2d 462 (Okla. Ct. App. 1977).

174. Barton v. Cleary Petroleum Corp., 566 P.2d 462, 463 (Okla. Ct. App. 1977).

175. *Id.*

176. *Id.* at 463-64.

177. *Id.* at 464. Under § 38-08-08(2) of the North Dakota Century Code the drilling owner may have a lien against the share of production accruing to the interest of an owner indebted to that drilling owner for the costs of the spacing unit. He also has the right to market and sell the oil and gas subject to the lien, applying the proceeds to the expenses secured by the lien. A working interest owner would not receive any share of the production until his proportionate share of that production were paid. N.D. Cent. Code § 38-08-08(2) (1980).

178. *See* Phillips Petroleum Co. v. Davis, 194 Okla. 84, _____, 147 P.2d 135, 145 (1942) (rights of nonleasing owners are creation of ordinance).

179. Desormeaux v. Inexco Oil Co., 298 So. 2d 897, 899 (La. Ct. App. 1974).

180. *See, e.g.,* Okla. Stat. Ann. tit. 52, § 87.1 (West Supp. 1981-1982) (well spacing and drilling units).

production among the tracts combined to make the unit.[181] The most straightforward way to allocate production is on the basis of and in proportion to the acreage content of the drilling unit.[182] The Mississippi Supreme Court approved this basis for allocation in *Humble Oil & Refining Co. v. Welborn.*[183] The circuit court reversed the order of the Oil and Gas Board when Welborn asserted that the sands underlying his land were thicker and contained more hydrocarbons, resulting in his being entitled to a greater share of production.[184] The court applied the state's conservation statute[185] which expressly provided that the allocation would be based on the ratio of acres owned by the unleased mineral owner to the total number of acres in the unit.[186]

The North Dakota oil and gas conservation statute provides that the allocation of production from a pooled tract is to be made on a just and reasonable basis; however, the formula to be applied is left to the Industrial Commission's discretion.[187] The statute providing for allocation of production for a unitized field, however, expressly provides that a separately owned tract's fair share be measured as follows:

> [The measure is] the value of each such tract for oil and gas purposes and its contributing value to the unit in relation to like values of other tracts in the unit, taking into account acreage, the quantity of oil and gas recoverable therefrom, location on structure, its probable productivity of oil and gas in the absence of unit operations, the burden of operation to which the tract will or is likely to be subjected, or so many of said factors, or such other pertinent engineering, geological, or operating

181. 6 WILLIAMS & MEYERS, *supra* note 1, § 970. One commentary states the following:

> One of the matters which frequently presents great difficulty in the negotiation of [pooling and unitization] agreements is the allocation of unit production among the premises included in the unit. There is, of course, no single method appropriate for all situations . . . the methods specified by the statutes of the several states and by various voluntary agreements vary substantially.

Id. (footnote omitted).

182. 6 WILLIAMS & MEYERS, *supra* note 1, § 970.1. Among the other variables listed as helpful in determining the allocation of production were (1) the drive mechanism available in the field; (2) well productivity; (3) well density; (4) effect of prorationing; (5) acre feet of productive formation; (6) oil initially in place beneath a tract; (7) extent and accuracy of information that has been obtained as a result of exploratory operations; (8) the extent of penetration into the producing formation; and (9) the current allowable formula. *Id.*

183. 216 Miss. 180, 62 So. 2d 211 (1953).

184. Humble Oil & Refining Co. v. Welborn, 216 Miss. 180, _____, 62 So. 2d 211, 211 (1953).

185. MISS. CODE ANN. § 6132-22 (1948) (current version at MISS. CODE ANN. § 53-3-7 (1972)).

186. 216 Miss. at _____, 62 So. 2d at 212.

187. N.D. CENT. CODE § 38-08-08(1) (1980).

factors, as may be reasonably susceptible of determination.[188]

Courts have recognized the difficulty of allocating production in a perfect manner.[189] The complexity of the problem has led legislatures to express the allocation standard broadly as in the North Dakota pooling provision[190] or to use a litany of specific factors to allocate production as in the North Dakota unitization statute.[191] The Mississippi Supreme Court has said that no formula could be devised which would secure for each landowner the exact amount of oil and gas which underlies his land.[192] It went on to say that "the surface acreage formula certainly is as fair and as equitable as any formula devised by any other state. It has the added merit of simplicity and certainty."[193]

The type of technical data used in allocating production may be of value to an unleased interest owner attempting to make an informed election, but it is not likely to be available to him.[194] In *Home-Stake Royalty Corp. v. Corporation Commission*[195] the request of an owner who sought to have the operator support its application for a pooling order with geological data was refused by the trial court.[196] The Oklahoma Supreme Court upheld the trial court's refusal, reasoning that geologic studies of undeveloped areas are proprietary information and that the owner of the information should not be compelled to reveal it.[197] The *Home-Stake Royalty* court also held that the order equating the present value of a right to drill with the price offered and accepted for leases on other parcels in the tract was supported by substantial evidence.[198]

Another Oklahoma case approved this measure of royalty due under a commission order. In *Coogan v. Arkla Exploration Co.*[199] unleased owners appealed from an order fixing cash bonuses at thirty-five dollars an acre with a one-eighth royalty in lieu of participating as a working interest.[200] The *Coogan* court found that the term of leases in the area was admissible to establish the reasonable market value and that the trial court could reasonably

188. *Id.* § 38-08-09.4(2).
189. *See* Masonite Corp. v. State Oil & Gas Bd., 240 So. 2d 446, 450 (Miss. 1970).
190. N.D. CENT. CODE § 38-08-08(1) (1980).
191. *Id.* § 38-08-09.4(2).
192. 240 So. 2d at 450.
193. *Id.* at 451.
194. Home-Stake Royalty Corp. v. Corporation Comm'n, 594 P.2d 1207, 1210 (Okla. 1979).
195. 594 P.2d 1207.
196. *Id.* at 1208.
197. *Id.* at 1210.
198. *Id.*
199. 589 P.2d 1061 (Okla. 1979).
200. Coogan v. Arkla Exploration Co., 589 P.2d 1061, 1061 (Okla. 1979).

find that thirty-five dollars an acre, which was paid in sections continuous with the pooled tract, was the market value even though plaintiff provided evidence of a one hundred dollar an acre bonus four to five miles from the tract.[201]

Oil and gas conservation statutes alter the common law rights and status of mineral interest owners in significant ways. Under the statutes a nonleasing owner may be made a party to development without his consent.[202] A pooling order may dictate the terms under which the mineral property will be developed.[203] The most generous of the plans will grant an unwilling owner the opportunity to elect between a bonus or payment of a share of the unit development costs in order to obtain a working interest share.[204] But, it would seem that such an option is not constitutionally required.[205] Where an election option is granted, the mineral interest owner has no right to see technical and geologic data amassed during the exploratory phase of development.[206] This is protected as proprietary information.[207] So, in making his election, the mineral owner will have to rely on intuition and the luck of a "doodlebugger."[208]

V. CONCLUSION

Unleased mineral interest owners have many common law remedies available to them, including contract, accounting, and partition actions. Given the active nature of oil and gas development, however, and the pervasive statutory and regulatory control exercised by the states over this activity, fractional mineral interest owners and natural resource developers are likely to rely on the provisions of conservation statutes to settle disputes.

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201. *Id.* at 1063.
202. N.D. CENT. CODE § 38-08-08 (1980).
203. *Id.*
204. Anderson v. Corporation Comm'n, 327 P.2d 699, 702 (Okla. 1958).
205. Hunter v. Justice's Court, 36 Cal. 2d 315, _____, 223 P.2d 465, 468 (1950).
206. Home-Stake Royalty Corp. v. Corporation Comm'n, 594 P.2d 1207, 1210 (Okla. 1979).
207. *Id.*
208. The term doodlebuggers has been defined as follows:

> [Doodlebuggers were] pseudo-scientific diviners and mystics — who materialized as if by magic, promising new [wells]. . . . Some professed supernatural gifts, others claimed secret scientific knowledge, and all were prepared to lead promoters and drillers to oil. A good many of them prospered, for a seer or diviner with a reputation supplied the bemused wildcatter with faith, and wildcatters stubborn enough to drill on locations ignored by others hit oil repeatedly during the early years in the Southwest. Doodlebuggers, in fact — thanks to the laws of chance, the era's imperfect understanding of underground structures, and the widespread presence of petroleum in Texas and Oklahoma — discovered much more oil than geologists in the period of feverish exploration after Spindletop.

TIME-LIFE BOOKS, INC., THE END AND THE MYTH 167 (1979).

Under the conservation statutes in effect in a majority of jurisdictions, an unleased owner will be given the option of paying a portion of expenses, usually "up front," and assuring a working interest share, or leasing his property under the terms of a pooling order. Under this statutory plan a nonleasing mineral owner is assured treatment equal to other royalty owners involved in the pool, and those with the resources may assume the position that would have been held by a lessee.

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