THE EAGLE FORD SHALE

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Biographical Information

Steve Riner was born in Corpus Christi, Texas, on January 12, 1955, and he is the third of four boys. At age 9, the Riners moved to St. Croix, U.S.V.I., where Steve and his brothers spent four years riding their horses through the cane fields or snorkeling round the reefs. Then, after one year in Orinda, California, the Riners moved to Jamaica, W.I., for four years, where the Riner boys specialized in tennis and golf, no work permits having been issued the boys by the Jamaican government. In 1972, the Riners moved to Baton Rouge, Louisiana, where Steve finished high school and attended LSU for seven years, earning an undergraduate degree in accounting and a juris doctorate degree in law. As an undergraduate, Steve played on the tennis team for three years and was elected off-campus student council representative for two years during which he conducted a mildly successful battle with the university to increase on-campus parking available to off-campus students. Although his legal studies focused on federal taxation, upon graduating from law school, he turned down an offer from the IRS and accepted a better offer clerking for Frank Polozola, U.S. District Judge, Middle District of Louisiana. After completing the very exciting clerkship, Steve headed west, joining his three brothers and his uncle, James V. Riner, already in Houston, and obtained a position with the law firm of Jones, Stephens, Bell & Willey, which specialized in oil and gas title examination in Texas and Louisiana. In early 1986, the price of oil dropped from $28/barrel to $10/barrel resulting in Steve starting his solo practice in late 1986. As a solo, he increased his real estate expertise by handling all civil matters of a real estate or probate estate nature, with emphasis upon the foreclosure market and property taxation issues, including conducting five first chair jury trials and 100 or more trials to the bench. By 1990, the oil and gas industry had sufficiently recovered so that oil and gas title work again dominated Steve’s practice, and since 1995, his practice has been limited to that. Steve joined Second Baptist Church, Dr. Ed Young, Pastor, in 1983, where he met and married Kevine Louise West in 1987. They have four boys and reside adjacent to the Houston Racquet Club (Memorial Drive) where they spend their leisure hours playing tennis.
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I. What is the Eagle Ford Shale?

It is an oil and gas producing formation with a relatively high carbonate shale percentage, making it brittle and more frackable. It trends from Mexico across Texas, is approximately 50 miles wide and 400 miles long, has depths ranging from 4,000 feet to 12,000 feet with an average thickness of 250 feet, and lies between the Austin Chalk and the Buda Lime formations. The shale play is named for an outcrop appearing in the town of Eagle Ford, Texas, located six miles west of downtown Dallas. The shale becomes shallower, and the shale content increases, as it moves to the northwest, changing from a dry gas to wet gas to oil:

Petrohawk drilled the first Eagle Ford wells in 2008, discovering the Hawkville Field in La Salle County. The discovery well was perforated with ten frack stages at approximately 11,150 feet from a 3,200 foot lateral and flowed at 7.6 MMcf of gas per day. The wells in the deeper part of the play deliver a dry gas, but moving northeastward and updip, more liquids are produced:

Source: Texas Railroad Commission website.
There were 40 producing oil leases in 2009. That number sharply increased to 2521 producing oil leases by 2013. There were 67 producing gas wells in 2009, which rapidly increased to 2418 producing gas wells by 2013. As of March, 2014, oil production stood at 804,299 barrels per day, condensate at 204,951 barrels per day, and gas at 3,496 MMcf per day.

Following is a photo of a portion of the Orr Ranch in Karnes County, in the heart of the Eagle Ford play:

Source: http://earthly-musings.blogspot.com/2013/01/a-trip-to-booming-eagle-ford-shale-oil.html
The surface of the land can be generally described as primarily mesquite trees with some grass and a lot of cactus. This land is cattle country, not farm land, although the proportion of farm land increases as the formation moves to the southeast and closer to the Texas coast.

The Eagle Ford play has had a tremendous economic impact on the surrounding counties. The Eagle Ford was named the 2013 San Antonian of the Year. Shell Oil paid one of the largest bonuses on record to Dan Harrison: $10,000 per acre for 100,000 acres of the Harrison Ranch near the Rio Grande River on the western side of the play.

The activity in the Eagle Ford is visible from space. Compare this 2007 photo:
with the following photo taken in December of 2012:

![Photo of Eagle Ford Shale lights up South Texas as boom](http://www.caller.com/news/2012/dec/13/eagle-ford-shale-lights-up-south-texas-as-boom/)

II. Eagle Ford titles from the oil company’s perspective.

There are many ranches in the Eagle Ford ranging from 200 acres to 10,000 acres. Leasing activity began in 2008 and peaked in 2009/2010. Customary bonuses started at $500 per acre and increased to $10,000 per acre depending upon the area. Leases usually provide up to a 25% royalty, a three year primary term, a favored nations clause that terminates at the end of the primary term, an anti-communitization clause, provisions which restrict or prohibit pooling without the lessor’s consent, and provisions requiring the designation of production units of up to 640 acres to hold acreage.
If oil companies were anticipating that the titles on Eagle Ford ranches would be simple, they were disappointed. The Eagle Ford is liberally sprinkled with lands falling into several categories: (1) lands whose minerals are claimed by the State of Texas because they fall under the Relinquishment Act, or they are alleged vacancy lands consisting of unpatented gaps between two older patents, or they are within the bed of a navigable river or within the bed of a perennial stream subject to a Spanish grant, or they were patented after September 1, 1983 and all the minerals were reserved by the state, (2) lands subject to a claim by the State of Texas to a $\frac{1}{16}$ “free royalty” including alleged vacancy lands, (3) lands subject to mineral reservations or reservations of nonparticipating royalty interests, many of which can be quite old, going as far back as 1901, and most of which originated in the period from 1900 through 1950, and (4) highway lands claimed by the county and leased through the state. To complicate matters, it is not unusual to find ranches that were accumulated into larger ranches of tens of thousands of acres during the 1800’s, then subdivided into smaller tracts, usually from 20 acres up to 200 acres, during the period from 1900 until the mid-1930’s\(^1\), and then reformed into ranches of from 600 acres to 10,000 acres after the mid-1930’s. Many of the mineral and royalty reservations affect only particular subdivision lots and can appear in a checkerboard pattern across a larger ranch. Following is my depiction of what you might expect to find in the Eagle Ford:

\(^1\) An example of such a subdivision is the Dr. Charles F. Simmons Subdivision located in Atascosa County, totaling about 100,000 acres and subdivided into mostly 20 acre tracts. It appears from my examinations that many subdivisions were marketed to potential immigrants from east of the Mississippi River. It’s not rare to find in the county clerks’ records brochures describing the Eagle Ford area as rich farm land, a Garden of Eden, with large crop yield projections and comparisons to farm yields in the eastern United States. These marketing efforts were substantially successful and resulted in many deeds during the period from 1900 to about 1930, followed by a general exodus of the new buyers after they were unable to make the land produce, sometimes reserving some minerals or royalties as a “fare-the-well”.
Some comments about the plat:

(1) County roads are not always an issue because in many cases in the Eagle Ford, county roads were established without a supporting deed or easement.

(2) The type of mineral interest reserved by the State of Texas (all of which are depicted on the plat in dark green) depends upon the date the patent was issued. Relinquishment Act lands only appear with respect to patents issued between September 1, 1895 and August 21, 1931 with respect to lands classified by the GLO as “mineral”, and although technically the State of Texas owns all of the minerals on those lands, the construction of the statute has the effect of vesting one-half of the minerals in the state and one-half of the minerals in the surface owner. “Free Royalty” lands (1/16th RI) only appear with respect to patents issued between August 21, 1931 to September 1, 1983. The state reserved all the minerals in all patents that it issued after September 1, 1983 to present. Except with respect to the river and stream on the plat, the various tracts in which the state claims a mineral or royalty interest were the result of alleged vacancies caused by the poor surveying process established by the state in patenting out public lands. The State of Texas owns the beds of navigable rivers and claims the beds of perennial streams within Spanish grants by virtue of inherent sovereignty.

(3) The lease rush that began in 2008 further complicated the titles and frequently resulted in undivided leasehold interests spread among several companies, each with their own lease forms. Often, small players were able to insert themselves in lease blocks by securing leases from undivided mineral interests, and those leases have their own peculiarities including sometimes lacking pooling provisions. Generally speaking, the 1901 1/3 fee mineral reservation depicted on the plat in orange is the type of interest that is particularly susceptible to multiple competing interests in the same lease block.
DeWitt County is fairly representative of the survey boundaries we expect in the eastern part of the Eagle Ford as we can see from the GLO GIS mapping below:
McMullen County is fairly representative of the survey boundaries we see in the western part of the Eagle Ford as depicted by the GLO GIS mapping below:
III. How did Eagle Ford titles get this complicated?

To answer to this question, we look at historical facts related to severance from the sovereign and the influence of the oil industry.

A. Severance from the sovereign.

In Texas, we have the result of what may be described as a collision between the Roman law principle that the owner of the land owns the mineral rights also, a principle that was preserved in England at the time of its establishment of the original 13 American colonies and eventually passed on to Texas, on the one hand, and on the other hand, the trend in Spain and other states after the breakup of the Roman Empire to confiscate the mineral rights on behalf of the crown. Texas’ mining law is a derivative of the law of Spain, as adopted by Mexico, and the

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2 This Roman law principle was explained as “Cujus est solum, ejus est usque ad coelom et ad inferos”, meaning “To whomsoever the soil belongs, he owns also the sky and to the depths.” Black’s Law Dictionary 341 [5th ed. 1979]). This was the law familiar to those U.S. citizens who immigrated to Texas from the United States during the 1800’s and who comprised 90% of Texas’ population during that period.

3 The Spanish Crown began the process of confiscating the mineral rights in 1263 with the passage of Las Siete Partidas, and in particular, Partida III, Title XXVIII, Law XL, and substantially completed that process with amendments adopted in 1383, 1387 and 1559. I find it interesting that included in the reasons given by the King of Spain, Don Phillip, II, for the passage of the January 10, 1559 law was the failure of the private sector to develop the mineral rights.

On May 22, 1783, Charles III, King of Spain, issued a royal proclamation, applicable to all Spanish America except Peru, reserving all minerals to the Crown. This reservation included specifically “not only mines of gold and silver, but also those of precious stones, copper, lead, tin, quick-silver, antimony, calamine, bismuth, rock salt and all other stony matter (fossils), be they ores, or semi-minerals, bitumen and liquids (juices) of the earth.” (See: Hawkins, El Sal del Ray, quoting from a translation in John Rockwell, A Compilation of Spanish and Mexican Law in Relation to Mines and Titles to Real Estate, in Force in California, Texas, and New Mexico. London 1825; New York 1851.)
English common law. England and Spain each early developed different concepts: the Spanish Crown claimed all the mineral rights, while the English Crown claimed only gold and silver.\(^4\) The Spanish law passed to the Mexican Republic when it declared its independence from Spain in 1821, so that grants of lands in Texas by Mexico during the period from 1821 to 1835 conveyed only the surface estate and reserved the mineral rights in the Mexican Republic. Thereafter, the Texas Republic, and then the State of Texas, succeeded to the Mexican Republic’s claim to the mineral rights in all lands in the state.\(^5\)

Generally, the American colonies followed the English common law that mineral ownership accrued to the surface owner. After the colonies gained their independence, their newly formed federal government recognized as valid prior grants made by prior governments of lands within the United States\(^6\), and the federal government was not aggressive (although some attempts were made) in reserving minerals on lands it disposed, its policies being focused primarily upon settlement and development. To this end, the federal government caused all of its lands to be surveyed into townships and ranges and then patented out certain of those lands, usually without reserving the mineral rights.

\(^4\) The English Crown did not confiscate the oil and gas within the land area of Great Britain until the Petroleum (Production) Act 1934.

\(^5\) Historically, each sovereign has validated the grants by the prior sovereign, but only to the extent of that prior grant. As applied in Texas, the Spanish Crown granted lands to private parties, reserving the mineral rights, followed by Mexico declaring its independence from Spain while validating prior Spanish grants of the surface of the lands and claiming the mineral rights formerly owned by the Spanish Crown, followed by Texas declaring its independence from Mexico while validating prior Spanish and Mexican grants of the surface of the lands and claiming the mineral rights formerly owned by the Mexican Republic.

\(^6\) For example, the Jay Treaty, Nov. 19, 1794 United States-Great Britain, 8 Stat. 116, T.S. 105.
It is interesting to note the origin of the system of townships and ranges. In 1784, Thomas Jefferson as chairman of a congressional committee and with the assistance of Pennsylvania born Doctor of Mathematics Hugh Williamson, engaged to determine how to sell millions of acres of public land. Williamson, who had earned his doctorate in Holland, was impressed by the rectangular Dutch fields. The committee recommended the public lands be surveyed into ten square mile “townships.” Congress through the Land Ordinance of 1785 changed the size of a township, but otherwise basically followed the committee’s recommendations. The Land Ordinance of 1785 set up the rectangular survey system used in most areas of the 30 “Public Domain” states, called the Public Land Survey System [PLSS] and is used to determine titles to land. The basic units of the PLSS are township, range and section. A township is 36 square miles. A range identifies a row or tier of townships. Each square mile contains 640 acres and is called a section and each section is numbered. Each section can be further subdivided for sale. Frequent subdivisions are the quarter-section (160 acres) and the quarter-quarter section (40 acres). Each township and section is measured from its own “initial point” which consists of intersecting principal meridian and baseline. A principal meridian is the principal north-south line used for survey control in a large region. A baseline is the principal east-west line that divides townships between north and south. An important point is that the Ordinance prohibited the sale of the public land until after the land had been surveyed and the survey accepted by the federal government. The lands patented by the federal government were located in newly acquired territories. The original thirteen states (Connecticut, Delaware, Georgia, Maryland, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, Virginia), retained all of their public domain lands upon forming the United States,
as did the states carved from the original thirteen states (Kentucky, Maine, Vermont, West Virginia). To accomplish the surveys of the public lands, the federal government established survey offices for each district, and each township was completely surveyed by the district office as detailed on final township plat. It is important to note that these surveys are based on “in the field” work, and in my experience, were performed with excellence. As a result, vacancies are not as prevalent in lands patented by the federal government, in sharp contrast with the multitude of vacancies alleged by the Texas General Land Office. An example of a federal government township survey conducted in 1848 in Louisiana follows:

Source: Louisiana State Land Office.
After Texas declared its independence from Mexico in 1836, it retained the Spanish concept of state ownership of minerals and asserted title to all mineral rights within the state. The theory of state ownership of mineral rights prevailed in Texas until the passage of Article X, §9, of the Texas Constitution of 1869, which change in the law culminated in the passage of the Relinquishment Act effective from September 1, 1895 to August 21, 1931, during which the state reserved in all patents that it issued, in effect, one-half of the mineral rights on lands classified as “mineral” by the commissioner of the General Land Office (the “GLO”). From August 21, 1931 to September 1, 1983, the state reserved in all patents that it issued a 1/16th “free royalty” on oil and gas, and from September 1, 1983 to present, the state reserves all mineral rights on all patents that it issues. Land titles in the Eagle Ford evidence each stage of this battle between the State of Texas and Texas landowners over control of the mineral rights, the details of which are omitted from this paper.

An anomaly unique to southwest Texas including the Eagle Ford area is the claim by the State of Texas to the bed of what are called perennial streams: streams that are not navigable but flow water year round. The southwest part of the state has a number of perennial streams whose waters are supplied by springs. The Spanish Crown retained title to the bed of perennial springs. There are approximately 60 land grants from the Spanish period which begins in 1519 when the Spanish Crown first claimed the area we now call Texas, and ends with the Mexican Revolution in 1821. Most of these Spanish land grants are southwest of

7 Texas retained all of its lands within its present-day boundaries when it was annexed by the United States. Annexation of Texas, 3 Res. 8, 28th Con. 2d Sess., 5 Stat. 797 (1845).

8 Tex. Const. of 1869, Article X, § 9, states that “The State of Texas hereby releases to the owner or the owners of the soil all mines and mineral substances that may be on the same, subject to such uniform rate of taxation as the Legislature may impose.”
the Nueces River. They are remarkable because of their size, many covering tens of thousands of acres. Any perennial stream located within a Spanish land grant may be subject to a claim by the State of Texas to the minerals.

Mexico gained its independence from Spain in 1821, and from that time until the Texas revolution in 1836, and in an effort to settle and develop the area, Mexico granted a large number of relatively smaller tracts, usually one league (4,428 acres), or less, and usually to immigrants from the United States. These grants are remarkable because they were promoted under contracts between “empresarios” such as Stephen F. Austin and Mexico. In my experience, the survey work performed under the empresarios was generally of better quality than surveys performed elsewhere in the state.

In 1844, the Republic of Texas, in an effort to deal with its $10,000,000 public debt, and to better protect itself from Mexico, proposed that the United States annex Texas and pay off Texas’ public debt in return for Texas’ 175 million acres of unallocated public domain. Congress rejected the land for debt portion of the treaty but approved annexing Texas as a state, with the result that aside from the 13 original colonies (and the four states formed out of those colonies), Texas is the only state in the Union that kept its lands upon joining the United States.

From 1836 to about 1900, the Republic of Texas and the State of Texas issued patents to land from the unallocated public domain for various purposes including raising revenue, paying debts, and promotion of settlement and development, a process which was administered by the General Land Office (GLO). These patents were for tracts usually 640 acres or less. Patents were issued for headrights to settlers to encourage immigration (36,876,492 acres), pensions for veterans of the revolution (5,354,250 acres), battle donation grants for veterans of the revolution (1,162,240 acres), veterans donation grants (1,377,920 acres),
empresario colonies (4,494,806 acres), Pre-Emption Acts sales (4,847,136 acres), loan and sales scrip (1,329,203 acres), internal improvement scrip to encourage construction of canals and other internal improvements (4,088,640 acres), railroad grants (32,152,878 acres), and state capitol construction (3,000,000 acres). We find all of these types of grants in the Eagle Ford play.

Every land title issued by the Republic of Texas or the State of Texas involved a land certificate, a/k/a “land scrip”, field notes, and a patent. Land certificates were usually issued by the GLO or a county board of land commissioners, and they entitled the grantee to a certain number of acres anywhere in the state. The grantee would locate available land, pay to have it surveyed (usually by the county surveyor), file the surveyor’s field notes, which were usually in the form of metes and bounds, with the GLO, and apply for a patent. As we will see, this Texas system of the grantees hiring and paying for surveys in a piecemeal distribution by the state of the unallocated public domain, instead of having all of the unallocated public domain surveyed as part of one survey process, coupled with poor survey work and the grantees’ surveyors’ extensive use of natural and artificial monuments subject to deterioration over time, and in the context of the GLO’s tendency since the early 1900’s to assert vacancies notwithstanding the long-established boundaries of the surveys in question, has resulted in a multitude of instances, especially in the Eagle Ford, in which the GLO asserts vacancies and mineral interests in lands on the theory that they are located between two prior surveys and have not been patented and severed from the sovereign.

Following is an example of a land certificate issued on May 27, 1873 to the H&GNRR Co., in payment for construction of rail road:
Source of the land certificate and the following field notes: Texas General Land Office.

And following are the quoted the field notes for the selected 640 acres:

“Beginning at a stake the NE corner of Survey 21, S 18 E to the west corner of Alford’s House, the NE corner of Survey No. 21, the SE corner of No. 24 hereto made for the H&GNRR Co., Thence East 1900 vs. a stake and SW cor. of Sur. No. 9 & NW of No. 10 both made for said RR Co., Thence North 1900 vs. a stake the NW cor. of Sur. No. 9, the SW of No. 8, and SE of No. 25 all made for the said RR Co., Thence West 1900 vs. a stake the SW cor. of Sur. No. 25, the SE of No. 50, & NE of No. 24 all made for the said RR Co., Thence South 1900 vs. to the place of beginning.”

Those field notes (taken from the following photocopy) serve to illustrate the problems encountered in establishing survey boundaries in Texas:
(1) The vacancy problem: unreliable surveys.

From a legal perspective, the above survey for the Houston and Great Northern Railroad Company provides a description sufficient to allow the location on the ground of a specific tract of land, notwithstanding the probability that the calls for course, distance and acreage conflict with the calls for adjoinder and the calls for natural or artificial monuments: Texas law has always been clear: calls for adjoinder and/or for natural or artificial objects are superior to conflicting calls for course, distance or acreage (Frost v. Socony Mobil Oil Co., 433 S.W.2d 387, 413-414 (Tex. 1968). Customarily, and following Texas law, the owner would take possession of his tract using the artificial and natural monuments described in the survey, i.e., the stakes and the west corner of “Alford’s House.” Many surveys bounded a river and would call that boundary by following the meanders of the river. And it was common to call certain points on a boundary by reference to nearby “witness trees”. The problem is that stakes and houses are removed or destroyed, rivers change course and witness trees die.

A general description of survey work performed in Texas is quoted from an article published by the Texas State Historical Association:

“Surveying was first practiced in Texas to define the boundaries of Spanish land grants. Methods varied greatly; distances were occasionally given in such units of measurement as ‘a cigarette’s length’ or ‘half a day’s walk,’ and compass bearings were often inaccurate. Other surveys, slightly more accurate, made use of measurements in varas [33 1/3 inches, although some argued that a vara was 33 inches], cordels, and leagues. Surveyors were required by Spanish and Mexican law to point out to grantees each and every corner of the grant and to tell him ‘in a loud voice’ that he was invested with the property pointed out. The grantee indicated his acknowledgement of the grant by throwing rocks, shouting aloud, firing guns, and making other and sundry noises. With the beginning of Anglo-American colonization,
Stephen F. Austin was careful not to issue titles to colonists until a survey had been made. His instructions from the Mexican government as to surveying were printed and issued by Juan Antonio Padilla, the land commissioner; Austin’s contracts with such surveyors as Horatio Chriesman, Seth Ingram, William Kincheloe, and Elias R. Wightman required that they use the Mexican vara as a standard unit, use the true meridian after calculating compass variation, establish corners with bearing trees at each principal corner marked with the owner’s initials or with mounds of earth at least three feet high, mark every line not bounded by a river or creek so that it could be easily traced and followed, make correct notes and plots for each survey, and execute all work accurately. Austin warned surveyors to avoid leaving vacancies between tracts. The surveyor’s fee was to be five dollars per Spanish mile, payable in property, or three dollars per mile, payable in cash. The early surveyors used a linked chain twenty varas long or a Gunter’s chain corrected to the vara standard. They had a tendency, when land was cheap and unoccupied, to add twenty to 100 varas to each mile of line to make certain that no one was cheated; hence, a supposed section of land has often been found to contain from one to 100 acres of excess. A Jacob staff with a box compass and peep sights was used for running lines. Surveyors could not agree on the declination; some thought it should be east, others thought it should be west; others used no declination at all but simply ran a magnetic course. No compensation was made for calendar variations of magnetic north, and no correction was made for the curvature of the earth.” [bolded emphasis supplied]

“Despite these handicaps, the work of the first surveyors was surprisingly accurate; later surveyors in the land boom days, although better equipped, were frequently less accurate. Their inaccuracies, which gave rise to land vacancy and land excess, resulted from crude equipment, incorrect methods, lack of training, and carelessness. Demands for speed often meant that surveys were not closed on the ground and that careless errors in chaining and bearings were made. In the location of railroad grants, field notes to hundreds of sections were made and filed by surveyors who were never on the land they described. One device used to speed up surveying in the prairie country was to tie a rag to a buggy wheel, drive over the lines following a magnetic compass, and count the revolutions of the buggy wheel to obtain the distance. Discrepancies and mistakes from inaccurate surveys have caused numerous and expensive lawsuits. Because of these
Inaccuracies, the Texas legislature has made several reforms, particularly the Statute of Limitations, to protect settlers who located on land sometimes considerably distant from that described in their patents, and House Bill No. 9 of the Forty-sixth Legislature, June 19, 1939, to protect owners of excess land from unscrupulous land grabbers.” [bolded emphasis supplied]

“A typical surveying party of the last quarter of the nineteenth century consisted of a chief of party, a transitman, two chainmen, one or two flagmen, a corner builder, and a cook. Iron rods and cane poles served for flagpoles; transit stations varied between a half mile and two miles; colored oil cloth, paper, and mirrors were used for signaling. A light buggy was provided for the transitman, and the corner builder used a light wagon. A fifty-vara tape was commonly employed, although old link chains, usually not longer that twenty varas, were also used.”

“Texas surveys were not laid out by means of a regularly established system; tangible control points of well defined base lines were never used. Description in metes and bounds has been used from the beginning….”

Illustrations of the difficulties encountered in determining the locations of original surveys are found in portions of a report prepared in the 1940’s by an Eagle Ford area county surveyor addressed to the commissioner of the General Land Office with regard to a block of contiguous surveys totaling about 9,000 acres:

He finds overlapping patents:
He re-locates a 53,000 acre block of railroad surveys to the northeast by hundreds of varas:

He finds the surveyor for the canal company apparently did not go to the field:

He finds the surveyor for the railroad company did not leave the office:

He finds a vacancy resulting from his own prior surveying error:
He finds a vacancy resulting from a prior surveyor’s error:

He finds a vacancy resulting from correction of his own prior survey:

He finds that the surveyor for the canal company thought he was headed west when he was actually headed east:
He finds that the outside lines of the railroad survey block were never marked on the ground by the surveyor:

He finds overlapping surveys, a small vacancy and a large vacancy (over 100 acres) separating three 640 acre surveys:
It’s remarkable that the State of Texas required the railroads to survey one section of land for the state for each section of land the railroad surveyed for its own account. Frequently, the result was “in office” surveys where the railroad’s surveyor drafted the survey without going on the land. Even so, “in office” surveys were not unusual with respect to other listed grants by the state.

(2) The vacancy problem: apparently, the GLO asserts marginal claims.

So the question for the Texas courts was how to determine the boundaries of a tract where the natural and artificial monuments are gone or moved, and the calls for course, distance and acreage conflict with the possession being exercised by the owner. The courts’ answer is under the doctrine of juridical (regular, related to the administration of justice) possession, long-continued occupancy is sufficient to establish the boundaries. Atchley v. Superior Oil Co., 482 S.W.2d 883, 892 (Tex. Civ. App.—Beaumont 1972, writ ref’d, n.r.e.); State of Texas v. Superior Oil Co., 526 S.W.2d 581, 585 (Tex. Civ. App.—Corpus Christi 1975, writ ref’d, n.r.e.).

Even so, apparently there was, and continues to be, resistance within the GLO to following the case law, motivated by a desire to generate revenue for the state and to limit the patented surveys to the called-for acreage amounts. Following is quoted from House Bill No. 9 of the Forty-Sixth Legislature, approved June 19, 1939, effective September 21, 1939:

“Section 8. The fact that numerous persons commonly known as Vacancy Hunters are encouraged by existing statutes to seek to destroy or discredit old recognized lines and landmarks and to shift surveys into other positions in order to create alleged vacancies from which they can profit, and that many alleged but unproven vacancies have been recently granted and sold or leased in disregard of the rights of taxpaying citizens who have
long believed themselves the true owners of such land, and that many suits have been filed and are being filed to recover such areas from the people who have in some cases been occupying same for generations, and that many suits are now on file in which the arbitrary action of the Land Commissioner in granting vacancies will throw upon the land owners the almost impossible task in many cases of retracing the unmarked “footsteps of the original surveyor” made fifty to one hundred years ago in order to overcome the pronouncement of the Land Commissioner that the land is vacant, creates an emergency and an imperative public necessity that the Constitutional Rule requiring bills to be read on three (3) several days be, and the same is hereby suspended, and this act shall take effect and shall be in force from and after its passage, and it is so enacted.” [bolded emphasis supplied]

Not deterred, the GLO continued to grant vacancies based on the “re-survey” of old surveys by elevating calls for course, distance and acreage amount over calls for adjoiner and over calls for natural and artificial monuments. Following is quoted from a report filed with the GLO in November of 1941 by a county surveyor serving the Eagle Ford area, regarding a proposed vacancy:

“In the month of May of this year I made a trip to Austin and the General Land Office to obtain help in the reconstruction of river surveys 499, 500, 501, 502, 503 and 504, it was my understanding that I was advised to construct the northeast end lines of the above said surveys, by beginning at the north bank of the Nueces River and running out each survey, its call course and distance from its beginning corner. I have conformed strictly to this method. Then giving the northeast end lines their call course and distance; Thence giving the third call its course as called for and actual distance to the north bank of said river. The said river being the only positive original marker found of said river surveys. This method gives each of said surveys about the quantity of land granted, except survey No. 501 which falls short of the amount granted. By giving the third call its call distance from the north bank of said river or reversing the calls, it would have a large excess over the quantity granted but would place its east corner more nearly the distance called for to the north corner of said Sur, 502. By drawing the north corner of survey No.
502 S. 45 W. to fit the called distance to the east corner of said survey No. 501 would greatly shorten the quantity of land granted in said survey No. 502 the present owner of said survey No. 502 objects to. Also, the present owner of the southeast part of Curtis Herring Sur. No. 2 objects. [bolded emphasis supplied]

In other words, the GLO told the surveyor to calculate strictly according to course and distance in order to obtain the quantity of acreage granted, notwithstanding the long-established, and probably fenced, boundaries of the surveys! The commissioner of the GLO has no authority to change the calls of the field notes, or to leave out any portion of them, so as to grant to the patentee a different tract of land from that actually run out by the original surveyor (Atlantic Refining Co. v. Noel, 443 S.W.2d 35, 38 (Tex. 1968)), and he cannot patent lands to one person that have already been sold to another. Foster v. Duval County Ranch Co., 260 S.W.2d 103, 107, Tex. Civ. App.—San Antonio 1953, writ ref’d, n.r.e.).

Following are just two examples of GLO practice in declining to honor the long-established boundaries of surveys within the state and/or established rules of construction of patents. (Both examples are cited with such modifications of the facts to conceal the true descriptions of the lands in question.)

(a) If at first you don’t succeed, try and try again.

In 1942, the commissioner of the GLO declares a vacancy and causes the issuance of a patent conflicting with a survey granted in 1852, in spite of the facts that:

(1) in 1911, the commissioner of the GLO had denied a similar application on the ground that it conflicted with the west boundary of the 1852 survey;

(2) in 1930, the commissioner granted a vacancy on a tract adjacent to the west boundary of the 1852 survey which confirmed its west boundary
and confirmed the location of the original witness trees described in the 1852 survey and determining that west boundary;

(3) the GLO applicant’s original application for vacancy was based on a survey which confirmed the west boundary of the 1852 survey and was based on that surveyor’s location of the same witness trees identified in the 1852 survey as establishing its west line;

(4) in September of 1941, the district court for the county granted a final judgment for title and possession to the owner of the 1852 survey and against the GLO applicant, and others, confirming the west boundary of the 1852 survey and confirming the owner’s fence, which judgment was based on the testimony of the GLO applicant’s own original surveyor and on the testimony of a court-appointed surveyor, both of whom located the witness trees establishing the west boundary of the 1852 survey, and accurately placed the owner’s fence;

(5) in November of 1941, GLO applicant secured a new surveyor who could not locate the witness trees found by the other three surveyors because he was at the wrong part of the river, and who calculated the west boundary of the 1852 survey starting from the wrong part of the river, whose erroneous survey is approved by the GLO and used as the basis of the 1942 vacancy patent; and

(6) throughout the process the GLO applicant misrepresented that he owned the lands in question and disregarded the true owner’s fence which had been in place since at least as early as 1908 (and is still there today), and disregarded the district court’s judgment.

Today, the GLO, with full knowledge of the facts, claims to own a 1/16 free royalty on oil and gas produced from lands within the 1852 survey based on the 1942 vacancy patent, declining to recognize that the state cannot patent lands previously patented to someone else, and provoking the affected landowner to litigate the matter.
(b) The GLO incompetently transcribes the field notes to the patent and then compounds the error by claiming a vacancy.

(1) In 1926, a homestead donation claimant submits a survey for about 120 acres having the following field notes:

“Beginning at a fence corner 4011.3 varas N. from the S. W. corner of sur. 51[sic] for N.W. cor. of Survey 51[sic], the S.W. corner of this survey; Thence N. 740 varas set a stake for N.W. cor. of this survey; Thence E. 966 varas a stake for N.E. cor. of this survey; Thence S. 740 varas to a fence corner for a S.E. corner of this survey and N.E. cor. of sur. 51[sic]; Thence W. 966 varas to the place of beginning.”

[survey number modified] [bolded varas supplied]

(2) In 1934, the GLO erroneously (by leaving out the references to the northwest and northeast corners of Survey 51) transcribes the field notes to the patent which is issued with the following description:

“Beginning at a fence corner 4011.3 varas N. from the S.W. corner of sec. 51[sic] for the S.W. corner of the J. B. Salmon survey; Thence N. 740 varas a stake for corner; Thence E. 966 varas a stake for corner; Thence S. 740 varas a stake at fence corner for corner of the J. B. Salmon survey; Thence W. 966 varas to the place of beginning.”

(3) In 1941, a vacancy application is filed with the GLO, with a survey showing a 10 acre vacancy on the south side of the 120 acres asserting that its south line did not join the north line of Survey 51, being separated by an average distance of over 50 varas, the difference caused by the surveyor’s erroneous elevation of the distance calls of the patent for Survey 51 over the survey actually run out on the ground, and his ignoring the superior call in the field notes for the 120 acres that the two surveys join. No patent issues although it appears that the vacancy application is approved by the GLO.

Today, in disregarding the rule that calls for adjoinder are superior to calls for distance [Frost v. Socony Mobil Oil Co., 433 S.W.2d 387, 413-414 (Tex. 1968)], the GLO claims it owns the minerals of the 10 acres instead of
recognizing that the appropriate resolution is for the 1934 patent to be corrected to include the omitted references to the northwest and northeast corners of Survey 51. See Tex. Nat. Res. Code Section 51.253 which states the following:

“Sec. 51.253. CORRECTED PATENT. (a) An owner of land in one or more patented surveys may apply to the General Land Office for a corrected patent to correct scriveners’ errors or obvious errors in the field note description of the original patent as determined by the commissioner. The application must clearly identify the error in the original patent. (b) The General Land Office may adopt rules relating to the implementation and operation of this section, including rules requiring the payment of reasonable filing and processing fees by an applicant for a corrected patent.” Added by Acts 1983, 68th Leg., p. 752, ch. 182, Sec. 1, eff. Sept. 1, 1983.

Instead of asserting a vacancy, the GLO should recognize the party entitled to the corrected patent as the beneficial owner of the tract.

In 1940, it was estimated that vacancies amounted to as much as five percent of the total area of the state. In my experience, landowners with resources are able to defeat most vacancy claims by the State of Texas. Nevertheless, operators must deal with vacancy issues which liberally sprinkled throughout the Eagle Ford area.

B. The oil industry effect.

The oil industry itself has complicated land titles in the Eagle Ford. Prior to the recent development of the Eagle Ford shale, there were relatively few oil and gas fields in the area. One might expect, as a result, fewer mineral transactions and reservations in the Eagle Ford: not so. Discoveries such as Spindletop near Beaumont, Texas (discovery well completed January, 1901), the East Texas Field (discovery well completed October, 1930), the San Salvador Field in Hidalgo
County (discovery well completed August, 1935, the La Gloria Field in Brooks and Jim Wells counties (discovery well completed March, 1939), to name a few, provided incentive for sellers of land in the Eagle Ford area to frequently reserve minerals and/or nonparticipating royalties, some of which began as early as April of 1901, and many of which affect large tracts of land such as the Armstrong reservation of one-third of the minerals affecting over 18,000 acres in La Salle County. In my examinations, I have frequently observed mineral reservations during the period from 1900 through the present resulting in extensive mineral related title issues: issues which did not warrant curative efforts until recently. Under Common Law, severed mineral estates are not abandoned by neglect, and loss by adverse possession ordinarily requires drilling a well by the adverse possessing claimant. Because of the lack of actual drilling in the area, mineral reservations are usually still in effect, there being no history of adverse possession of the mineral estates. The owners of these mineral estates often no longer reside in the Eagle Ford area and, as you can imagine, the ownership lists can be lengthy, especially with reservations over 50 years old. Oil and gas exploration and production related activities have a tendency to clarify land/mineral titles in prospective areas, and yet the Eagle Ford is in the early stages of that clarification process.

IV. What tools will you need to develop your Eagle Ford acreage?

The obvious answer is full lease coverage, or operating agreements with all the leasehold interests and/or unleased interests, and pooling agreements with all the other interests, before you drill the well. Assuming that may not be possible, however, then there are some tools to consider.
A. Compulsory pooling.

The first tool that comes to mind is: apply for a Railroad Commission compulsory pooling order. The short answer to that is: Not!

Texas’ compulsory pooling statute has a limited purpose, that being to protect small tract owners from drainage, not to protect correlative rights or to allow large tract lessees flexibility in development. The Mineral Interest Pooling Act was passed effective as of August 29, 1965, long after Texas had emerged as the nation’s top oil and gas producer. A compulsory pooling statute was not enacted earlier because owners of small tracts and independent operators preferred the conservation law and Railroad Commission practice that had developed in the absence of compulsory pooling. This legal framework consisted of a liberal Rule 37 exception process for obtaining well permits on small tracts, coupled with large per-well allowables in the prorationing formulas promulgated by the commission in fields with small tracts. For decades, this system benefited the owners of small tracts and their lessees by assuring them a drilling permit and a “living allowable” that let them produce more than their share of the reservoir. Independent producers and small tract owners were, and still are, politically powerful, and could defeat proposals for compulsory pooling acts which would compel such owners and operators to accept only their fair share.

On March 8, 1961, in Atlantic Refining Co. v. Railroad Commission, 162 Tex. 274, 346 S.W.2d 801 (Tex. 1961) (also called the Normanna decision), the Texas Supreme Court invalidated prorationing formulas that allowed uncompensated drainage from one tract to another. From that time, small tract owners were interested in compulsory pooling because proration formulas were based on surface acreage or productive acre-feet of sand, and drilling on small
tracts was often unprofitable. Between March 8, 1961, and the passage of the Mineral Interest Pooling Act four years later, de facto pooling existed in Texas through the Railroad Commission’s operation of a special allowable system: oil and gas fields were prorationed based on productive surface acreage, but if a small tract owner (or lessee) could prove that drilling under this acreage prorationing formula was unprofitable and that the owners of nearby tracts had refused to accept a fair and reasonable pooling offer, the Railroad Commission would grant a special allowable to the small-tract owner which would render drilling on small acreage profitable by allowing the tract to drain from others. To avoid this drainage, the owners of nearby tracts had only to accept the small tract owner’s offer to pool.

The special allowable de facto pooling system was designed to induce an attitude of cooperation between large and small tract owners, and was enacted into law on March 4, 1965, with the passage of the Mineral Interest Pooling Act (“MIPA”).

The courts have consistently construed the MIPA as limited in function to protecting small tract lessees. Many jurisdictional hurdles must be jumped before the Railroad Commission can issue a compulsory order. MIPA Section 102.011 limits the commission’s jurisdiction to pooling of separate tracts: it is not authorized to compel pooling of cotenants nor to compel pooling on its own motion. The MIPA does not apply to fields discovered before March 8, 1961, and only applies to tracts sharing a common reservoir. The MIPA does not apply to state lands, and the GLO must consent to any pooling. A pooling order may issue only in reservoirs with field rules already established and only where a well has been proposed. Pooling orders cannot have retroactive effect. The maximum risk

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9 However, there is some limited authority for forced pooling unleased mineral owners. See the MIPA application filed by Finley Resources Inc. under Docket No. 09-0252373, Railroad Commission.
penalty that can be imposed is 100%, and yet the pooling order may provide for less. The forced pooled unit may not exceed 160 acres for an oil well and 640 acres for a gas well, plus a 10% tolerance, which may not work for horizontal wells under Statewide Rule 86. The applicant must first make a strong effort to secure pooling voluntarily by making a fair and reasonable offer and by negotiating in good faith. This process alone may be quite lengthy. The courts have held that what is fair and reasonable before a well is drilled may not be fair and reasonable after a well is drilled. Only after the voluntary negotiation process fails may an application be filed with the commission. Contested applications to compel pooling are procedurally complicated, expensive, and have a success rate of about 50%. Successful contested applications can take more than one year to secure a pooling order. The compulsory pooling process is a procedural maze of time limits, venue, and standing problems. It may be that compulsory pooling is possible, and yet that is not the current practice.

B. Community leases, the non-apportionment rule, entirety clauses, and anti-communitization clauses.

Community Lease: Some of your ranch leases may already be community leases. A community lease may be considered a type of unit in itself. The owners of separate tracts may jointly execute a single lease covering both tracts as if the entire area was jointly owned, also called a community lease. The lessors will share the royalty proportionately without regard to well location.\textsuperscript{10} A nonparticipating royalty interest owner has the option to ratify the lease and share

\textsuperscript{10} French v. George, 159 S.W.2d 566, 569 (Tex. Civ. App.-Amarillo 1942, writ ref'd).
in the royalty.\textsuperscript{11} There is authority that the NPRI owner can make separate elections as to each well.\textsuperscript{12}

**Non-Apportionment Rule:** When a mineral owner executes a lease and subsequently conveys a divided portion of the oil and gas rights to another (i.e., N/2 of the leased lands), and there is production from only a portion of the leased lands after the division, only the owner of the particular portion upon which the well is located benefits from production.\textsuperscript{13}

**Entirety Clause:** The parties to a lease may avoid the uncertainty of a community lease and the application of the Non-Apportionment Rule by including in the lease an entirety clause\textsuperscript{14} providing that in the event that the leased premises shall thereafter be owned in severalty or in separate tracts, that the entire leased premises shall be developed and operated as one lease, and that all separate owners will share in production in the proportion that the acreage owned by each separate owner bears to the entire leased premises.\textsuperscript{15}

**Anti-communitization Clause:** Parties may avoid the effect of a community lease by including a provision which states that if the lease covers multiple tracts, it shall not be treated as a community lease, and no pooling or unitization is intended.

\textsuperscript{11} Ruíz v. Martin, 559 S.W.2d 839, 843 (Tex. Civ. App.-San Antonio 1977, writ ref'd n.r.e.).

\textsuperscript{12} **MCZ, Inc. v. Triolo,** 708 S.W.2d 49, 53-54 (Tex. App.-Houston [1st Dist.] 1986, writ ref'd n.r.e.).

\textsuperscript{13} Japhet v. McRae, 276 S.W. 669, 670 (Tex. Comm'n App. 1925, judgm't adopted).

\textsuperscript{14} But see Montgomery v. Rittersbacher, 424 S.W.2d 210, 212 (Tex. 1968) (holding that “the enlargement or diminishment of the rights of a prior nonparticipating royalty owner can be accomplished by the holder of the executive rights executing an oil, gas, and mineral lease which includes either a pooling clause or an entirety clause, provided the nonparticipating owner ratifies such action”).

\textsuperscript{15} See, e.g., Montgomery, 424 S.W.2d at 212.
However, Texas courts have been reluctant to enforce anti-communitization clauses in leases against nonparticipating royalty interests.\textsuperscript{16} The result is that an NPRI owner, even though his tract lies outside of a unit, but within a lease included in that unit, may be able to ratify the lease, thereby communitizing his interest, and thereafter be entitled to his share of royalties from the unit.

C. Browning v. Luecke.

What happens if your horizontal well crosses multiple tracts and either you do not have a unit or your unit fails because of lack of pooling authority?

In \textit{Browning Oil Co. v. Luecke},\textsuperscript{17} after drilling several horizontal wells, the lessees were sued, the trial court found that their units were invalid, and the trial court measured damages based on the traditional rules for the owner of a drillsite tract whose interests have been improperly pooled, that measure being an undiluted royalty on all production coming through the wellbore that was located on the plaintiff’s tract. The trial court so ruled in spite of the fact that there were take points along that portion of the drainhole that were not located on the plaintiff’s tract. Based on that traditional theory, the plaintiff was awarded a “double royalty”. In rejecting this recovery, the court of appeals articulated the reasons why a different damages rule should apply to wrongful pooling of royalty interests as applied to horizontal and not vertical wells. It stated:

“Horizontal wells can extend across several tracts of land in a linear configuration to accommodate the length of the horizontal drainhole. Consequently, all the tracts are not contiguous. Several tracts of land may

\textsuperscript{16} \textit{London v. Merriman}, 756 S.W.2d 736 (Tex. App.–Corpus Christi 1988, writ denied) (declining to apply the anti-communitization clause against an NPRI owner.).

\textsuperscript{17} \textit{Browning Oil Co. v. Luecke}, 38 S.W.3d 625 (Tex. App.–Austin 2000, pet. denied).
separate the penetration point of the drainhole from the terminus point. And each of the tracts traversed by the horizontal drainhole is considered a drillsite tract, which likely includes underlying fractures that are being drained by the wellbore. Thus, each point along the drainhole is contributing to production from isolated fractures, and no one drillsite is naturally draining minerals from all of the penetrated tracts. Even though the rule of capture and other principles of oil and gas law would afford the Lueckes royalties on all production if a vertical well were drilled on their land without valid pooling, these principles have no application in the case of horizontal wells that contain multiple drillsites on tracts owned by multiple landowners. Absent the ability to naturally drain neighboring tracts, the Lueckes are not entitled to production from other lessors’ tracts unless there has been a cross-conveyance of property interests. Because the purported units were invalid, there has been no cross-conveyance of interests, and the Lueckes are not entitled to royalties on production from lands they do not own. 18 … The better remedy is 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 certainty. 19 (bolded emphasis supplied)

In other words, according to Browning Oil Co. v. Luecke, horizontal wells are a de facto pooling in and of themselves. Presumably engineering and geological evidence would be needed to make a determination of what production can be attributed to which tract with reasonable certainty based on the extent of fracturing at each take point and other factors.

D. Cotenancy.

If your working interest in a particular tract is large enough, and if you cannot obtain operating agreements from your other lessees and/or leases from the unleased interests, you may consider drilling the well under Texas’ cotenancy law.

18 Id at 646.
19 Id at 647.
More specifically, owners of undivided portions of oil and gas rights in and under a single tract of land are cotenants, and each cotenant may enter upon the tract for exploration and development purposes. However, one cotenant cannot exclude the other. Upon obtaining production, the producing cotenant must account to the nonproducing cotenant for his proportionate share of the profits after deducting his proportionate share of the costs, in effect netting the nonproducing cotenant who is not entitled to revenue until his interest has “paid out”. However, the costs attributable to the nonproducing cotenant are not necessarily the same costs he would pay under an operating agreement, and the nonproducing cotenant need not contribute to dry holes.

Nonproducing cotenants may ratify your lease and become entitled to a proportionate share of the lease royalty in lieu of a share of net profits. If one cotenant signs a lease that purports to cover the entire tract and (1) the lease contains a pooling clause, (2) the lease covers multiple tracts with differing ownership and contains an entirety clause, or (3) the lease is a community lease, the unleased cotenant can ratify the lease and will receive a royalty share of any pooled production from a well located on the unleased cotenant’s tract or off that tract but subject to the lease. Ratification may be express or implied.

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

22 Id.

23 Id.

E. Production Sharing Agreements and Pooling Agreements.

If your lease block is sprinkled with small tracts of minerals claimed by the State of Texas, and if you don’t want to nominate those tracts for fear you will be outbid in the sealed bid process, the Railroad Commission has come to your rescue and developed “production sharing agreements” (PSA’s) and “pooling agreements”, both of which operate like an oil and gas lease, with the “lost royalty” at 25% and the “lost bonus” at the market rate for the area. The purpose of these agreements is to allow operators to protect their acreage from “block busters” while developing the state’s resources. A PSA is defined as “an agreement between royalty, working, and other mineral interest owners with interests in multiple pooled units and/or unpooled leases in which the parties agree to a method for allocating production from horizontal wells. Most PSAs in use allocate production based on the length of the horizontal lateral on a particular tract in comparison to the total length of the horizontal lateral from the first take point to the terminus of the lateral. One caveat: PSA’s and/or pooling agreements may not solve the favored nations problem.

F. Voluntary pooling.

If you continue to pursue pooling authority even after the well is drilling or has been drilled, you should consider some basic rules. Absent express authority, a lessee has no power to pool interests in the estate retained by the lessor with those

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25 See T.R.C. Form PSA-12 Production Sharing Agreement.
of other lessors.\textsuperscript{26} The lessee can pool its leasehold interest, but without a pooling clause, it is powerless to pool the royalty interest or the possibility of reverter.\textsuperscript{27} Without pooling authority, if the well is located on the pooled tract, the lessor would be entitled to its full royalty and if the well is located on the non-pooled tract, the leasehold habendum clause would not be satisfied.\textsuperscript{28} Lessee’s pooling authority must be exercised in good faith and not for the sole purpose of maintaining lessee’s leases.\textsuperscript{29} Beware that in Texas, the executive cannot pool nonparticipating royalty interests,\textsuperscript{30} and presumably, the same rule applies to nonexecutive mineral interests. The bottom line is: make sure your pooling authority covers all the interests, including non-executive mineral and non-executive royalty interests, that it clearly authorizes your unit, and that all leasehold owners join in the unit declaration.

G. Non-executive mineral/royalty interests.

Non-executive mineral interests are generally defined as mineral rights without the executive rights, and nonparticipating royalty interests. Texas courts have historically protected non-executive interests because of their limited

\textsuperscript{26} Jones v. Killingsworth, 403 S.W.2d 325, 328 (Tex. 1965) (citing Brown v. Smith, 174 S.W.2d 43 (Tex. 1943)); accord Se. Pipe Line Co. v. Tichacek, 997 S.W.2d 166, 170 (Tex. 1999).

\textsuperscript{27} Knight v. Chic. Corp., 188 S.W.2d 564, 566-67 (Tex. 1945).

\textsuperscript{28} Knight, 188 S.W.2d at 566; see Bruce v. Ohio Oil Co., 169 F.2d 709 (10th Cir. 1948).

\textsuperscript{29} Amoco Prod. Co. v. Underwood, 558 S.W.2d 509, 511-13 (Tex. Civ. App.-Eastland 1977, writ ref’d n.r.e.).

\textsuperscript{30} Brown v. Smith, 174 S.W.2d 43,46 (Tex. 1943); Nugent, 306 S.W.2d at 170-71; Minchen v. Fields, 345 S.W.2d 282, 285 (Tex. 1961); MCZ, Inc. v. Triolo, 708 S.W.2d 49, 53 (Tex. App.-Houston [1 st Dist.] 1986, writ ref’d n.r.e.).
development options. That protection has usually comes in the form of allowing the non-executive interest to cherry-pick the lessee’s operations through ratification(s) and the courts’ declining to apply lease provisions that bar ratifications. A full discussion of this area is beyond the scope of this paper.

V. Some selected division order issues in the Eagle Ford.

**Issue No. 1.** Your drillsite has cotenants, whether leased or unleased, who have not consented to drilling. What happens if you drill without the consent of your cotenant?

Answer: If you drill a dry hole, your non-consenting cotenant owes no part of the cost. If you drill a good well, your non-consenting cotenant backs in after payout with no risk penalty. Prior to payout, your non-consenting cotenant is not entitled to any of the revenue, whether he is an unleased owner or is a non-consenting lessee cotenant.

**Issue No. 2.** Where your non-consenting cotenant is a lessee, who pays the lessor’s royalty on that lease before payout?

Answer: The non-consenting cotenant lessee would be obligated to pay the royalty due under the lease even though he receives no revenue prior to payout.

**Issue No. 3.** Where your non-consenting cotenant is an unleased mineral owner, what happens if he grants your company a lease prior to payout of the well and the lease is not retroactive to date of first production? In other words, does he have any claim to revenue accruing prior to the effective date of the lease?

Answer: If the lease does not address the question, then your company owes only the royalty accruing after the effective date of the lease. In other words, the formerly non-consenting and now leasing cotenant would not be credited with a proportionate share of the pre-payout revenue.

**Issue No. 4.** What happens when your non-consenting cotenant, whether leased or unleased, is not drillsite but has a mineral/leasehold interest in a portion of your
company’s declared unit and ratification of one of your company’s leases covering that non-drillsite tract is either not an option or has not occurred. Who gets the revenue attributable to the mineral interest of that non-drillsite non-consenting cotenant?

Answer: All of the revenue attributable to the mineral interest of that non-drillsite non-consenting cotenant’s mineral interest in the non-drillsite tract is proportionately divided among the working interest owners.  

**Issue No. 5.** What happens when the State of Texas owns a 1/16\textsuperscript{th} free royalty on a 20 acre portion of one of your ranch leases containing 4,000 acres, and the State of Texas ratifies the lease and purports to pool it’s 1/16\textsuperscript{th} free royalty across the entire 4,000 acres?

Answer: You advise your ranch lease lessor of the state’s ratification and that you intend to comply with the state’s purported pooling of that free royalty across the 4,000 acres. (You know from experience that your ranch lessor will take no action against the state.)

**Issue No. 6.** Who bears the state’s pooled royalty as described in Issue No. 5? In other words, do all the royalty owners across the entire 4,000 acres proportionately bear their share of the diluted 1/16\textsuperscript{th} free royalty? or just the royalty owners on the 20 acres from which the 1/16\textsuperscript{th} free royalty originates?

Answer: Just the royalty owners on the 20 acres from which the 1/16\textsuperscript{th} free royalty originates.

**Issue No. 7.** What happens when the Crooked Fork Trust attempts the same thing as the State of Texas as described in Issue No. 5 only with respect to a 1/32\textsuperscript{nd} nonparticipating royalty interest on 40 acres in the southwest corner of the 4,000 acres?

Answer: You advise your ranch lease lessor of the Crooked Fork Trust’s ratification and that you intend to comply with the trust’s purported unitization of

\[31\text{ As a practical matter, the industry practice has been for the operator to hold that revenue and attempt to secure a lease from the unleased owner effective date of first production, if possible, and then distribute the revenue.} \]
that 1/32nd nonparticipating royalty interest across the 4,000 acres. (However, you know from experience that your lessor will take action to enforce the anti-communitization clause of the ranch lease so you suspend payment.)

**Issue No. 8.** Who bears the “excess royalty” due when a drillsite nonparticipating royalty interest refuses to pool?

Answer: Ordinarily, all royalty is paid out of lessor’s royalty, and your lease may so provide, and yet, be prepared for an argument.

VI. **Conclusion.**

Texas recognizes its citizens are entitled to an extraordinary amount of liberty in managing their affairs, and this is especially true in its oil and gas industry. In my opinion, industry players who play fair and treat their neighbors right have nothing to fear while navigating the “rules of the game”, Texas style.

**Suggested further reading:**

I recommend the following excellent articles, both of which I referenced in preparing this paper:

(1) the GLO website has an excellent article titled “History of Texas Public Lands”, and

(2) an article titled “Disposition of the Mineral Estate on United States Public Lands: A Historical Perspective” by Sylvia L. Harrison.