



Executive Rights, Good Faith and Fair Dealing in Texas: Recent Developments

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In the past year, Texas courts issued decisions interpreting whether a grantor conveyed executive rights by deed and issued a decision regarding the duties of an executive rights owner to the nonexecutives in a mineral interest. This recent case law in Texas suggests that, absent a clear indication of intent, the courts are reluctant to find the conveyance of an executive right in minerals.

In particular, *Five Star Royalty, Ltd. v. Mauldin*, 2020 U.S. App. LEXIS 27748 (5th Cir. 2020), and *Geary v. Two Bow Ranch Ltd., P'ship*, 2020 Tex. App. LEXIS 552 (Tex. Ct. App. – San Antonio Jan. 22, 2020, *pet. filed*) examined the effect of deed construction in determining ownership of executive rights. Upon the finding of an executive right, *Tex. Outfitters, Ltd., LLC v. Nicolson*, 572 S.W.3d 647 (Tex. 2019) examined the duty of an owner of an executive mineral right to execute a lease on behalf of nonexecutive mineral owners.

In *Tex. Outfitters*, the Texas Supreme Court's mandate that an executive rights owner may be required to lease not just a nonexecutive interest but also the executive's own minerals against the executive's will is a new obligation on executive property rights in Texas.

Conveyancing Issues and the Executive Right

At both the state and federal levels, Texas courts reserved executive rights in favor of the grantors over grantees in instruments described in the following cases:

***Five Star Royalty, Ltd. v. Mauldin*, 2020 U.S. App. LEXIS 27748 (5th Cir. 2020)**

In *Five Star Royalty, Ltd.*, the 5th Circuit interpreted a deed purporting to convey a "royalty interest" and an "equivalent reversionary interest" in oil, gas, and minerals. Regarding executive rights, the deed states:

... the grantee by reason of the possible reversionary interest in the . . . minerals in and under said land shall have no interest in any rentals, bonuses or other revenues or moneys other than royalties received or derived from the lease or sale of said land, and neither the grantee nor its successors or assigns shall have any control over the lease or sale of said lands for minerals or other purposes, and for the purpose of leasing, selling or making other contracts for the development and production of the minerals in said lands, the original grantors are expressly made

the agents of the grantee, and it shall not be necessary to consult the grantee in any way with respect thereto...

After determining that the conveyed royalty interest was a right to receive royalties proportionate to the mineral interest, and not a fixed royalty interest, the Court then considered the status of the executive right. Noting that the designation of the grantor as the grantee's "agent" appears in connection with rights *not* conveyed, the Court stated that the agency language would not transfer the executive right because the first step of the "two-grant" process under Texas law did not occur. Rather, the Court reasoned that the language is there merely to describe how the grantor may exercise the right that was never conveyed in the first place. The Court went on to note that the grantor retained the executive right (and the right to develop) but the agency language required a fiduciary standard of conduct on the part of the executive rights owner that was otherwise lacking in the jurisprudence at the time the deed was executed.

***Geary v. Two Bow Ranch Ltd., P'ship*, 2020 Tex. App. LEXIS 552 (Tex. Ct. App. – San Antonio Jan. 22, 2020, *pet. filed*)**

In *Geary v. Two Bow Ranch Ltd.*, the Texas Court of Appeals ruled on the ownership status of the executive rights in a mineral interest resulting from the execution of a deed.

The Warranty Deed conveyed to the Defendant/Appellee Two Bow's predecessor-in-interest a tract of land "together with...one-half (1/2) of all oil, gas and other minerals and related executory rights and interests associated therewith currently held by Grantors..." The deed goes on to state:

Grantors expressly reserve and retain unto themselves one-half (1/2) of all oil, gas and other minerals and related executory rights and interests associated therewith currently held by Grantors. Grantee may control the executory rights pertaining to the minerals provided the Grantors and Grantee share equally in any and all proceeds related thereto...

In 2001, Two Bow entered into a mineral lease, and the Plaintiffs/Appellant Geary's predecessors entered into leases with a different lessee; although, they claimed that the leases were "ratifications" of the Two Bow Ranch lease. In 2006, Two Bow Ranch entered another lease, and Geary subsequently executed ratifications of that lease. In 2011, Two Bow Ranch entered yet another mineral lease with Whiting Oil and Gas Corporation, upon which Two Bow Ranch received a sizable bonus payment. Geary brought suit claiming that Two Bow had an executive power over their interest based upon the 1981 Warranty Deed, that the 2011 Lease to Whiting covered their mineral interests as well as Two Bow's interest, and that Two Bow owed them one-half of the bonus paid by Whiting.

Geary argued that Two Bow acquired an executive right over the their minerals, and that Two Bow breached its fiduciary duties by not sharing its lease bonus and by not leasing their interest under the same terms as Two Bow Ranch leased its own interest. The courts did not reach the merits of this claim because the trial court found that the 1981 Warranty Deed did not convey to the grantee an executive right in the reserved minerals, relying on the plain language of the deed itself that "Grantors expressly reserve and retain unto themselves...related executory rights and interests...."

Duty to Lease Imposed on the Executive Rights Owner

***Tex. Outfitters, Ltd., LLC v. Nicolson*, 572 S.W.3d 647 (Tex. 2019)**

In *Tex. Outfitters, Ltd.*, the Texas Supreme Court examined whether the owner of the executive rights to a mineral interest breached its duty of utmost good faith and fair dealing by refusing to lease the nonexecutives' mineral estate. The court noted that these cases tend to be very fact-specific; however, in this case, the court found that the executive rights owner did breach its duty of good faith and fair dealing to the nonexecutives.

Texas Outfitters purchased the surface estate, a 4.16% mineral interest, and the executive rights to the 45.84% mineral interest retained by the seller in a 1,082-acre tract. The purchaser acquired the executive rights to the seller's mineral interest to protect its intended use of the surface estate for a deer breeding and hunting operation. In March 2010, Texas Outfitters rejected an initial lease offer claiming it was holding out for a better offer. In June 2010, Texas Outfitters rejected a better offer to lease from El Paso Oil Exploration & Production Company, again claiming that it was holding out for a better offer. Notably, after poor drilling results were obtained in the area and this lawsuit was commenced, Texas Outfitters also rejected two other favorable offers that were ultimately withdrawn when the would-be lessees learned that El Paso had leased the other 50% mineral interest not subject to this lawsuit.

The nonexecutive minerals owners sued Texas Outfitters for breach of its duty of good faith and fair dealing by refusing to execute the El Paso lease. The Court upheld the holding of the lower courts, which found that Texas Outfitters, Ltd., breached its duty to the nonexecutive mineral owners and awarded damages in an amount equal to the bonuses that they would have received if the minerals had been leased. In determining whether the executive engaged in acts of self-dealing that unfairly diminished the value of the nonexecutive interest, the Texas Supreme Court considered its rulings in *Leslie v. Veterans Land Bd. Of State*, 352 S.W.3d 479 (Tex. 2011), and *KCM Fin. LLC v. Bradshaw*, 457 S.W.3d 70 (Tex. 2015), which held that the controlling inquiry in ascertaining whether an executive breached its duty to a nonexecutive is whether the executive engaged in acts of self-dealing that unfairly diminished the value of the non-executive interest.

In *Tex. Outfitters*, the Court noted that evaluating an executive's conduct is highly dependent on the particular facts and circumstances of the case. In this case, the executive chose to gamble with both its own mineral interest and that of the plaintiffs' much larger interest, knowing that the plaintiffs did not want to take that risk. Texas Outfitters refused El Paso's lease knowing that the other 50% mineral interest had been leased to El Paso, thereby diminishing the potential pool of lessees, and Texas Outfitters did so for its own benefit in operating its planned hunting operations. While an executive is not obligated to accept a lease of its own interest and the nonexecutive's mineral interests under any circumstances, by purchasing the executive rights, the executive also purchases a corresponding duty of utmost good faith and fair dealing. By refusing to lease at the expense of the other mineral owners, Texas Outfitters was held to have engaged in acts of self-dealing that diminished the value of the nonexecutives' interest to the nonexecutives' detriment.

For more information about executive rights in Texas, please contact [Craig Berube](#) or [Deana Allen](#).