

**Union Pacific Resources Company, Appellant v. Hellen Reasoner Hutchison, Milburn E. Nutt, and Susan McRae, Appellees**

**NO. 03-98-00257-CV**

**COURT OF APPEALS OF TEXAS, THIRD DISTRICT, AUSTIN**

**March 11, 1999, Filed**

**SUBSEQUENT HISTORY:** Petition for Review Denied August 26, 1999. The Publication Status of this Document has been Changed by the Court from Unpublished to Published May 20, 1999.

**PRIOR HISTORY:** FROM THE DISTRICT COURT OF FAYETTE COUNTY, 155TH JUDICIAL DISTRICT NO. 94V-165, HONORABLE DAN R. BECK, JUDGE PRESIDING.

**DISPOSITION:** Affirmed in Part; Reversed and Rendered in Part.

**COUNSEL:** FOR APPELLANT: Mr. Shayne D. Moses, Cantey & Hanger, L.L.P., Fort Worth, TX.

FOR APPELLEE: Mr. John M. Zukowski, Zukowski & Bresenhan, L.L.P., Houston, TX.

**JUDGES:** Before Justices Kidd, Yeakel and Powers \*.

\* Before John E. Powers, Senior Justice (retired), Third Court of Appeals, sitting by assignment. See Tex. Gov't Code Ann. § 74.003(b) (West 1998).

**OPINION BY:** JOHN E. POWERS

**OPINION**

Union Pacific Resources Company appeals from a judgment recovered by appellees Hellen Reasoner Hutchison, Milburn E. Nutt, and Susan McRae<sup>1</sup> after a non-jury trial based on a set of agreed issues and stipulated facts. We will reverse in part the trial-court judgment and render judgment as set out below, affirming that part of the judgment not reversed.

<sup>1</sup>For convenience, we shall refer collectively to the appellees as "Hutchison" save where necessary to name them individually.

**THE CONTROVERSY**

In an "Oil, Gas, and Mineral Lease" dated June 24, 1976, William Kirk Morgan and others leased to Hut-

chison a tract of land in Fayette County comprising an estimated 692 acres. The lessors reserved no executive rights and vested in Hutchison, as lessee, an express right to pool or combine the land covered by the lease or any portion thereof, as to oil and gas, with other lands and leases when in Hutchison's judgment it was necessary or advisable to do so in order properly to develop and operate the leased premises. Morgan reserved in the lease a non-participating royalty.

In an instrument dated June 25, 1976, Hutchison assigned to Rex Fuller, "his heirs, successors and assigns . . . all right, title and interest in and to the" Morgan Lease, "together with the rights incident thereto." Hutchison reserved in the assignment an undivided three-percent overriding royalty; Fuller assumed and agreed to perform the terms, covenants, and conditions imposed upon Hutchison in the Morgan Lease. Nothing in the assignment purports to reserve in Hutchison any executive rights and nothing purports expressly to prohibit pooling of the mineral estate without Hutchison's consent.

The Morgan Lease expired at the end of its primary term, save for a sixty-five-acre tract that had been pooled into an eighty-acre unit upon which a vertical well (the Linda Ann Morgan Unit No. 1 Well) had been completed.

Having acquired in 1992 all of Fuller's interest in the Morgan Lease, Union Pacific dissolved the eighty-acre unit and pooled the sixty-five-acre tract from the Morgan Lease with other tracts outside that lease to form a 336.052-acre pooled unit known as the Knebel Cer-Mor-Leb Unit No. 1. Production from the Knebel unit was obtained by means of a horizontal well having two "drainholes," one approximately 1,851 feet in length and the other approximately 3,559 feet in length. The former did not cross the sixty-five-acre tract; the latter traversed a corner of that tract for a distance of about 300 feet. Production from the Knebel unit ceased in 1993.

Hutchison's consent was not obtained before either pooling action mentioned above. Alleging that Union Pacific's pooling into the Knebel unit was wrongful without her consent, Hutchison sued Union Pacific in the present cause for a declaratory judgment to that effect, together with actions for an accounting and for damages based upon fraud, breach of contract, and conversion.

Union Pacific counterclaimed for a declaratory judgment that Hutchison's consent to the pooling was not required and that her interest was therefore equal to three percent of 65/336 of 8/8ths of production from the Knebel unit.

Based on the parties' stipulated facts and a statement of agreed issues, the trial court determined in its final judgment that Union Pacific did not possess the right, at its election ("option"), to pool Hutchison's three-percent overriding royalty interest without her consent. The court ordered, in addition, that she recover from Union Pacific \$ 76,000 in damages, representing three percent of the value of all production from the entire Knebel unit.

In its appeal, Union Pacific raises two issues: the first is whether the trial court erred in holding that Hutchison's consent was required before the sixty-five-acre tract was pooled into the Knebel unit; the second issue is whether Hutchison was entitled to three percent of all production from the entire Knebel unit, assuming her consent to pooling was required. Under the parties' trial-court agreement, we need not determine the second issue and may render judgment if the trial court erred with respect to the first issue.

## DISCUSSION AND HOLDING

The parties join issue on whether Hutchison's express consent to the pooling of the sixty-five-acre tract, into the Knebel unit, was required before the pooling was effective against the overriding royalty she reserved in her assignment to Fuller. Hutchison's overriding royalty, reserved in that assignment, is an interest in land. She argues her consent was therefore required under the cross-conveyances principle. That principle holds that a pooling of royalties and minerals under different tracts of land effects cross-conveyances among the owners of minerals under the several tracts pooled, so that they all own undivided interests under the pooled unit in the proportion their contribution of acreage bears to the acreage of the entire unit. A royalty owner's consent to the pooling is therefore required because only an owner may convey his interest in land. *See Montgomery v. Rittersbacher*, 424 S.W.2d 210, 213 (Tex. 1968); *Minchen v. Fields*, 162 Tex. 73, 345 S.W.2d 282, 285 (Tex. 1961); *Brown v. Smith*, 141 Tex. 425, 174 S.W.2d 43, 46 (Tex. 1943); *Veal v. Thomason*, 138 Tex. 341, 159 S.W.2d 472, 475-76 (Tex. 1942); Raymond M. Myers, *Stare Decisis and the Pooling of Nonexecutive Interests in Oil and Gas: A Reply*, 47 Tex. L. Rev. 1379, 1379-89 (1969); Lee Jones, Jr., *Non-Participating Royalty*, 26 Tex. L. Rev. 569, 596-98 (1948).

If Hutchison's assignment to Fuller authorized him, his heirs, successors and assigns, to pool the sixty-five-acre tract, then no additional consent on Hutchison's part was required of Fuller's successors in interest.

Whether that was the effect of her assignment depends upon the intention of the parties as reflected in the whole of the instruments involved (the Morgan Lease and the assignment), considered in light of the subject matter and surrounding circumstances. *See Jones v. Killingsworth*, 403 S.W.2d 325, 328 (Tex. 1966); *Veal*, 159 S.W.2d at 476. In that connection, one must bear in mind that Hutchison's very act of reserving an overriding royalty "negatives the existence of an intention to confer upon [Fuller] the power or authority to" pool, with its resulting diminution of her royalty interest. *Brown*, 174 S.W.2d at 46. Moreover, the fact that Fuller and his assigns and successors were given "mere executive rights" is insufficient in and of itself to constitute an authority to pool.<sup>2</sup> *See Montgomery*, 424 S.W.2d at 213; *Minchen*, 345 S.W.2d at 282; *Brown*, 174 S.W.2d at 46.

2 Narrowly considered, an "executive right" is simply another name for an exclusive power to execute an oil and gas lease, from which the lessor will not derive all the usual lease benefits, namely bonus, rental, and royalty. If the lessor retains only a royalty, an interest subject to the power to lease is called a *non-participating* royalty, indicating that the royalty owner does not share in bonus or rental, nor in the right to execute leases or to explore or develop. In a broad sense, "executive right" may also refer to any managerial power over the lease or the mineral estate, including power over exploration and development. *See* 8 Martin and Kramer, *Williams & Meyers Oil and Gas Law*, "Exclusive leasing power," "Executive right," "Non executive mineral interest," "Nonparticipating royalty." (1998).

Against the foregoing precepts, one must weigh other factors in arriving at the parties' intention. The Morgan Lease expressly authorized Hutchison to pool the land covered by the lease, or any part thereof, and to assign all her right, title, and interest in the lease, together with rights incident thereto. In an assignment dated one day after the lease, Hutchison assigned the leasehold in its entirety to Fuller, except for her overriding royalty, vesting in Fuller by her own act all executive rights. The legal effect of her unqualified assignment was to vest in Fuller, his heirs, successors and assigns, the identical rights, privileges, and benefits Hutchison possessed under the Morgan Lease, which included an express power to pool. *See Cassity v. Smith*, 193 S.W.2d 991, 993 (Tex. Civ. App.--Texarkana 1946, writ ref'd) (right of lessee to notice, given in lease, passed with his assignment of leasehold to assignee); *Mann v. Rio Bravo Oil Co.*, 107 S.W.2d 653, 658 (Tex. Civ. App.--Beaumont 1937, writ ref'd) (lessee's assignment, reserving overriding royalty, transferred to assignee all of leasehold acreage when disputed small tract not expressly excluded); *Greenwood*

& *Tyrrell v. Helm*, 264 S.W. 221, 223 (Tex. Civ. App.--San Antonio 1924, writ ref'd) (where lessee held under lease mere option to drill, with no obligation to do so, and lessee's assignment imposed no express obligation to drill, assignee received identical option to drill unencumbered by obligation to do so).

We conclude the parties intended that Fuller should receive by Hutchison's assignment the right to pool given Hutchison in the Morgan Lease in express terms. She did more than reserve an overriding royalty and Fuller acquired more than "mere executive rights." She transferred to Fuller the identical right to pool she had under the Morgan Lease, and he acquired that specific right as a matter of law because it was among the rights included in the all-inclusive description contained in her assignment, namely "all right, title and interest in and to the [Morgan Lease] together with the rights incident thereto or used or obtained in connection therewith."<sup>3</sup>

3 In reference to the precise issue here involved, it has been stated summarily that no particular problem would be presented by the grant or reservation of a non-participating royalty interest subsequent to, and, therefore, subject to, a prior outstanding lease containing--a pooling provision, provided the royalty grant or reservation covered the entire leased premises.

Lee Jones, Jr., *Non-Participating Royalty*, 26 Tex. L. Rev. 569, 598 (1948). The Morgan Lease reserved a royalty that covered the entire 692-acre tract leased to Hutchison, and Hutchison's assignment to Fuller was *expressly* made subject to the Morgan Lease.

It is doubtful that the parties intended that Fuller should have the right to pool the Morgan interests but not the right to pool Hutchison's interest. The record suggests no developmental or other purpose in that arrangement. Yet that is the substance of Hutchison's contention, which we reject.

We hold Hutchison transferred to Fuller, in her assignment, her express authority to pool the sixty-five-acre tract. Consequently, no further consent on her part was required before Union Pacific pooled the sixty-five acres into the Knebel unit.

Consistent with the parties' agreed issues and stipulated facts, we order as follows:

We reverse the trial-court judgment insofar as it declares that Hutchison's assignment to Fuller did not vest in him, his heirs, successors, and assigns, a power to pool the sixty-five-acre tract and the three-percent royalty reserved by Hutchison in her assignment. We render judgment that Union Pacific possessed the power to pool the sixty-five-acre tract as Fuller's successor-in-interest.

We render judgment that Hutchison, Nutt, and McRae are collectively entitled to an overriding royalty in production from the Knebel unit equal to three percent of 65/336.052 of 8/8ths of said production.

We reverse the trial-court judgment insofar as it awards Hutchison, Nutt, and McRae damages in the amount of \$ 76,000, and render judgment that they take nothing by their causes of action against Union Pacific.

We affirm the trial-court judgment insofar as it denies Union Pacific, Hutchison, Nutt, and McRae their claims for attorneys' fees, interest, and costs of court.

We award Union Pacific appellate costs.

John E. Powers, Justice

Before Justices Kidd, Yeakel and Powers \*

\* Before John E. Powers, Senior Justice (retired), Third Court of Appeals, sitting by assignment. See *Tex. Gov't Code Ann. § 74.003(b)* (West 1998).

Affirmed in Part; Reversed and Rendered in Part

Filed: March 11, 1999