REAL OR PERSONAL?: THE AREA OF MUTUAL INTEREST COVENANT IN THE WILLISTON BASIN AFTER *GOLDEN V. SM ENERGY COMPANY*

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ABSTRACT

The recent resurgence of oil and gas development in the Williston Basin has predictably been accompanied by a dramatic resurgence in oil and gas leasing and assignment. Contemporary developers of existing leaseholds often inadvertently inherit leases or agreements with divergent priorities, as well as obligations that are simply incongruous with current needs. With this resurgence has come a unique challenge to title examination in appropriately defining the scope of inquiry where a predecessor in title imposes affirmative obligations that have an uncertain legal status with respect to mineral title. The legal uncertainty of certain transactional tools is often tolerated where these tools are necessary to permit collaboration and the meaningful structuring of risk, capital, and resources in oil and gas plays. All the same, title examiners continually look for clarification to assist their clients in appropriately evaluating and limiting risks associated with transactions collateral to title. The North Dakota Supreme Court's recent decision in *A. G. Golden v. SM Energy Company* assesses the legal status of the area of mutual interest agreements, which is a transaction tool designed to increase the potential of mineral development. This Article will identify a tension at the heart of the Court's analysis in *A. G. Golden v. SM Energy Company* as it concerns its treatment of the AMI, and consider the implications of this tension on the future treatment of AMIs as convents in North Dakota. From this analysis, the paper asserts that assignees of mineral or leasehold title cannot foreclose the possibility that an AMI can exist as a real covenant in North Dakota.

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I. INTRODUCTION

Oil and gas development in the Williston Basin began with a non-commercial well drilled in southeast North Dakota in 1892.[1] Sustained commercial drilling in the basin did not begin, however, until the 1950s.[2] Since then, drilling has progressed through three successive cycles of sustained oil and gas activity, the first cycle beginning in 1951, the second in 1973 and the third in 1994.[3] Most recently, in North Dakota, as in other parts of the country, technological advancements in horizontal drilling and recovery techniques have enabled a surge of oil and gas development. Discoveries in the Parshall Oil Field in 2005 have set in motion North Dakota's fourth cycle of sustained development, which continues today.[4]

As development techniques have evolved, so too have issues relating to property interests and leasing. Naturally, the incidence and complexity of leasehold chains of title have increased after many cycles of sustained development and leasing activity. Leasehold estates that survived the

1. United States Geological Survey Williston Basin Province Assessment Team, *Executive Summary—Assessment of Undiscovered Oil & Gas Resources of the Williston Basin Province of North Dakota, Montana and South Dakota*, at 4, *available at* http://pubs.usgs.gov/dds/dds-069/dds-069-w/.

2. *Id.*

3. *Id.* at 17.

4. Anthony Effinger, *Dakota Oil Fields of Saudi-Sized Reserves Make Farmers Drillers,* BLOOMBERG, June 3, 2008, *available at* http://www.bloomberg.com/apps/news?pid=newsarchive&sid=ayj1uo_gdNI4. For example, the number of producing oil wells in the Bakken formation has increased from a then historical high of 303 wells in 2007, to over 6,600 wells in 2013. N.D. Industrial Comm'n, Dep't of Mineral Res., Oil and Gas Division, *General Statistics*, https://www.dmr nd.gov/oilgas/stats/statisticsvw.asp (last visited Feb. 7, 2014). The U.S. Geological Survey estimates the presence of 3,844 million barrels of oil, 3,705 billion cubic feet of gas and 202 million barrels of total natural gas liquids in the Williston Basin Province—with the bulk of this undiscovered oil and gas residing within the Bakken formation. *Id.*

production cycles of the mid-to-late twentieth century often survived with priorities and concerns that contrast starkly with those of contemporary development. This is due to, for example, changes in regulatory schemes, increased acreage requirements for pooling obligations, need for greater capital investment, and the increased sophistication and cost of recovery techniques. These changes also increase cost barriers to developers entering new plays and heighten the need for transactional tools that permit collaboration and meaningful structuring of risk, capital, and resources. Contemporary developers of existing leaseholds often inadvertently inherit leases or agreements with divergent priorities, as well as obligations that are simply incongruous with current needs and priorities. As a result, today's title examiners have the difficult but critical task of defining the scope of inquiry where a predecessor in title imposes affirmative obligations that may affect the nature of interest assumed by the client.

These challenges are nowhere better highlighted than in the recent North Dakota Supreme Court decision in *A. G. Golden v. SM Energy Company,*[5] decided in February of 2013. The *Golden* Court assesses the relevancy of a forty year old Area of Mutual Interest Agreement ("AMI") in the context of a dispute over the intent of lease operators in a fifteen year old assignment.[6] In general, the AMI is a contract to offer an option in future acquired leasehold or mineral interests within a particular geographic area.[7] It functions (either as a provisional part of a larger agreement or independently) to increase the probability of mineral and leasehold development—in part because of its profound impact on title. Part of the efficacy of the AMI depends on its binding effect on successors-in-interest, whether that effect is achieved intentionally or through a party's inadvertent assumption of the burden.[8] The AMI's effect on title occupies an uncertain legal status in many oil and gas producing states. Where courts have encountered the AMI, they have reached significantly divergent conclusions as to its appropriate classification as a covenant, and its impact on title.[9] The recent decision of the North Dakota Supreme Court in *Golden* is typical of this uncertainty. It raises a number of questions to the character of the AMI and its relationship to title and the effected estates.

5. 2013 ND 17, 826 N.W.2d 610.

6. *Id.* ¶ 1, 826 N.W.2d at 613.

7. John S. Lowe, *Analyzing Oil and Gas Farmout Agreements*, 41 SW. L.J. 759, 844 (1987).

8. *See generally* Justin J. Quigley & Stephen Hull, *Give What? To Whom? But Why? Area of Interest Provisions in Mining Agreements*, 55 ROCKY MTN. MIN. L. INST. 38-1 (2009); *see also* Terry I. Cross, *The Ties That Bind: Preemptive Rights and Restraints on Alienation That Commonly Burden Oil and Gas Properties*, 5 TEX. WESLEYAN L. REV. 193 (1999).

9. *See generally* Quigley & Hull, *supra* note 8.

The proceeding discussion will first highlight a tension at the core of the Court's reasoning in *Golden*—between the Court's implied characterization of the AMI and the relationship of the AMI to the vested leasehold. This tension exposes the need for a more consistent jurisprudence concerning the relationship of the AMI to demised estates. Comparing the law of real covenants in North Dakota to the purpose and function of the AMI, this Article asserts the following two theses: First, the AMI ought to be characterized as a benefit to certain demised estates for purposes of the real covenant analysis because of its intended and important role in facilitating the development of estates bound by its obligations. Second, following *Golden*, assignees of mineral or leasehold title cannot foreclose the possibility that an AMI can exist as a real covenant in North Dakota.

II. *A.G. GOLDEN V. SM ENERGY COMPANY*

A. G. Golden and several other plaintiffs (collectively, "Golden")[10] owned a number of oil and gas leases covering property in McKenzie County, North Dakota. In July of 1970, Golden assigned these leases ("Original Leasehold") to Universal Resources Corporation ("Universal"). In conjunction with the assignment of leases between Golden and Universal, the parties executed an accompanying letter of agreement ("Letter Agreement") providing for a "joint area of interest" (i.e., the AMI). The AMI obligated Golden to offer Universal any future leaseholds he purchased within a defined geographic area in return for a four percent overriding royalty interest and reciprocally obligated Universal to assign to Golden a four percent overriding royalty interest in any leaseholds Universal acquired within the same defined geographic area.[11] The Letter

10. A. G. Golden was joined in the action by several other plaintiffs including: Paul E. Nordstog, Cooper B. Land, Solveig K. Land, Howard D. Armentrout and Delores K. Armentrout, as Co-Trustees of the Armentrout Family Revocable Living Trust dated May 24, 2005, Craig L. Bolenbaugh, and Joseph Michael Bolenbaugh, Peter Francis Bolenbaugh and James Patrick Bolenbaugh, as joint tenants, and Royalty Interests Partnership, LP.

11. *Golden*, ¶ 2, 826 N.W.2d at 613-14. The AMI provided in relevant part:

> A joint area of interest is designated between the parties hereto and is described as All of Sections 19, 20, 29, 30, 31 and 32 in Township 153 North, Range 95 West and all of Section 2 in Township 152 North, Range 96 West. It is agreed that should A.G. Golden purchase any leasehold interest within the above descirbed [sic] area, he will offer it at cost to Universal Resources Corporation, subject to a reservation of four per cent (4%) overriding royalty. Should Universal Resources Corporation purchase any leasehold interest in the joint area of interest, they will assign a four percent (4%) overriding royalty to A. G. Golden without cost. Said joint area of interest is shown by Exhibit "B" (attached hereto and made a part hereof) . . . . Should production be encountered on any acreage owned or controlled by Universal Resources Corporation in the joint area of interest, the obligations of the parties hereto shall continue to each

Agreement also provided that "[a]ny assignment of this agreement made by [Universal] shall recite the terms and conditions of this agreement."[12] In effect, the Letter Agreement obligated Universal to assign the AMI to any successors-in-title. The Letter Agreement was recorded by the parties.

Universal purchased several leases during the 1980s within the geographic area covered by the AMI, including the "Thompson Lease," and duly assigned to Golden a four percent overriding royalty interest in those leases.[13] In 1993, Universal assigned its interest in the Original Leases and Thompson leases (lands covered by the AMI) to Tipperary Petroleum Company ("Tipperary").[14] This assignment, known as the "Universal-Tipperary assignment" provided that Universal had assigned: all right, title and interest of [Universal] in and to . . . all operating agreements, joint venture agreements, partnership agreements, and other contracts, to the extent that they relate to any of the Assets.[15]

Later in 1993, Tipperary acquired an additional leasehold interest from Texaco Exploration and Production, Inc. in federal lands ("Federal Lease") also located within the geographic area of the AMI.[16] Tipperary did not assign any interest from the Federal Lease to Golden. In a third assignment effective March 1, 2000, Tipperary assigned all of its interest in the leases—including the Original Leases, Thompson and Federal Leases—and its contractual rights and obligations to Nance Petroleum Corporation ("Nance").[17] The assignment and bill of sale specified that Nance "assumes all of Assignor's duties, liabilities and obligations relating to the Assets to which Assignor was a party or by which it was bound on and after the date hereof."[18] Nance later merged into SM Energy Company ("SM Energy").[19]

SM Energy operated a well situated within the drill spacing unit for the Thompson and Federal Leases and paid Golden the royalties due under production attributable to the Thompson lease, but not those attributable to the Federal Lease that was originally acquired by Tipperary.[20] Golden sued

> other for so long as production continues . . . . The terms of this paragraph shall extend to all new lease purchases, lease renewals lease extensions of any nature whatsoever.

Golden, ¶ 2, 826 N.W. 2d 610 at 613-14.

12. *Id.*

13. *Id.* An overriding royalty interest is an interest in production "carved out" of the working interest in the lease. PATRICK H. MARTIN & BRUCE M. KRAMER, WILLIAMS & MYERS, OIL AND GAS LAW ABRIDGED, § 418 (5th ed. 2013) [hereinafter WILLIAMS & MYERS].

14. *Golden*, ¶ 3, 826 N.W.2d at 613-14.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* ¶ 4.

SM Energy in an action for declaratory judgment, to quiet title, and for an accounting to recover royalties under the Federal Lease.[21] The trial court granted summary judgment in favor of Golden, holding that SM Energy, through its predecessor-in-interest, had assumed the obligations under the AMI of the Letter Agreement. The trial court reasoned that the language of the Universal-Tipperary assignment, Tipperary's constructive notice of the recorded Letter Agreement, and Tipperary's acceptance of the benefit of the assignment in light of North Dakota Century Code section 9-03-25[22] demonstrated Tipperary's intent to assume the obligation imposed by the AMI included in the Letter Agreement. The trial court held that Tipperary, and by extension SM Energy, assumed the obligation imposed by the AMI as a matter of law. SM Energy subsequently appealed the order of the trial court granting summary judgment.[23]

On appeal to the North Dakota Supreme Court, the parties stipulate that the AMI was a *personal* covenant, not a real covenant, and was subject to the law of assignment.[24] Pursuant to the law of assignment, the question of whether SM Energy was obligated under the AMI turns upon whether the parties had each assumed the obligation from their respective predecessor-in-title.[25] Because SM Energy had assumed all of Tipperary's obligations, the Court focused on the language of the Universal and Tipperary assignment. Contrary to the trial court, the Court found the language of the assignment to be ambiguous on whether Tipperary assumed the obligation of the AMI under the Letter Agreement. Specifically, the Court observed the language of the assignment could be rationally interpreted to either include or exclude the AMI depending on how one treats the phrase "to the extent."[26] The AMI provided, in relevant part, that Tipperary would assume all "contracts . . . to the extent that they relate to any of the Assets."[27] In light of this apparent ambiguity, the Court determined that resolving the question of Tipperary's intent to assume the AMI obligations

21. *Id.* Golden also sought accounting for payments on a production on a well located on the subject property pursuant to an executed division order. *See generally id.* ¶¶ 23-26, 826 N.W.2d at 619.

22. *Id.* ¶ 15, 826 N.W.2d at 617-18. N.D. CENT. CODE. § 9-03-25 provides: "A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it so far as the facts are known or ought to be known to the person accepting."

23. *Golden*, ¶ 6, 826 N.W.2d at 615.

24. *Id.* ¶ 9.

25. *Id.* ¶10.

26. *Id.* ¶ 13, 865 N.W.2d at 617 (citing Nichols v. Goughnor, 2012 ND 178, ¶ 12, 820 N.W.2d 740, 744 (N.D. 2002) (observing that "[a] contract is ambiguous when rational arguments can be made for different interpretations.")).

27. *Id.* ¶ 3, 865 N.W.2d at 614.

under the Letter Agreement was a question of fact and reversed the trial court's grant of summary judgment.

The law of assignment provides that a party may assume an obligation explicitly or by implication.[28] If an obligation was not explicitly assumed, implicit assumption of the obligation "may be manifested by the parties' conduct, the subject matter of the contract, the language of the assignment, or the surrounding circumstances."[29] The Court concluded that nothing of record provided any indication of Tipperary's intent regarding the assumption of the AMI.[30] Responding to the reasoning of the trial court, the Supreme Court observed that constructive notice of the obligation is not determinative of intent to assume that obligation.[31] Furthermore, the trial court's conclusion that Tipperary had assumed the benefit of the transaction and therefore intended to assume the AMI's obligation was misguided. The Court observed that this conclusion begged the question whether a party entered into the transaction in the first place.[32] Instead, looking to the language of the Universal-Tipperary assignment, the question the Court remanded was as follows: did Universal and Tipperary intend for the AMI to "relate" to the assigned assets? In summary, the North Dakota Supreme Court resolved that SM had assumed Tipperary's obligations, but the scope of the obligations was uncertain. *Golden's* holding turns upon the language of and intent of the fifteen year old Universal-Tipperary assignment.

III. WAS THE AMI IN *GOLDEN* REALLY A REAL COVENANT?—A THOUGHT EXPERIMENT.

A covenant is not a real covenant unless the executing parties intend it to be.[33] On this basis alone, the *Golden* Court can dismiss the notion that the AMI functioned as a real covenant.[34] But this is not where the Court ended its analysis. The *Golden* Court characterized the AMI as a personal covenant, citing *Beeter v. Sawyer Disposal LLC,*[35] for the proposition that

28. *Id.* ¶ 10, 826 N.W.2d at 615-16 (citing 6A C.J.S. *Assignments* § 94, 485-86 (2004)).

29. *Id.*

30. *Id.* ¶¶ 12-14, 826 N.W.2d at 616-17.

31. *Id.* ¶ 14, 826 N.W.2d at 617.

32. *Id.* ¶ 16, 826 N.W.2d at 618 (citing N.D. CENT. CODE § 9-03-25 (providing that "[a] voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it so far as the facts are known or ought to be known to the person accepting.")).

33. In *Golden*, the Court acknowledges that absent intent, a covenant cannot run with the land. *Golden*, ¶ 9, 865 N.W.2d at 615 (citing Mountain W. Mines, Inc. v. Cleveland-Cliffs Iron Co. 376 F. Supp. 2d 1298 (D. Wyo. 2005), *aff'd in part,* 470 F.3d 947 (10th Cir. 2006) (holding that an AMI does not run with the land because the parties did not intend the AMI to run with the land)).

34. *Id.*

35. 2009 ND 153, ¶¶ 13-14, 771 N.W.2d 282, 287.

the AMI benefited the grantor personally and that the covenant served no direct benefit to the land.[36] This *gratis dictum* characterization of the AMI begs the question—had the parties intended to execute a real covenant, does it follow that the AMI did not benefited the land?

The facts of *Beeter* focus on a deed covenant requiring the grantee and its successors-in-title to make perpetual payments to the grantor from the gross revenues of a waste disposal business conducted on the demised property.[37] The grantors in the original conveyance sued after a successor-in-title failed to remit payment pursuant to the covenant.[38] To evaluate the covenant, the Court applied section 47-04-26 of the North Dakota Code, which provides that, "[a]ll covenants contained in a grant of an estate in real property, which are made for the direct benefit of the property or some part of it then in existence, run with the land."[39] The Court determined that the benefit of the covenant (i.e., passive receipt of landfill profits) did not "benefit" the land, but served only to personally benefit the grantor. Alluding to Henry Bigelow's real covenant analysis, the *Beeter* Court cites *Barton v. Fred Netterville,* out of the Southern District of Mississippi, observing that a covenant that is not "so related to the land as to enhance its value and confer a benefit upon it does not run with the land . . . is a collateral and personal obligation."[40] As a result, without a demonstrable and direct benefit to the land, the covenant cannot bind successors-in-title despite the intent of the original parties.[41]

The invocation of *Beeter* led to the conclusion that the AMI in *Golden* did not provide a "direct benefit" to the leasehold assets, but instead constituted only a personal benefit to Golden, the party seeking its enforcement. Notably, the covenant at issue in *Beeter* can be reduced in principal to an exchange of real property for a perpetual payment in business profits. The *Golden* Court implicitly analogized the passive receipt of future landfill profits in *Beeter* and the receipt of future overriding profits from the oil and gas production from yet unacquired properties. Pursuing this logic to its full extent, the benefit enjoyed by Golden, according to the court, cannot be said to have "related" to the value or use of the real estate interest he retained in the dominant estate—rather, it cannot be said that the parties intended the AMI to *relate* to the assigned

36. *Golden*, ¶ 9, 865 N.W.2d 610 at 615.
37. *Beeter,* ¶ 2, 771 N.W.2d at 283-84.
38. *Id.*
39. N.D. CENT. CODE § 47-04-26 (1999).
40. *Beeter,* ¶¶ 13-14, 771 N.W.2d at 286 (citing Barton v. Fred Netterville Lumber Co., 317 F. Supp. 2d 700, 704 (S.D. Miss. 2004)).
41. *Id.*

assets. In *Beeter*, the grantor clearly held an easement in gross, with no adjoining right in the real estate; in contrast, the assignor in *Golden* retained an interest in the property in the form of an overriding royalty interest.[42] While it is clear that the AMI provision personally benefited Golden, as the Court suggested, it does not follow that the AMI is unbeneficial to the estate in land. The presence of a personal benefit is not mutually exclusive of the possibility that the AMI was "so related to the land as to enhance its value and confer a benefit upon it."[43]

This implicit characterization provided by *Beeter* is at odds with the Court's determination that the language of the Universal-Tipperary assignment is ambiguous. That is, the observation that the AMI may or may not relate to the transferred assets reflects an implicit indecision about the nature of the AMI provision at issue in the case. On one hand, the court implied that the AMI cannot relate to either of the leasehold estates for the purpose of benefiting them. On the other hand, the Court said it was possible that the AMI was related to the leasehold estate for purposes of delegation. This indecision is best highlighted in the two interpretations of the assignment offered by the litigants, SM Energy and Golden, and the underlying competing notions of how, and if, the AMI "relates" to the Original Lease and Federal leasehold.

Pursuant to the Universal-Tipperary assignment, Tipperary assumed "contracts to the extent that they relate to any of the Assets."[44] Of course, the Court was not clear as to which of the assets (i.e., the Original Lease or Federal leasehold) the AMI must "relate" to before the obligation is assumed. Golden's reading of the assignment implies that an AMI "relates" to *existing* assets, including the Original Lease and Federal leaseholds, whereas SM Energy's reading of the assignment provides that an AMI covenant can only "relate" to future acquired assets—that is, only those assets Universal would acquire in the future.[45] This tension highlights the fact that the ambiguity perceived by the court was really a latent ambiguity in the characterization of the AMI. If the AMI cannot "benefit" the land for purposes of being characterized as a real covenant, but only confers a personal benefit as implied in the *Beeter* reference, how can it be said to "relate" to a present vested real estate interest? A closer look at what it

42. *See, e.g.*, Petroleum Exchange v. Poynter, 64 N.W.2d 718, 722 (N.D. 1954); GeoStar Corp. v. Parkway Petroleum, Inc., 495 N.W.2d 61, 67 (N.D. 1993) (holding that the overriding royalty interest is estate in realty).

43. *See generally* Mullendore Theatres, Inc. v. Growth Realty Investors Co., 691 P.2d 970 (Wash. Ct. App. 1984).

44. *Golden*, ¶ 3, 826 N.W.2d at 614.

45. *Id.* ¶12, 826 N.W.2d at 617.

means to "benefit" an estate for purposes of defining a real covenant seems to suggest that Golden's reading of the assignment—that the AMI related to the Original and Federal leaseholds—is not a plausible interpretation of the Universal-Tiperrary assignment.

IV. REAL COVENANTS IN NORTH DAKOTA

The analysis of real covenants under the common law presents a similar question as that posed by the Universal-Tipperary assignment—is the covenant so related to the land to confer a benefit or enhance its value? North Dakota's law concerning real covenants is codified at North Dakota Century Cody section 47-04-24 *et seq*. The benefit requirement treated in *Beeter* is derived from North Dakota Century Code section 47-04-26, which provides that "[a]ll covenants contained in a grant of an estate in real property, which are made for the direct benefit of the property or some part of it then in existence, run with the land."[46] The section of the code immediately following provides:

> A covenant for the addition of some new thing to real property, or for the direct benefit of some part of the property not then in existence or annexed thereto, when contained in a grant of an estate in such property and made by the covenantor expressly for the covenantor's assigns or to the assigns of the covenantee, runs with the land so far only as the assigns thus mentioned are concerned.[47]

These provisions of the North Dakota Century Code are the product of an early attempt to bring order to the notoriously arcane law of real covenants. Derived from the "Field Code," these provisions are a codification of substantive New York law undertaken by David Dudley Field and enacted in the Dakota Territory in 1866. The above-quoted sections 47-04-26 and 27 specifically codified the rule in *Spencer's Case*.[48]

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46. N.D. CENT. CODE § 47-04-26 (1999).

47. N.D. CENT. CODE § 47-04-27 (1999).

48. *Spencer's Case,* 77 Eng. Rep. 72, 74 (K.B. 1583). North Dakota has no case law addressing the meaning or effect of Section 47-04-27 on the running of covenants. Section 27 shares the same origin of identical provisions in Montana, South Dakota and California. All were copied from New York's "Field Code" (published in 1865) and adopted by the Dakotas in 1866. Montana and South Dakota—like North Dakota—have no authoritative case law addressing the meaning or effect of section 47-04-27 on the running of covenants. An unpublished Montana decision does cite the provision to uphold a covenant subjecting successor purchasers to the rules of a homeowners association not yet in existence). *See* Lewis v. Ponderosa Pines Ranch Prop. Owners Ass'n, 126 P.3d 507 (Mont. 2005) (unpublished). California, on the other hand, has extensive commentary on the code corollary of section 47-04-27—namely California Code section 1464, repealed 1997. California adopted the Field Code in 1872 along with sections 1462 and 1464 (repealed 1997)—the corollaries of N.D. CENT. CODE §§ 47-04-26 and 27, respectively.

Although David Field compiled the code with a Benthamian vision of displacing the common law, the adopting states, including North Dakota, almost immediately began supplementing their application of Code provisions with common law principles.[49] For example, the itemized covenants of section 47-04-26 of the Code were early treated as a general guiding principal rather than an exclusive list for construing covenants that run with the land.[50]

At common law, a real covenant is a "covenant so connected with realty that either the right to enforce or the duty to perform passes to assigns of the land."[51] For a covenant to run with the land, a party seeking enforcement needed to establish four elements: (1) horizontal; (2) vertical privity; (3) intent that the covenant run; and (4) the covenant must "touch and concern" the land.[52] The difficulty of interpreting real covenants arises most often in the context of the fourth element—whether the covenant can be said to "touch and concern" an estate in land.[53] Showing that *Spencer* is alive and well, *Beeter's* benefit principal derives from the common law requirement that the covenant 'touch and concern' an estate in land.[54]

The "touch and concern" element of the real covenant analysis has its origins in a 1583 English decision known as *Spencer's Case*.[55] The facts of *Spencer's Case* involve a covenant between a lessor and lessee, providing that the lessee erect a brick wall upon the leased premises. *Spencer* taught that for a covenant to run, it must explicitly bind assignees and it must "touch and concern" the land. At its best, the legacy of the "touch and concern" doctrine has been one of confusion. The most well-known

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Commentaries on these sections identify Section 1464 squarely as a derivative of the rule in *Spencer's Case*. *See Repeal of Civil Code Section 1464: The First Rule in Spencer's Case*, 26 CAL. L. REV. COMM. REPORTS 29, 33 (1996).

49. *See* Robert G. Natelson, *Running With the Land in Montana*, 51 MONT. L. REV. 17, 39-41 (1990).

50. For a discussion of the creation, adoption and use of the Field Code in the Dakotas, *see* William B. Fisch, *The Dakota Civil Code: More Notes for an Uncelebrated Centennial*, 45 N.D. L. REV. 9 (1968); Natelson, *supra* note 49, at 39-41; *see also* N. Pac. Ry. Co. v. McClure, 81 N.W. 52, 55 (N.D. 1899) (observing that the code does not provide an exclusive list of possible real covenants provided in the common law, but only examples of those covenants); Reeves & Co. v. Russell, 148 N.W. 654-9 (N.D. 1914) (observing that the common law was adopted by code revisions in 1905 to provide rights and remedies not identified in statute).

51. Charles E. Clark, *The Doctrine of Privity of Estate in Connection with Real Covenants*, 32 YALE L.J. 123, 123 (1922).

52. *Spencer's Case,* 77 Eng. Rep. at 74.

53. *Cf.* Grimes v. Walsh & Watts, Inc., 649 S.W.2d 724 (Tex. App. 1983) (holding that an AMI did not run because privity was lacking between the parties where the original leasehold had expired). The Court opined that after the leasehold had terminated, the AMI could only be enforced as a personal covenant. *See id.* at 727.

54. Beeter v. Sawyer Disposal LLC*,* 2009 ND 153, ¶ 10, 711 N.W.2d, 282, 286.

55. *Spencer's Case,* 77 Eng. Rep. at 74.

attempt to provide a workable order to the case law is the analysis provided by Professor Henry Bigelow.[56] Bigelow distilled the case law following *Spencer's Case* to identify two categories of real covenants: (1) those imposing limitations upon the rights that form a part of the title to land; and (2) those whose connection with the land is in the character of the benefit conferred.[57] It is the second category—those that pivot upon character of the benefit—that is particularly significant to a discussion of the AMI.

A. THE BIGELOW TEST AND CHARACTERIZING THE BENEFIT

Essentially, Bigelow's test of whether the covenant runs with the land rests on whether it materially affects the promisor's legal relationship to the land.[58] An effect is material if the covenant renders an interest of the estate holder more or less valuable. Although the North Dakota Supreme Court has never explicitly acknowledged Bigelow's analysis as the source of its real covenants understanding, it has nevertheless implicitly adopted the test. Opining on section 47-04-26, the *Beeter* Court articulated that standard, observing that a covenant which is not "so related to the land as to enhance its value and confer a benefit upon it does not run with the land . . . is a collateral and personal obligation."[59] According to Bigelow, the benefit or value must arise out of the legal relations of the parties as owner of interests in the estate and not merely their generic interests as citizens.[60] Otherwise, "where the covenant is of such a nature that the performance of it might equally well be made to enure to the benefit of any given person" the covenant must be personal.[61] Bigelow's analysis determing the nature of the covenant's effect on title essentially involves two questions—the first is a question of fact and the second is a question of law: (1) what privilege or power of the covenantee is the covenant primarily designed to and does protect; and (2) is the privilege or power in question possessed by covenantee by virtue of his estate in land?[62] If the covenant does not protect a privilege incident to an estate in land, it does not run.

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56. Harry A. Bigelow, *The Content of Covenants in Leases*, 12 MICH L. REV. 639 (1914). *See* 6A RICHARD W. POWELL & PATRICK J. ROHAN, POWELL ON REAL PROP. 673[2][a] (1994); *see also* Michael J. D. Sweeney, *The Changing Role of Private Land Restrictions: Reforming Servitude Law*, 64 FORDHAM L. REV. 661, 672 (1995) (observing that a majority of courts have adopted Bigelow's test for determining whether a covenant can be said to touch and concern a given estate).

57. Bigelow, *supra* note 56, at 652.

58. *Id.* at 639.

59. *Beeter*, ¶10, 771 N.W.2d at 286 (citations omitted); *see also* N. Pac. Ry. Co. v. McClure, 81 N.W. 52, 55 (N.D. 1899) (reiterating the common law test of real covenants).

60. Bigelow, *supra* note 56, at 645.

61. *Id*. at 645-46.

62. *Id*. at 646.

Bigelow illustrates the distinction between those benefits that relate to the land and those that enure to the benefit of any generic person by comparing two promises that might be exchanged between a lessor and lessee. First, the lessor may require the lessee to deliver to him all the grain grown upon the demised premises; second, the lessee may require the lessor to maintain windbreaks upon the demised premises. According to Bigelow, the former of these promises would not run, while the latter would. The difference between the two being that the promise to deliver grain (just as the promise to deliver landfill profits in *Beeter*) benefits only the lessor, not as the owner of revisionary interest in the land, but as the owner of a chattel; whereas the promise to erect windbreaks "operates directly to make more valuable the exercise of the privilege of raising grain."[63]

Of course, a promise that runs with the land will necessarily affect the value of that land. For this reason, the Bigelow test has drawn criticism as being circular in its logic.[64] Of course, this problem can be avoided if the effect of a promise concerning land can be evaluated independently of its effect on successive interests in title. Nevertheless, the circular nature of the test is also instructive in understanding a fundamental aspect of real covenant laws. Namely, the covenant must *directly* operate to benefit the land. Bigelow remarks that a covenant does not run if it only "indirectly or mediately operate[s] to the benefit of the covenantee with respect to his rights as owner of the soil."[65] Accordingly, the outcome of this analysis often depends upon how the reviewing court first characterizes the intended benefit of the covenant as conceived by the executing parties. Many covenants—like the AMI—can have many benefits, some direct and some collateral, including their direct effect on successive interests in title.

Thus, given this potential for confusing the direct and collateral benefits of covenants, it becomes clear that the crucial determination of the Bigelow test is how a given court chooses to characterize the benefit of the covenant. Comparison is useful to illustrate the narrow margin of certain scenarios that arise under the Bigelow test in this context. Bigelow provides an example of two divergent treatments of the "privilege" or "right" protected by a non-compete agreement. Two cases, *Thomas v. Haywood*[66] and *Norman v. Wells*[67] were decided on identical facts: a lessor covenanted not to sell liquor within a mile of a saloon he leased to his

63. *Id*.

64. *See* Sweeney, *supra* note 56, at 678; JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 962, 1037 n.56 (1981) (observing that the logic of the Bigelow test is circular).

65. Bigelow, *supra* note 56, at 646.

66. L. R. 4 Ex. 311 (1869).

67. 17 Wend. (N.Y.) 136 (1837).

lessee.[68] The court in *Thomas* held that the covenant was not enforceable by the lessee's successor-in-title, as the benefit enured to the lessee's financial benefit as a vendor.[69] The *Norman* court reached the opposite conclusion and construed the benefit of the non-compete covenant as a privilege of selling liquor *in a particular place* rather than a privilege solely related to his rights in chattel.

The significance of the *Norman* case and the illustration of the treatment of non-compete covenants is two-fold. First, these cases touch upon the running of a non-compete covenant, the benefit of which is directly analogous to a benefit of the AMI. Second, *Norman* is a New York case of the Field Code variety. While North Dakota has ostensibly recognized the running of non-compete covenants, the reasoning underpinning *Norman* also arguably introduces to the Field Code states a precedent for construing the promised benefit in the context of the unique circumstances of the estate.[70] That is, the respective holdings of *Thomas* and *Norman* can be distinguished in how each court considers the privilege of selling liquor in context of the estate itself—whereas the *Thomas* court conceptually separates the right to the profit of the land from the business conducted on it, the *Norman* Court considers the business conducted on the land as a privilege or right appurtenant to the lessor's estate in land.[71]

B. FINAL THOUGHTS ON REAL COVENANT ANALYSIS

These observations lead to a final point regarding a much more intuitive aspect to real covenants—namely, the fact that a particular privilege or benefit contained in a covenant must be evaluated in the context of unique privileges and limitations of a given estate.[72] This point is particularly true of oil and gas leasehold or mineral estates.[73] The oil and

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68. Bigelow*, supra* note 56, at 651.

69. *Id.*

70. N. Pac. Ry. Co. v. McClure, 81 N.W. 52, 55 (N.D. 1899) (observing that non-compete covenants run with the land at common law).

71. *See generally* N.D. CENT. CODE § 47-04-26 (1943).

72. *See* WILLIAMS & MYERS, *supra* note 13, § 202.1. The unique status of an oil and gas leasehold *vis a vis* adjoining landowners is observed in Colorado. *See*, Maralax Res., Inc. v. Chamberlain, No. 12CA2575, 2014 WL 43531 (Colo. App. Jan. 2, 2014). Here, the court granted an oil and gas lessee standing to maintain a prescriptive easement claim against an adjoining landowner because of its character as real property. The court observed "[b]ecause of the unique nature and purposes of oil and gas leases, we do not agree that common law landlord-tenant principles apply to determine whether an oil and gas lessee has standing to maintain a prescriptive easement claim." *Id.* at 11.

73. The leasehold and constituent rights in royalties are considered real property in North Dakota. Petroleum Exchange v. Poynter, 64 N.W.2d 718, 722 (N.D. 1954); GeoStar Corp. v. Parkway Petroleum, Inc., 495 N.W.2d 61, 67 (N.D. 1993) (holding that the overriding royalty interest is estate in realty). Clearly AMIs can be employed in the conveyance of mineral or fee

gas leasehold exists to facilitate the exploration and production of mineral rights in land for the realization of profit in form of royalties—which can also be treated as a separate estate in land. The leasehold is uniquely limited by a term extended only by active operation. Profit from the development is the only benefit to the estate.

Consider again the facts of *Beeter* where an agreement is made to convey property in exchange for passive profits from a landfill business conducted upon the land. In *Golden*, the plaintiff retained a right in passive profits in the form of a discrete estate in the leasehold, an overriding-royalty interest. This comparison illustrates the uniqueness of the leasehold estate and its appurtenant rights—what was a personal covenant in *Beeter* is an estate in land in *Golden*.

Yet the facts of *Beeter* are a poor analogy for understanding the benefit of the AMI for another reason. In the confines of the unique and limited uses of an oil and gas leasehold, the AMI operated as a covenant not to compete between two parties on adjoining leaseholds, and directly affected the prospects of leasehold development on the Original Leasehold estate in which both parties had vested interests. Thus, when asking the question under Bigelow's analysis (i.e., what privilege or power is the AMI covenant designed to and does protect?), it becomes clear that the privileges and the powers of the oil and gas leasehold must be considered with the understanding that oil and gas development, for the realization of profit, is the sole end of the oil and gas leasehold.

While the continued relevance and viability of the common law conception of real convent is debated,[74] Bigelow's test remains the law of many oil and gas producing states, including North Dakota. Reviewing Bigelow's analysis of real covenants, we see that the question implied in *Golden*—that is, does the AMI "relate" to the Original or Federal Leaseholds?—is the same question that would have been posed in a covenant analysis under Bigelow. The consideration of the privilege or power the AMI covenant is designed to protect must be asked in the unique context of the rights and privileges of the leasehold estate.

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estates. However, the typical absence of a term in these conveyance creates a unique set of problems that I do not evaluate here.

74. Some states, like California, have overhauled their statues governing covenants over concerns about the relevance of, and arcane qualities of, real covenants—particularly with the inconsistency of the first rule in *Spencer's Case* with modern priorities. Sweeney, *supra* note 56, at 678.

V. THE NATURE AND PURPOSE OF THE AMI AGREEMENT

I've highlighted the tension at the heart of *Golden*'s passing characterization of the AMI covenant and its holding concerning the language of assignment.[75] In light of the law of real covenants in North Dakota, it becomes clear that *Golden's* characterization of the AMI as a covenant without a direct benefit to the land presupposes that it has no relationship or (at best) an attenuated relationship to the Original and Federal Leaseholds. This raises the question of how the AMI ought to be characterized as they relate to leasehold estates under the rubric of the Bigelow Test.

AMIs appear in many contexts, and as a result, have been characterized in a number of different ways by legal commentators. The *Golden* Court itself relied upon an early assessment by Dante Zarlengo of the AMI provision and its nature as a covenant.[76] Zarlengo argued that the obligations of the AMI should be treated as a form of option contract, suggesting that:

> an area of mutual interest clause does not directly affect ownership of the particular oil and gas leases to be conveyed. It does not alter in any way the rights of an oil and gas lessee to go upon the land and produce oil and gas, pay delay rentals, or [have] the right to production from the oil and gas lease.[77]

Accordingly, Zarlengo argues that the AMI passes to successors-in-title as they take title subject to contracts containing AMI obligations—"[w]hether or not these obligations were assumed by a party acquiring oil and gas leases subject to an area of mutual interest clauses is a question of intent, and all the surrounding circumstances must be evaluated to determine that intent."[78] The *Golden* Court's analysis builds upon the foundation Zarlengo lays, assuming the legal character of the AMI and focusing on intent.[79]

The same year that Zarlengo published his article, the Texas Supreme Court decided *Westland Oil Development Corp. v. Gulf Oil Corp.*, holding that an AMI could run with the land.[80] In response to the *Westland* decision, Angus Earl McSwain criticized the Court's notion that the AMI

75. *Golden*, ¶ 9, 826 N.W.2d at 615. Construing the AMI as a personal covenant because of the lack of intent does not create this problem. It is the *Golden* Court's citation of *Beeter* that creates this tension.

76. *Id.* ¶ 11, 826 N.W. 2d at 616.

77. *See generally* Dante L. Zarlengo, *Area of Mutual Interest Clauses Regarding Oil and Gas Properties: Analysis, Drafting, and Procedure,* 28 ROCKY MT. MIN. L. INST. 14 (1982).

78. *Id.* at 859-60.

79. *Golden*, ¶ 11, 826 N.W.2d at 616.

80. Westland Oil Dev. Corp. v. Gulf Oil Corp., 637 S.W.2d 903, 911 (Tex. 1982).

could confer a benefit to the land: "[a] contract to do something which bears no relation to the use or value of the land cannot operate to benefit or burden assigns" despite the intentions of the parties.[81] The AMI's purpose in *Westland*, McSwain argues, was "not to affect the use or value of [acreage within the AMI] but rather to induce the conveyance thereof."[82] McSwain likens the AMI in *Westland* to a purchase money mortgage—a contract that "deals with, and is tied to the land or interest conveyed, but its basis is found in the terms of the conveyance of the property and not in its effect upon the land."[83] Like Zarlengo, McSwain argues that that the type of covenant represented by the AMI, like the purchase money mortgage, can be binding on an assignee "only when he expressly assumes it and not when he merely takes the estate 'subject to' the lien."[84]

More recently, Terry Cross has argued for a more focused analysis of the AMI contract itself and its context.[85] Cross acknowledges a practical need for a mechanism to bind successive interest holders in the contexts of certain agreements that facilitate leasehold development.[86] While Zarlengo argues that the AMI is always a *de facto* personal covenant, Cross conversely suggests that the initial focus should be on analyzing the AMI covenant itself—identifying the original interest burdened "and remain focused on those burdened interests" when considering the benefit of the AMI.[87] The few court decisions addressing the issue of whether AMIs can or should run with the land are split along these same lines: between assuming the character of the AMI and employing a willingness to evaluate the benefit in context of the intended purposes of the transaction of rights.

The Zarlengo/McSwain assumption creates two problems. First, this approach leaves the parties to the AMI at the mercy of the commitment of the opposite party in assuring its interests are preserved in future assignments. The inefficacy of this approach is highlighted in *Golden* because Golden was left to rely on Universal, now long gone, to clearly delegate and assign the AMI's provisions. Second, the assumption that the AMI (to borrow McSwain's language describing *Westlands'* AMI) "bears no relation to the use or value of the land" can force perverse reasoning when interpreting relatively common assignment language. Zarlengo's

81. Angus E. McSwain, *Westland Oil Development Corp. v. Gulf Oil: New Uncertainties as to Scope of Title Search,* 35 BAYLOR L. REV. 629, 636 (1983).

82. *Id.* at 641.

83. *Id.*

84. *Id.*

85. *See generally* Cross*, supra* note 8.

86. *Id.* at 218.

87. *Id*. at 220.

problem is the *Golden* dilemma: if courts are to assume the AMI can have no relation to the use of value of the property as an initial premise, it is then inconsistent to consider whether or not the parties intended the AMIs to relate to and benefit the demised property. But, as we shall see, courts consistently find that AMIs do relate to the demised premises – at least insofar as they function to facilitate development and reward risk. Further, under Zarlengo's analysis, any relationship between the AMI and demised property is *per se* attenuated and incidental, and obligations of an AMI could only conceivably be assigned where they are *expressly* assigned. This is a preferable way (at least conceptually) of preventing AMIs from acting like a runaway train in title succession, but it also creates a complete bar to interest holders from employing an important protection of structured arrangements of risk and capital in cooperative development agreements.

A. CHARACTERIZING THE AMI AGREEMENT

AMI covenants commonly appear in agreements affecting oil and gas assets in regions where little exploration has occurred.[88] The nature of an AMI is a contract to convey an interest in oil and gas lease interests.[89] The AMI requires that parties acquiring interest within a defined area: (1) give notice to all parties of any acquisition and its terms within the defined area; and (2) provide to all parties of the agreement an option to participate in the acquisition for a specified period of time.[90] The anticipated interest of an AMI typically includes leaseholds or mining rights, but can be broad enough to include surface and mineral rights as well.[91] Commentators have characterized or analogized the AMI to option contracts, preferential-right-to-purchase agreements, purchase money mortgages, or non-compete agreements.[92] AMIs may appear independently or as part of joint operating agreements, farmout agreements, confidentiality agreements, earn-in agreements, or as part of a leasehold assignment.[93]

The typical motivation for parties entering into an AMI agreement is to provide protection for geological data, reduce risk and cost, spread risk,

88. Zarlengo, *supra* note 77, at 859-60.

89. John S. Lowe, *Analyzing Oil and Gas Farmout Agreements*, 41 SW. L.J. 759, 844 (1987).

90. Gary B. Conine, *Property Provisions of the Operating Agreement—Interpretation, Validity, and Enforceability*, 19 TEX. TECH. L. REV. 1263, 1346-47 (1988).

91. Mark T. Nesbitt, *Area of Interest Provisions—Two Edged Swords,* 35 ROCKY MTN. MIN. L. INST. § 21.02[2] (1989).

92. *See* Zarlengo *supra* note 77, at 859-60; Cross, *supra* note 8, at 215-20; Conine, *supra* note 90, at 1346-47. *But see* Hultberg v. City of Garrison, 56 N.W.2d 319, 322 (N.D. 1953) (holding that an option to purchase real property is a privilege given by the owner to the optionee, and vests in the optionee no interest in the property until he has accepted the option and becomes obligated thereby in accordance with its terms).

93. *See* Quigley & Hull, *supra* note 8, at 4.

organize investments, and in conjunction with a MUI provision,[94] guarantee the participation of sufficiently capitalized parties.[95] The primary purpose of the AMI is to increase the likelihood of leasehold or mineral development. The AMI often represents an equitable division of, and participation in, interests acquired on the basis of joint expenditure and information.[96] In context of joint operating agreements, these provisions permit parties to "insure a fair distribution of any benefits derived from the joint investment of the parties and the information and data obtained from joint operations."[97] The practical effect of the AMI is to limit competition within a given geographic area.[98] An AMI executed within the context of a confidentiality agreement has the effect of creating unilateral obligation.[99]

AMIs typically appear in one of four scenarios.[100] First, similarly situated parties will execute an AMI to limit competition and avoid costs related to seismic options or leases and spread the risk of acquisition, exploration, and development. Parties in this scenario will likely be in equal bargaining positions. Second, an independent producer with the technical and operational expertise, but limited geological and geophysical data, can use an AMI provision to define the areas where passive investors will fund future acquisitions. This will create a "take-it or leave it" situation for willing investors. Third, and similar to the second scenario, an AMI may be used in situations where a development company with an otherwise strong lease position, data and technical and operational expertise is seeking to spread risk of exploration and production.[101] This situation will likewise create a "take-it or leave it" situation for willing investors.

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94. The "maintenance of uniform interest," or "MUI" provision allows the smooth operation of the AMI over time. Cross, *supra* note 8, at 220. The MUI serves to either prevent non-uniform assignment of interests subject to an AMI, or otherwise allocate responsibility under the AMI when parties to the original agreement assign an unequal undivided interests. *Id.* at 222.

95. *Id.* at 214-15.

96. Anita Gefreh Himebaugh, *An Overview of Oil and Gas Contracts In the Williston Basin,* 59 N.D. L. REV. 7, 32 (1983).

97. Conine, *supra* note 90, at 1337. Conine observes that in jurisdictions that treat joint operating agreements as joint ventures, the need for these sort of assurances are lessened by the presence of fiduciary duty. *Id.* at 1337-38. North Dakota does not imply a joint venture when joint operating agreements are formed without an implied or express contract to that effect. *But see* Come Big or Stay Home, LLC v. EOG Res., Inc., 2012 ND 91, 816 N.W.2d 80 (observing that JOA did not create a joint venture and that parties to a JOA were not co-tenants).

98. Cross, *supra* note 8, at 215.

99. Quigley & Hall, *supra* note 8, § 38.05(2)(a).

100. *See generally* Allen D. Cummings, *Area of Mutual Interest Agreements*, 2010 No. 2 ROCKY MTN. MIN. L. INST. Paper No. 10.

101. *Id.* An example of an arrangement under scenarios two and three might include a "promoted deal" wherein a promoter finds a drilling prospect and seeks passive investment as to the start-up costs. The initial well is drilled with the investors' money with advance agreement as to the respective rights of the parties to participate in future wells—this agreement constituting the "mutual area of interest." *See* Evertson v. Cannon, 411 N.W.2d 612, 619 (Neb. 1987).

Finally, an AMI is used in situations where individual players, like landmen or petroleum engineers operating as individuals, will seek to leverage their respective positions (be it a leasehold interest or geological/geophysical information) with larger players such as exploration and production companies.[102] This situation is similar to that presented in *Golden v. SM Energy Company*. The individual will seek to strengthen his position by seeking an AMI covering a large area with a long term and covering a broad range of property interests, as well as bind successors-in-interest.

B. THE AMI IN OTHER JURISDICTIONS

To date, relatively few court cases have addressed the nature of the AMI in terms of real covenant jurisprudence. The handful of cases that address the issue provide different answers or inferences to questions raised by the analysis. These cases illustrate both the diversity of circumstance in which the AMI can arise, and highlight the value and benefit that the AMI confers upon present vested leasehold estates. A brief review is helpful in understanding the AMI in context of its actual use, and is also helpful for two reasons. First, these cases are helpful in understanding how the AMI can operate to increase the probability of the leasehold development. Second, these cases illustrate the unavoidable relationship between the AMI and the vested interest of developers of the leasehold estate.

In *Westland Oil Development Corp. v. Gulf Oil*, the Texas Supreme Court considered whether an AMI could burden successive interests-in-title.[103] Westland Oil Development ("Westland") entered into a farmout agreement dated, August 4, 1966, with Mobil Oil Corporation ("Mobil") covering Mobil's multiple leasehold interests. Westland later assigned its interest in the farmout to a partnership, Chambers and Kennedy ("C&K"), along with the obligations of an AMI provision executed between Westland and Mobile contained in a November 15, 1966, letter agreement.[104] C&K

102. *See generally* Cummings, *supra* note 100.

103. 637 S.W.2d 903 (Tex. 1982). *Westland* is not the first Texas case to deal with the AMI. In 1953, an appeals court in Courseview, Inc. v. Phillips Petroleum Co., 258 S.W.2d 391 (Tex. App. 1953), observed that an AMI provision did not violate the rule against perpetuities. Although not specifically identifying the provision as an AMI, the court nevertheless observed that it did not create right in real property at all but simply gave to predecessors a property right contingent on defendant's purchase of royalties, mineral interests or fee titles in area. *Id.* at 393.

104. The AMI provision read as follows:

> [i]f any of the parties hereto, their representatives or *assigns*, acquire any additional leasehold interests affecting any of the lands covered by said farmout agreement, or any additional interest from Mobil Oil Corporation under lands in the area of the farmout acreage, such shall be subject to the terms and provisions of this agreement; provided, however that in no event shall the owners of the working interest under any portion of such acreage be entitled to less than 75% working interest leases.

Westland, 637 S.W.2d at 905.

fulfilled the obligations of the August 4, 1966, farmout between Westland and Mobile, and Mobile duly assigned the earned acreage to C&K. Mobil later executed a farmout agreement with Bernard Hanson by letter agreement dated April 18, 1972, covering lands within the Westland/Mobile farmout, agreeing to assign interest to Hanson in exchange for drilling a test well at a specified depth.[105] Hanson later entered into a similar farmout agreement with C&K covering similar acreage, including acreage derived from the agreement with Westland covered by the November 15, 1966, letter agreement.[106] Hanson then assigned these agreements to Gulf Oil Corporation ("Gulf") and Superior Oil Company ("Superior").[107] When Westland learned of the assignment from Mobil pursuant to these farmouts, Westland brought suit seeking a declaratory judgment that the November 15, 1966, agreement's provisions were valid and binding on the leasehold interests acquired by Gulf and Superior.[108]

Addressing the question of whether the AMI could be considered to touch and concern the land, the court determined that the AMI did run with the land, observing that "the promise to convey the prescribed interests in the leases . . . clearly affected the nature and value of the estate conveyed . . . . It burdened the promisor's estate and could be considered to have rendered it less valuable."[109] Although the *Westland* Court wanders into the circular reasoning of the Bigelow analysis, the court's holding implicitly acknowledges a benefit independent of the effect of the AMI on successors-in-title. McSwain sees the AMI as purposed "not to affect the use or value" of the initial leasehold, but purposed to "induce" the conveyance.[110] It is difficult to see how increasing the marketability of the leasehold did "not affect the use or value" of the leasehold estate. The AMI initially served to increase the possible return on any risk assumed by parties developing the original leasehold, increasing the potential profit of the initial venture. From Mobil's perspective, the AMI promised an increased return of initial investment and greatly increased the likelihood that developers would undertake the risk of developing the leasehold.[111]

105. *Id.* at 906.
106. *Id.*
107. *Id.* at 907.
108. *Id.*
109. *Id.* at 911.
110. McSwain*, supra* note 81, at 641. To be consistent with Bigelow's analysis, it would be more appropriate to say that the AMI does not *directly* affect the use or value of the leasehold. It is clear that it does.
111. Subsequent court decisions have questioned whether *Westland Oil Development* had not altered Texas' "touch and concern" analysis by removing "the benefit analysis" from the calculus. *See* In re El Paso Refinery, LP, 302 F.3d 343, 356 (5th Cir. 2002).

In Kansas, the courts have declared the AMI to be a personal covenant. One case, however, offers an example of a dispute over the conveyance of a benefited estate. In *Slawson Exploration Co., Inc. v. Vintage Petroleum, Inc.,*[112] the Tenth Circuit applied Kansas' contract law to the interpretation of an assignment of AMI attendant to a leasehold interest in Montana. Slawson Exploration ("Slawson") entered into a participation and operating agreement with Oryx Energy Company, formerly Sun Exploration Company ("Sun/Oryx"), to produce a leasehold situated in Richland County, Montana.[113] The participation agreement (i.e., the AMI) provided that the parties would explore and jointly develop an area of mutual interest with the reciprocal obligation of offering each respective party an option to participate in future acquisitions at its proportionate interest. Slawson drilled the Tiller #1-9 Well pursuant to the operating agreement on a leasehold within the AMI.[114] Slawson later assigned to Vintage Petroleum, Inc. ("Vintage") all its right, title, and interest in several properties, including the Tiller #1-9 Well. The exhibit to the assignment described the property interest and provided the qualification that the "assignment is expressly limited to the spacing unit for the Tiller #1-9 Well, being the E/2 NE/4 Section 9, and all of Section 10, T25, R55E, Roosevelt MT."[115] Following the Slawson/Vintage assignment, Sun/Oryx recompleted the Tiller #1-9 Well at a deeper formation, and pursuant to Montana's conservation laws, expanded the Tiller #1-9 spacing unit from 160 to 320 acres by acquiring additional leaseholds adjacent to the existing well.[116] Sun/Oryx notified Slawson of the acquisition and of its belief that Vintage owed the additional acreage under the AMI. Slawson subsequently brought an action seeking declaratory judgment that it, and not Vintage, owed the additional interest under the AMI. The court reviewed the language of the assignment conveying unto Vintage "all agreements, leases . . . and other instruments in any way related [to the Tiller well and spacing unit]" and determined that the AMI agreement "related to" the discrete well interest

112. Slawson Exploration Co., Inc. v. Vintage Petroleum, Inc., 78 F.3d 1479 (10th Cir. 1996). The Supreme Court of Kansas characterized the AMI as a personal covenant several years before *Slawson* in context of considering whether the AMI would violate the rule against perpetuities. First Nat'l Bank and Trust Co. of Oklahoma City v. Sidwell Corp., 678 P.2d 118, 126 (Kan. 1984) (citing the RESTATEMENT (FIRST) OF PROPERTY § 401 (1944)). Answering the question of whether an AMI without a term would be barred by the rule against perpetuities, the court observed that the AMI is purely contractual and does not create right in property: "[t]he contract here did not involve the vesting of future interest in real property and did not constitute a restraint upon the alienation of that property." *Id.*

113. *Slawson*, 78 F.3d at 1480.

114. *Id.* at 1481.

115. *Id.*

116. *Id.*

assigned to Vintage and held that Vintage was the proper recipient of the right to participate in additional acreage under the AMI.[117]

The *Slawson* Court evaluated assignment language nearly identical to the language of the Universal-Tipperary assignment considered in *Golden*. In both cases, the assignor purported to assign all rights that "relate" to the demised premises. In *Slawson*, however, the court did not balk at determining that Slawson's original "participation rights" were unambiguously "related" to the Tiller Well.[118] In reaching this conclusion, the court highlighted a distinction Slawson made between the demised premises and those adjoining properties "that would be useful in developing" a yet undeveloped and adjoining well prospect.[119] The significance of this distinction is that it subtly implies that the perceived relationship between the AMI and the demised property turns upon the assignor's perception of the benefit of the AMI to the usefulness of developing the Tiller Well. The underpinning assumption of *Slawson*'s holding is that the AMI inheres to the development of the leasehold's estate rather than existing as a disembodied contractual benefit.

The AMI often represents an equitable division of and participation in interests acquired on the basis of joint expenditure and information. The equitable operation of the AMI in the second scenario is illustrated in a Colorado case—*Kincaid v. Western Operating Co*.[120] In *Kincaid,* a producer and several passive investors executed an operating agreement to develop multiple leaseholds in multiple township sections, including a section where the parties only possessed fifty percent of a particular leasehold interest.[121] After success drilling several wells, the operator obtained the remaining fifty percent leasehold interest without providing notice to the parties who provided the initial investment.[122] Although these investing parties did not execute an AMI with the original operating agreement, the court chose to impose an AMI to effect the implicit intent of the parties in the initial agreement and prevent unfair advantage.[123]

The *Kincaid* court imposed the AMI to maintain the equities between the parties in a development partnership. Presumably, the developer in *Kincaid* wsa in the best position to realize the potential of the initial

117. *Id.* at 1482.

118. The court considers the effect of the assignment language as it is qualified by definitions in the accompanying exhibit. *Id.* The court rejects Slawson's argument that the exhibit demonstrates its intent to assign the well and not the participation rights.

119. *Id.* at 1483.

120. 890 P.2d 249 (Colo. App. 1994).

121. *Id.* at 251.

122. *Id.*

123. *Id.* at 253.

prospect as well as obtain the remaining interest related to that prospect, giving the developer an unfair access to a significant benefit of leasehold development—market positioning. Of course, *Kincaid* offers no explicit commentary on the relationship between the AMI and the leasehold estate held by the passive investors. But implicitly, the court's holding reflects the integral purpose of the AMI to the development of the initial leasehold. The scenario presented in *Kincaid* is also interesting insomuch as it shows an AMI operating in a much more intimate proximity to the vested estates in land. It also demonstrates how the AMI operates to divide the unique risks and benefits of oil and gas leasehold development. Here, the AMI covenant, conceived and imposed as a necessary enablement to the development of a leasehold estate and imposed for realization of the benefit of royalty estates, could be characterized as a "benefit" to an estate in land entirely independent of its affect of successive title interest—this is particularly true in the context of passive investors whose interest in the leasehold is solely for the realization of profits through development.

VI. CONCLUSION

Whatever the merits of *Golden*, the reasoning by the Court was misguided. Promulgating the presumption that the AMI cannot benefit a present vested estate for the purpose of real covenant analysis obscures a primary motivation behind the use of the AMI. The AMI operates directly to facilitate a leasehold or mineral estate's development by reducing development risk and cost, spreading risk, organizing investments, and guaranteeing the participation of sufficiently capitalized parties. Furthermore, this presumption leads to confusion in the legal analysis.

Golden's characterization of the AMI as a personal covenant is implicitly premised upon the assumption that the AMI does not relate to the existing leasehold estate, but in the Court's conclusion, it sends the question concerning the relationship of the AMI to the existing leasehold estate back to the trial court to consider assignment. The confusion at the heart of *Golden* over the relationship between the AMI and the present leasehold estate highlights the need for a better theory of treating AMI agreements. A better approach for analysis is to inquire into the character of the AMI in the context of the circumstances of its creation, asking whether the AMI confers a benefit on the leasehold estate or its appurtenant rights independent of its effect on successors in title.

Of course, beyond the question of whether the AMI can be construed to bind successors-in-title, is the question as to whether they *should* bind successors-in-title. AMIs present several competing practical concerns, however: first, the concern that mineral developers will inherit leaseholds burdened by no-longer-useful AMIs and second, the concerns that freedom of contract and the need for mineral developers to increase incentives for spurring development and to enter cooperative agreements with the assurance that successive participants will not compete against parties to the original agreement with an unfair advantage. McSwain expresses particular concern as to the effect of permitting AMI's to run with the land on title and the resulting burden that will fall upon successive title holders. Under North Dakota's common law requirement of explicit intent,[124] many AMIs will pass—if at all—only through delegation and assumption. Otherwise, those AMIs intended to run with the land will declare themselves.

The issue of characterizing the AMI to understand its effect on title represents a collision of a sophisticated aspect of a modern industry with one of the more arcane aspects of the common law—the "touch and concern" aspect of real covenants. The AMI shares many analogous features to established real covenants such as non-compete covenants or option contracts—these similarities manifest both in their operation and in their purpose to provide a necessary advantage to realizing the profit from the estate. At common law, both covenants ran with the land.[125] The application of Bigelow's two-part analysis[126] argues for this same conclusion when applying the facts in *Golden*: the AMI is principally designed to protect Golden's privilege of realized profit from leasehold development, a privilege that inheres to his estate in the overriding royalty interest. Distaste for treating AMIs as real covenants seems to arise in circumstances, like that of *Golden* or *Westland*, where a real covenant extends the claims of passive holders of non-participating royalty interests or middlemen on the benefits of active production. Without a showing that such arrangements would discourage productive development, limiting the reach of the AMI would disadvantage development by denying parties a practical tool for distributing the benefits and risks of market position.

124. N.D. CENT. CODE § 9-03-25.

125. N. Pac. Ry. Co. v. McClure*,* 81 N.W. 52, 55 (N.D. 1899); *see also* N. Grand Mall Assocs., LLC, v. Grand Ctr., Ltd., 278 F.3d 854, 859 (8th Cir. 2002) (observing that "[a] leasehold interest is a recognized estate in land, and the option to purchase was an incident of this interest, a covenant running with the land, good against the lessor and any successor in interest of the lessor.").

126. *See* discussion *supra* notes 61-62. The analysis proposed by Bigelow involves the following two questions: (1) what privilege or power of the covenantee is the convenant primarily designed to and does protect; and (2) is the privilege or power in question possessed by covenantee by virtue of his estate in land?