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**An In-Depth Analysis of Texas Pooling Issues**

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## An In-Depth Analysis of Texas Pooling Issues

### **I. Introduction**

Over the past century, pooling has become critical to the efficient development of oil and gas in Texas. Often formally defined as “the joining together of small tracts or portions of tracts for the purpose of having sufficient acreage to receive a well drilling permit under state or local spacing laws and regulations,” pooling enables operators to combine and treat multiple tracts as belonging to a single unit for oil and gas production.<sup>1</sup> Pooling also affords operators an efficient means of preventing physical and economic waste by decreasing the number of wells servicing the productive reservoir. On the other hand, it allows mineral owners to share in production which would otherwise not be economically or physically feasible and also spreads the risk or reward of a good or bad well amongst all owners of the smaller interests comprising the pooled unit.

Although pooling exists by virtue of comprehensive compulsory pooling statutes in several states, this has not historically been the case in Texas. Though the Texas Legislature enacted the Mineral Interest Pooling Act (“MIPA”) in 1965, MIPA has been described as an act to encourage voluntary pooling rather than a true compulsory pooling act. Instead, although recent years have seen a dramatic uptick in the use of MIPA, it remains the case that most pooling in Texas occurs by way of voluntary agreement.

This article will examine several substantive and procedural points potentially affecting voluntary pooling in Texas. These include the common types of voluntary pooling arrangements, the legal requirements for valid pooling, pooling’s effects on oil and gas leases and on the interests of the parties involved, remedies arising from an invalid or improper exercise of the pooling power, and unique issues stemming from the practice of horizontal drilling.

As is the case with many areas of oil and gas law in Texas, pooling is largely a matter of contract law which has evolved with—and in response to—developments in the common law. The underlying facts and relevant contractual provisions are of critical importance when evaluating any pooling dispute. The goal of this article is to identify key concepts and points to evaluate when faced with a pooled unit or a dispute involving pooling in Texas.

### **II. Historical Basis**

Under the Rule of Capture, the landowner who extracts oil or gas from beneath his land acquires ownership of the extracted substances even if evidence discloses that a portion of the produced oil and gas was originally in place beneath the land of another.<sup>2</sup> Though the Rule of Capture encourages exploration and is perhaps the single most important doctrine in all of Texas oil and gas jurisprudence, the Texas Legislature recognized that an unbridled Rule of Capture encouraged economic and physical waste and precluded mineral owners from producing their fair share of the minerals under their tracts.

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<sup>1</sup> 1 BRUCE M. KRAMER & PATRICK H. MARTIN, *THE LAW OF POOLING AND UNITIZATION*, § 1.02 (3d ed. 2012) [hereinafter *KRAMER & MARTIN, LAW OF POOLING*].

<sup>2</sup> See, e.g., *Coastal Oil & Gas Corp. v. Garza Energy Trust*, 268 S.W.3d 1, 12–13 (Tex. 2008).

The prevalence of pooling in Texas is inextricably linked to the Railroad Commission's ("RRC") imposition of Rule 37 and Rule 38, which, respectively, set forth minimum spacing and acreage density requirements an operator must adhere to in order to obtain a drilling permit and together act as important limitations on the Rule of Capture.<sup>3</sup> Rule 37 originally provided for two-acre spacing in oil fields by requiring that wells be a minimum distance of 150 feet from lease or property lines and 300 feet from others wells.<sup>4</sup> The RRC has amended the rule six times over the years to provide for increasingly greater distances, and Rule 37 now requires wells to be drilled at least 467 feet from lease lines and 1,200 feet from other wells.<sup>5</sup> Rule 38, on the other hand, establishes the minimum number of acres a lessee must assign to each well in a given reservoir.<sup>6</sup> Currently, forty acres are required per well, unless special field or other rules govern.<sup>7</sup> Together, Rule 37 and Rule 38 prevent the clustering of wells, thereby discouraging surface, underground, and economic waste.<sup>8</sup> They also protect correlative rights by affording working interest owners the opportunity to recover their fair share of oil and gas by drilling wells in accordance with a uniform drilling pattern.<sup>9</sup> Rule 37 and Rule 38 proved effective in encouraging voluntary pooling among oil and gas operators, as parties turned to pooling out of necessity to combine and develop acreage that would otherwise not support the issuance of a drilling permit under Rule 37 or Rule 38.

The widespread acceptance of the non-apportionment doctrine also contributed to the proliferation of voluntary pooling.<sup>10</sup> The non-apportionment doctrine provides that where there is a post-lease subdivision of the lessor's interest, only the owner of an interest in the drillsite tract is entitled to royalty.<sup>11</sup> *Japhet v. McRae*, the first Texas case to adopt the non-apportionment doctrine, demonstrates how the doctrine operates.<sup>12</sup> After leasing a fifteen-acre tract, Fisher subdivided the northern five acres to Keebler.<sup>13</sup> Keebler then conveyed three of his five acres to McRae.<sup>14</sup> Several months later, Fisher sold the remaining southern ten acres to Keebler, who then conveyed the same ten-acre tract to Japhet.<sup>15</sup> Eventually, the lessee drilled two wells on the southern ten acres.<sup>16</sup> Thereafter, Keebler and McRae sought to recover their proportionate share of the royalties.<sup>17</sup> In concluding that Keebler and McRae had no right to royalties from production obtained from the southern ten acres, the court articulated and applied the non-apportionment rule:

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<sup>3</sup> See ERNEST E. SMITH & JACQUELINE LANG WEAVER, TEXAS LAW OF OIL AND GAS, § 9.3[A][1] (2d ed. 2010) [hereinafter *SMITH & WEAVER*].

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*; 16 TEX. ADMIN. CODE § 3.37.

<sup>6</sup> 16 TEX. ADMIN. CODE § 3.38.

<sup>7</sup> *Id.*

<sup>8</sup> See BRUCE M. KRAMER & PATRICK H. MARTIN, WILLIAMS & MEYERS, OIL AND GAS LAW § 901 (LexisNexis Matthew Bender 2020) [hereinafter *KRAMER & MARTIN, OIL & GAS LAW*].

<sup>9</sup> See KRAMER & MARTIN, LAW OF POOLING, *supra* note 1, at § 3.02[1].

<sup>10</sup> See *id.* at Ch. 7.

<sup>11</sup> See, e.g., *Japhet v. McRae*, 276 S.W. 669 (Tex. Comm'n App. 1925, judgment adopted).

<sup>12</sup> See *id.*

<sup>13</sup> *Id.* at 670.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

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