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The Fundamentals of Voluntary Pooling in Texas

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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.[1] 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 paper will focus on voluntary pooling in Texas.

This article will examine fundamental aspects of voluntary pooling in Texas, including an overview of what voluntary pooling is, when it is likely to be used and how it is accomplished. This paper will also examine common types of voluntary pooling arrangements, the legal requirements and process 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.

The goal of this article is to assist a practitioner is understanding and evaluating instruments that affect or accomplish a pooled unit and to identify key concepts affecting pooled units in Texas.

II. What is Voluntary Pooling?

Voluntary pooling generally refers to the combination of two or more leases or lands from two or more leases in a single "unit" for development purposes.[2] As a result of a valid voluntary pooled unit, operations anywhere within the unit are treated as if they occurred on all land on any pooled lease, and production from a unit well will maintain the pooled leases in effect past their primary terms.[3] Further, production from a unit well will be allocated between the owners of all of the pooled tracts based on the amount of surface acreage of each tract contained within the unit.

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[1] 1 Bruce M. Kramer & Patrick H. Martin, The Law of Pooling and Unitization, § 1.02 (3d ed. 2012) [hereinafter *Kramer & Martin, Law of Pooling*].

[2] *Browning Oil Co. v. Luecke*, 38 S.W.3d 625, 634 (Tex. App.—Austin 2000, pet. denied).

[3] Note that this result can be changed by the inclusion of a "Pugh" clause in a lease. See Section VII.A below.

To illustrate the result of valid voluntary pooling, consider the following basic example: A 100-acre pooled unit is created containing 25 acres from Lease A (Tract A) and 75 acres from Lease 5 (Tract B). A productive well is drilled on Tract B within the pooled unit. Both Leases A and B provide for a 1/4 lessor's royalty. Assuming each unit tract has one single owner, the owner of Tract A will be entitled to receive 25% of 1/4 of production, and the owner of Tract B will be entitled to receive 75% of 1/4 of production.

III. Historical Basis for Voluntary Pooling

Under the Rule of Capture, the landowner who extracts oil or gas from beneath his land acquires ownership of the extracted substances even if a portion of the produced oil and gas was originally in place beneath the land of another.[4] 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.

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.[5] Rule 37, as amended requires wells to be drilled at least 467 feet from lease lines and 1,200 feet from other wells.[6] Rule 38, on the other hand, establishes the minimum number of acres a lessee must assign to each well in a given reservoir.[7] Currently, forty acres are required per well, unless special field or other rules govern.[8] Together, Rule 37 and Rule 38 prevent the clustering of wells, thereby discouraging surface, underground, and economic waste.[9] 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.[10] Rule 37 and Rule 38 have proved effective in encouraging voluntary pooling among oil and gas operators, as parties have 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.[11] The non-apportionment doctrine provides that where there is a post-lease

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[4] E.g., Coastal Oil & Gas Corp. v. Garza Energy Trust, 268 S.W.3d 1, 12–13 (Tex. 2008).
[5] *See* ERNEST E. SMITH & JACQUELINE LANG WEAVER, TEXAS LAW OF OIL AND GAS, § 9.3[A][1] (2d ed. 2010) [hereinafter *SMITH & WEAVER*] (providing background and historical overview on the imposition of Rule 37 and Rule 38).
[6] *Id.*; 16 TEX. ADMIN. CODE § 3.37.
[7] 16 Tex. Admin. Code § 3.38.
[8] *Id.*
[9] *See* BRUCE M. KRAMER & PATRICK H. MARTIN, WILLIAMS & MEYERS, OIL AND GAS LAW § 901 (LexisNexis Matthew Bender 2020) [hereinafter *KRAMER & MARTIN, OIL & GAS LAW*] (describing how the drilling of unnecessary wells effectuate waste).
[10] *See* Emeka Duruigbo*, Small Tract Owners and Shale Gas Drilling in Texas: Sanctity of Property, Holdout Power or Compulsory Pooling?*, 70 Baylor L. Rev. 527, 529 (2018) (noting that "Rule 37 acts to protect the correlative rights of adjoining mineral interest owners").
[11] *Id.*

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