PUBLICATION UPDATE

Route to: ☐ _____ ☐ _____ ☐ _____ ☐ _____
☐ _____ ☐ _____ ☐ _____ ☐ _____

The Law of Pooling and Unitization

Publication 455 Release 47 September 2017

HIGHLIGHTS

Updates Throughout the Treatise

- Numerous topics related to pooling and unitization have been updated to reflect the latest developments, including the addition of a new section on "Horizontal-Fracking Technology Revolution and Legal Changes."

Updated State Statutes

- The state-by-state compilation of legislation has been thoroughly revised to reflect the latest statutory changes affecting the law of pooling and unitization.

Release 47 brings you the newest developments in oil and gas pooling and unitization law, including the following:

New section on horizontal-fracking—Added to Chapter 5 is new § 5.05, which provides an overview of the horizontal-fracking technology revolution and legal changes. This new discussion contrasts the Vertical Model of traditional drilling with the Horizontal-Fracking Model for the shale revolution. Among the issues of the Horizontal-Fracking Drilling and Production Model that are covered are multiple unit wells, cross-unit wells, allowables, common law trespass, and environmental impacts. Statutory and regulatory developments are illustrated with examples from the following states: Arkansas; Colorado: Illinois; Louisiana; Oklahoma; Pennsylvania; Texas; and West Virginia.

Offset drilling rule and rule of capture as impetus to the enactment of well spacing and pooling regulation—The negative impacts of the rule of capture and its corollary, the offset drilling rule, served as catalysts for the adoption of state well spacing and pooling statutes in Louisiana. *TDX Energy, LLC v. Chesapeake Operating Inc.* (5th Cir. 2017), discussed at § 2.01.

Restrictions on health professionals' access to frac fluid information unconstitutional—A Pennsylvania statute that restricted access of information about the content of injected frac fluids was held to be unconstitutional by the Pennsylvania Supreme Court. *Robinson Township v.*

Commonwealth (Pa. 2016), discussed at § 3.01.

Idaho enacts statute purporting to occupy the field of oil and gas regulation—In 2016, Idaho adopted a new statute (Idaho Code § 47-314) that purports to occupy the field of oil and gas regulation. Discussed at § 4.05.

Expansive reading of correlative rights—When it interpreted the meaning of "just and equitable basis" in the Ohio conservation statute applicable to mandatory pooling orders, the Ohio court found that an order protecting correlative rights should consider safety factors. *Simmers, Chief, Div. of Oil & Gas Resources Mgt. v. N. Royalton* (Ohio 2016), discussed at §§ 5.01[4], 12.03[2][l], 25.06[18].

Pooling clause negated a cross-conveyance of property—A pooling clause negating a cross-conveyance was given effect, defeating tax collection by a county adjacent to the property in question. *Chambers v. San Augustine County Appraisal District* (Tex. App.—Tyler 2017), discussed at §§ 8.02, 20.03[14].

Failure to file production reports with agency—An Ohio court has held that a lessee's failure to file production reports with the state conservation agency had no legal effect on termination for lack of production issues. *Potts v. Unglaciated Industries, Inc.* (Ohio 2016), discussed at § 8.04.

Lease maintained by communitzation—A 1,057 acre lease was maintained by a communitzation of 40 acres of the lease with 120 other acres, as was allowed by the lease pooling clause. *Horob v. Zavanna, LLC* (N.D. 2016), discussed at §§ 9.01, 9.06, 20.03[10].

"Conditional allowable" given limited effect—The operator of a unit was granted a conditional allowable to produce a unit well requiring that the disbursement of monies be in accordance with the result of unitization proceedings. The well-site lessors succesfully sought royalty payments on a lease basis for the period between the first production to the unit order's effective date. *Gladney v. Anglo-Dutch Energy, L.L.C.* (La. App. 2016), discussed at §§ 13.03[3], 25.06[10][b].

Jurisdiction of conservation agency—A nonoperator's claim in state court for an accounting from the operator of a compulsory unit where there was no contract among the parties was dismissed; the administrative remedy had to be exhausted before bringing a claim in court. *Grant Brothers Ranch, LLC v. Antero Resources Piceance Corp.* (Colo. Ct. App. 2016), discussed at §§ 13.08[1], 14.04, 25.06[5].

Royalties payable by federal oil and gas lessees included in exploratory unit must be based on takes and not entitlements—Under both federal agency practice and the Federal Oil and Gas Royalty Simplification and Fairness Act, all working interest owners in a federal exploratory unit must pay royalties on their actual takes and not on their allocated entitlements. *Chevron USA, Inc.* (ONRR 2016), discussed at § 16.02[2].

Communitization of a portion of a federal oil and gas lease does not segregate the lease—A federal oil and gas lease that is partially communitized (pooled) will not be segregated as to communitized and non-communitized areas. *Horub v. Zavanna, Inc.* (N.D. 2016), discussed at § 16.04.

Assignability of operatorship—Where a joint operating agreement does not have express language prohibiting the transfer or assignment of the operatorship, such a

transfer will be enforced. *U.S. Energy Development Corp. v. Stephens Energy Group* (10th Cir. 2016), discussed at § 17.02.

Forum selection clause enforceable—Where a joint operating agreement contains a forum selection clause, it will be enforced even where the operations are taking place in a state other than the one chosen by the parties. *Big & Little Oil, LLC v. Tanglewood Exploration, LLC* (Pa. 2001), discussed at § 17.02.

Oklahoma's statutory "Pugh clause"—The Oklahoma statutory "Pugh clause" was held not to apply to fieldwide units established pursuant to 52 Okla. Stat. Ann. § 287.1 *et seq*. *Stephens Production Co. v. Tripco, Inc.* (OK CIV APP 2016), discussed at § 20.03[11].

Arkansas pooling and conservation law constitutional—The Arkansas Oil and Gas Conservation Act, in general, and the statutory pooling or integration provisions specifically, are constitutional and do not constitute a taking of private property without just compensation. *Gawenis v. Arkansas Oil & Gas Commission* (Ark. 2015), discussed at § 24.01[2].

Carbon dioxide pipeline satisfies common carrier test—As a matter of law, a carbon dioxide pipeline is a common carrier because it has shown that it is likely to carry carbon dioxide owned by third parties at some time in the future. *Denbury Green Pipeline-Texas v. Texas Rice Land Partners* (Tex. 2017), discussed at § 24.02[2].

Exhaustion, primary jurisdiction, and collateral attack doctrines not applicable to federal suit for tort—Working interest owners sought damages, accounting, and injunctive relief after defendant obtained drilling permits and pooling orders from the New Mexico Oil Conservation Division (OCD) and drilled several wells. The New Mexico Oil Conservation Commission later overturned the OCD orders as to two of the well applications. Because the plaintiffs sought relief that could not be granted by the OCD or Commission, the court held that the suit should go forward without seeking administrative relief. Because the Commission had reversed the OCD, the suit was not a collateral attack on that Commission order. *Harvey E. Yates Co. v. Cimarex Energy Co.* (D.N.M. 2014), discussed at § 25.06[15].

Failure to exhaust administrative remedies—Plaintiff brought an action in state court seeking royalties on gas flared in production, such flaring allegedly in violation of N.D. Cent. Code § 38-08-06.4. Holding that the statute did not provide a private right of action, the court ruled that the plaintiff's remedy was with the Industrial Commission, which the plaintiff had not sought. *Vogel v. Marathon Oil Co.* (N.D. 2016), discussed at § 25.06[17].

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Publication 455 Release 47 September 2017

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VOLUME 1

Revision		
☐	Title page thru ix	Title page thru ix
☐	1-1 thru 1-5	1-1 thru 1-5
☐	2-3 thru 2-4.1	2-3 thru 2-4.1
☐	2-16.1 thru 2-17	2-17 thru 2-18.1
☐	2-33 thru 2-35	2-33 thru 2-36.1
☐	3-5 thru 3-23	3-5 thru 3-24.1
☐	3-36.3 thru 3-36.11	3-36.3 thru 3-36.12(1)
☐	3-39 thru 3-40.1	3-39 thru 3-40.1
☐	3-61 thru 3-67	3-61 thru 3-67
☐	4-4.1 thru 4-78.7	4-5 thru 4-78.11
☐	4-91 thru 4-101	4-91 thru 4-103
☐	5-1 thru 5-3	5-1 thru 5-3
☐	5-17 thru 5-18.1	5-17 thru 5-18.1
☐	5-83 thru 5-84.1	5-83
☐	5-127	5-127 thru 5-139
☐	8-3 thru 8-7	8-3 thru 8-8.1
☐	8-25	8-25 thru 8-26.1
☐	9-1	9-1 thru 9-2.1
☐	9-19	9-19 thru 9-20.1
☐	12-39	12-39 thru 12-40.1
☐	13-25 thru 13-27	13-25 thru 13-28.1
☐	13-53	13-53 thru 13-54.1
☐	14-43 thru 14-51	14-43 thru 14-55
☐	16-5 thru 16-15	16-5 thru 16-15
☐	16-31 thru 16-47	16-31 thru 16-48.17
☐	16-57 thru 16-83	16-57 thru 16-85
☐	17-1 thru 17-25	17-1 thru 17-26.1
☐	17-36.3 thru 17-37	17-37 thru 17-38.11
☐	17-49 thru 17-75	17-49 thru 17-76.1
☐	18-1 thru 18-5	18-1 thru 18-6.1
☐	18-15 thru 18-17	18-15 thru 18-17

VOLUME 2

Revision		
☐	Title page	Title page
☐	19-1 thru 19-19	19-1 thru 19-17
☐	19-39 thru 19-45	19-39 thru 19-46.1
☐	19-63 thru 19-82.1	19-63 thru 19-77

Check As Done	*Remove Old Pages Numbered*	*Insert New Pages Numbered*
☐	19-109	19-109 thru 19-110.1
☐	19-116.3 thru 19-122.5	19-117 thru 19-122.6(3)
☐	20-32.1 thru 20-34.1.	20-33 thru 20-34.1
☐	20-43 thru 20-59	20-43 thru 20-60.3
☐	20-91 thru 20-108.3	20-91 thru 20-108.5
☐	21-1 thru 21-61	21-1 thru 21-67
☐	22-3 thru 22-27	22-3 thru 22-28.3
☐	22-39 thru 22-43	22-39 thru 22-43
☐	23-49.	23-49
☐	24-3 thru 24-31	24-3 thru 24-32.1
☐	24-51 thru 24-53	24-51 thru 24-54.1
☐	24-64.1 thru 24-73	24-65 thru 24-74.37
☐	24-88.1 thru 24-101	24-89 thru 24-102.1
☐	24-111 thru 24-119	24-111 thru 24-120.1
☐	24-143	24-143 thru 24-144.1
☐	24-150.4(3) thru 24-150.4(10)(a)	24-150.4(3) thru 24-150.4(10)(a)
☐	24-150.4(17) thru 24-150.43	24-150.5 thru 24-150.44(7)
☐	24-150.57 thru 24-150.95	24-150.57 thru 24-150.99
☐	25-5 thru 25-34.17	25-5 thru 25-34.18(3)
☐	25-34.29 thru 25-34.34(1)	25-34.29 thru 25-34.34(1)
☐	25-57 thru 25-58.1	25-57 thru 25-58.1
☐	25-69.	25-69 thru 25-70.1
☐	25-84.1 thru 25-90.1.	25-85 thru 25-90.7
☐	25-114.1	25-114.1
☐	25-125 thru 25-127	25-125 thru 25-127
☐	25-135	25-135 thru 25-136.1
☐	26-9	26-9 thru 26-10.1
☐	26-35 thru 26-39	26-35 thru 26-39

VOLUME 3

Revision

☐	Title page.	Title page
☐	TS-1 thru TS-25	TS-1 thru TS-27
☐	TC-1 thru TC-123.	TC-1 thru TC-137
☐	I-1 thru I-67	I-1 thru I-67

VOLUME 4

Revision

☐	Title page.	Title page
☐	30-50.1.	30-50.1 thru 30-50.2(1)
☐	30-74.2(11) thru 30-74.4(1)	30-74.3 thru 30-74.4(11)
☐	30-74.21	30-74.21

Check As Done	*Remove Old Pages Numbered*	*Insert New Pages Numbered*
☐	30-74.28(5)	30-74.28(5) thru 30-74.28(6)(a)
☐	30-115 thru 30-116.1	30-115 thru 30-116.1
☐	30-235 thru 30-239	30-235 thru 30-240.1
☐	30-244.4(5) thru 30-244.4(10)(c)	30-244.4(5) thru 30-244.4(10)(d)(v)
☐	30-244.4(10)(o) thru 30-244.4(27)	30-244.4(11) thru 30-244.4(28)(g)
☐	30-244.4(39)	30-244.4(39) thru 30-244.4(40)(a)
☐	30-248.25.	30-248.25
☐	30-275 thru 30-315	30-275 thru 30-316.9
☐	30-429 thru 30-432.3	30-429 thru 30-431
☐	30-432.8(7) thru 30-432.8(16)(e)	30-432.8(7) thru 30-432.8(15)
☐	30-432.17 thru 30-432.23	30-432.17 thru 30-432.23
☐	30-448.2(2)(c) thru 30-448.2(9)	30-448.2(3) thru 30-448.2(11)
☐	30-448.12(1) thru 30-458.1.	30-449 thru 30-458.9
☐	30-466.1	30-466.1 thru 30-466.2(1)
☐	30-475 thru 30-480.9	30-475 thru 30-480.10(5)

VOLUME 5

Revision		
☐	Title page.	Title page
☐	30-493 thru 30-494.1	30-493 thru 30-494.1
☐	30-523 thru 30-535	30-523 thru 30-527
☐	30-552.7 thru 30-552.8(23).	30-552.7 thru 30-552.8(25)
☐	30-562.3 thru 30-562.5	30-562.3 thru 30-562.5
☐	30-607 thru 30-608.2(1)	30-607 thru 30-608.2(2)(a)
☐	30-608.7 thru 30-608.15	30-609 thru 30-617
☐	30-609 thru 30-624.13.	30-619 thru 30-624.13
☐	30-632.9 thru 30-632.15	30-632.9 thru 30-632.15
☐	30-824.31 thru 30-824.51	30-824.31 thru 30-824.52(1)
☐	30-868.2(3)	30-868.2(3)
☐	30-884.7 thru 30-884.9	30-884.7 thru 30-884.9
☐	30-929 thru 30-930.1	30-929 thru 30-930.1
☐	30-997 thru 30-1010.3.	30-997 thru 30-1010.3
☐	30-1018.1 thru 30-1018.5	30-1018.1 thru 30-1018.5
☐	30-1059 thru 30-1060.1	30-1059 thru 30-1060.1
☐	30-1093	30-1093
☐	30-1189 thru 30-1191	30-1189

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