

RUINING POOL PARTIES: DO DISCLAIMERS OF CROSS-CONVEYANCE OF INTERESTS IN AN OIL & GAS LEASE'S POOLING PROVISION RENDER A POOLED UNIT INVALID PER SE?

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According to Greek mythology, the Greek God Zeus gifted Pandora a box and told her that she must never open it.¹ Despite this warning, Pandora opened the enigmatic box only to unleash all of the troubles into the world.² The colloquial phrase “Pandora’s Box” refers to anything that appears ordinary but may produce unpredictable or harmful results.³ Unbeknownst to them at the time, parties to an oil and gas royalty dispute opened a Pandora’s Box when a mineral lessee perfunctorily alleged that the absence of a cross-conveyance of interest between royalty interest owners partially invalidated a pooled unit.⁴ In Texas, the “Box” remains open yet still contains the unknown legal impact of leases’ express disclaimers of cross-conveyances when the lessee pools the lease into a designated unit.

I. INTRODUCTION.

Commonly in oil and gas leases, a paragraph known as a “pooling provision” (or “pooling clause”) grants the lessee power to pool or combine acreage covered by the lease with other interests for purposes of developing and operating the leased premises in compliance with well spacing and

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¹Michael Karas & Charilaos Megas, *Pandora*, GREEK MYTHOLOGY (May 3, 2018), <https://www.greekmythology.com/Myths/Mortals/Pandora/pandora.html>.

²*Id.*

³*Pandora’s box*, MERRIAM-WEBSTER ONLINE DICTIONARY (2018), <https://www.merriam-webster.com/dictionary/Pandora%27s%20box>.

⁴Samson Expl., LLC vs. T.S. Reed Props., Inc., 521 S.W.3d 766, 776 (Tex. 2017).

density rules of the Texas Railroad Commission.⁵ Pooling promotes the conservation of oil and gas, prevents waste, and protects the correlative rights of adjoining mineral owners.⁶ Within this pooling provision, lessors frequently include an express disclaimer of cross-conveyance of title, which states that no party should construe an intent to effect a cross-conveyance of title between other interest owners within the pooled unit.⁷

In 2017, the Texas Supreme Court acknowledged, but did not address, the uncertainty of this disclaimer's effect on the validity of a pooling.⁸ In *Samson*, the court recognized that it “[has] never expressly considered whether cross-conveyance of title may be contractually disclaimed” within a pooling provision of an oil and gas lease.⁹ Under the lessee-defendant's proposed argument, express disclaimers render a pooling invalid because Texas law requires a cross-conveyance of interests when lessees exercise their pooling power.¹⁰ A holding validating that argument serves only to open more Pandora's Boxes.

This Comment advocates that disclaimers do not render a pooling invalid because parties may expressly negate an intent to effect a cross-conveyance of interests in an oil and gas lease. The interplay of Texas jurisprudence, precedent, public policy, and a theory proposed by this Comment supports a pooled unit's validity in spite of a provision disclaiming intent to cross-convey. Failure by Texas courts to embrace this position poses legal uncertainty and unwelcome ramifications.

Part II of this Comment defines fundamental oil and gas law concepts that apply to pooling in Texas. These principles also explain the cross-conveyance theory in Texas and its impact on other ancillary areas of law.

⁵El Paso Prod. Oil & Gas v. Tex. State Bank, No. 04-05-00673-CV, 2007 WL 752209, at *6 n.4 (Tex. App.—San Antonio March 14, 2007, pet. denied) (mem. op.).

⁶“Waste” is defined in Texas under a non-exclusive statutory list, including: “physical waste or loss incident to or resulting from drilling, equipping, locating, spacing, or operating a well or wells in a manner that reduces or tends to reduce the total ultimate recovery of oil or gas” TEX. NAT. RES. CODE ANN. § 85.046(6) (West 2015). “Correlative rights” means an owner has an opportunity to produce his fair share of recoverable oil and gas beneath his or her land. *Elliff v. Texon Drilling Co.*, 210 S.W.2d 558, 562 (Tex. 1948).

⁷2 BRUCE M. KRAMER & PATRICK H. MARTIN, THE LAW OF POOLING AND UNITIZATION § 8.02 (3d ed. 2017) [hereinafter “Kramer & Martin, Law of Pooling”] (“It is not uncommon to include in a pooling clause language that is designed to negate a cross-conveyance of property interests.”).

⁸*Samson*, 521 S.W.3d at 766.

⁹*Id.* at 777.

¹⁰*Id.* at 770.

Part III lays out the Pandora's Box *Samson* opened. Part IV discusses the recognition of express disclaimers of cross-conveyances in other jurisdictions in contrast to the gap in Texas law unable to close the Box. It also proposes an answer to Texas courts' treatment of express disclaimers before Part V discusses the complications from concluding disclaimers render pooled units invalid. Part VI then concludes this Comment.

II. FUNDAMENTAL OIL AND GAS LAW CONCEPTS.

Pertinent to the relationship between the mineral interest owner (the lessor) and the party wishing to conduct exploration and production (E&P) operations (the lessee) is the oil and gas lease.¹¹ The lessee receives a leasehold interest, the right to develop the minerals and conduct operations on the lessor's land at its own risk and expense.¹² The lessor retains the possibility of reverter when the lease terminates coupled with a right to a non-cost bearing share in production in the form of a royalty interest.¹³ The lease is both a conveyance and a contract; the lessee accepts the lessor's offer to lease his or her mineral interest subject to express and implied promises.¹⁴

It is critical to remember the basic relationship between lessor and lessee and each party's interests in the oil and gas lease. The lessor wants continuous and high production of the mineral estate in high volumes so as to maximize his or her royalty payments.¹⁵ The desire to efficiently explore and produce minerals, to minimize risk and expenses, and to maximize profits from production motivates the lessee.¹⁶ For these reasons, most

¹¹The term "lease" is a misnomer because the Lessor conveys a fee simple determinable interest to the Lessee, and typical landlord-tenant law does not resolve problems emanating from the lease. *Luckel v. White*, 819 S.W.2d 459, 464 (Tex. 1991); 6 HOWARD R. WILLIAMS & CHARLES J. MEYERS, OIL AND GAS LAW § 202.1 (LexisNexis 5th ed. 2017) (revised by Bruce M. Kramer & Patrick H. Martin) [hereinafter "Williams & Meyers, Oil and Gas Law"].

¹²*Anadarko Petroleum Corp. v. Thompson*, 94 S.W.3d 550, 554 (Tex. 2002).

¹³*Luckel*, 819 S.W.2d at 464; *Wagner & Brown, Ltd. v. Sheppard*, 282 S.W.3d 419, 423 (Tex. 2008).

¹⁴JOHN LOWE, OWEN ANDERSON, ERNEST SMITH, DAVID PIERCE & CHRISTOPHER KULANDER, CASES AND MATERIALS ON OIL AND GAS 177 (6th ed. 2012).

¹⁵*Amoco Prod. Co. v. Alexander*, 622 S.W.2d 563, 569 (Tex. 1981); 55 TEX. JUR. 3d *Oil and Gas* § 131.

¹⁶55 TEX. JUR. 3d *Oil and Gas* § 131.

modern leases contain a standard clause known as a pooling provision.¹⁷ This section introduces the legal concept of pooling, the express pooling provision, the cross-conveyance theory, and the express disclaimer of cross-conveyance.

A. *Pooling Leased Acreage in Texas.*

Pooling is the combination of two or more interests in land for the granting of a well permit under applicable spacing rules prescribed by the lease and the Texas Railroad Commission.¹⁸ Pooling aims to prevent physical and economic waste by avoiding drilling unnecessary wells and to protect correlative rights of landowners over a common reservoir.¹⁹ Voluntary pooling arises from agreements among interest owners in neighboring tracts to pool their interests.²⁰ Generally, there are three ways to voluntarily pool: (1) a community lease; (2) a separate pooling agreement; and (3) a lease's pooling provision.²¹ This Comment focuses on the most common of these three methods: the pooling provision.²²

B. *The Pooling Provision Within an Oil and Gas Lease.*

A pooling provision grants the lessee express authority to combine all or part of the leased acreage to create a single production unit.²³ The provision

¹⁷56 TEX. JUR. 3d *Oil and Gas* § 616 (discussing how pooling clauses authorize lessees to pool leasehold acreage into a unit to improve efficient oil and gas development and production) (citing *Grimes v. La Gloria Corp.*, 251 S.W.2d 755, 761 (Tex. Civ. App.—San Antonio 1952, no writ).

¹⁸*Browning Oil Co. v. Luecke*, 38 S.W.3d 625, 634 (Tex. App.—Austin 2000, pet. denied). Two kinds of pooling exist: compulsory pooling and voluntary pooling. *Wagner & Brown, Ltd.*, 282 S.W.3d at 421. This Comment focuses exclusively on voluntary pooling.

¹⁹*Wagner & Brown, Ltd.*, 282 S.W.3d at 420–21.

²⁰*Williams & Meyers, Oil and Gas Law*, *supra* note 11, at § 902.

²¹A community lease is a single lease document that covers two or more separately owned tracts of land executed by the mineral owners of such tracts. RICHARD W. HEMINGWAY, *THE LAW OF OIL AND GAS* 428 (West Publishing Co., 3d ed. 1991) [hereinafter “Hemingway, Oil and Gas”]. A separate pooling agreement occurs when all parties who own interests in the minerals underlying the tracts to be pooled enter into a specific agreement authorizing the pooling of their tracts, such as executing a Designation of Pooled Unit or Consent to Pool agreement. *See Howell v. Union Producing Co.*, 392 F.2d 95, 99 (5th Cir. 1968) (discussing pooling agreements).

²²*Hemingway, Oil and Gas*, *supra* note 21, at 427–29; *Shown v. Getty Oil Co.*, 645 S.W.2d 555, 560 (Tex. App.—San Antonio 1982, writ denied).

²³*Shown*, 645 S.W.2d at 560.

generally covers: (1) the authority of the lessee to pool or combine acreage; (2) the method of designation of the pooled acreage; (3) the effect of production within the unit upon acreage within and outside of the unit; and (4) the allocation of production.²⁴ For example, a lessee may pool acreage if the lease includes the following provision:

Lessee, at its option, is hereby given the right and power to pool or combine the interests granted by this lease, or any portion thereof as to oil and gas, or either of them, with other interests, lease or leases in the immediate vicinity thereof to the extent hereinafter stipulated, when in Lessee's judgement it is necessary or advisable to do so in order to properly explore or develop and operate said leased premises in compliance with the spacing rules of the Railroad Commission of Texas, or other authority, or when to do so would, in the judgment of Lessee, promise the conservation of oil and gas in and under and that may be produced from said premises.²⁵

The clause treats operations anywhere within the unit as if they occurred on all of the land within the unit, and it treats production from a well located on the pooled unit as production occurring on all of the tracts pooled into the unit.²⁶ Pooling units must also comply with state statutes and regulations promulgated by the Texas Railroad Commission.²⁷

A lease's pooling provision triggers several potential areas of law.²⁸ In Texas, pooling implicates both contract and property law because the lessee's authority to pool acreage is a contractual right while an exercise of pooling creates interests in real property.²⁹ These interests in realty emanate

²⁴Hemingway, Oil and Gas, *supra* note 21, at 430–31.22, at 430–31.22, at 430–31.22, at 430–31.

²⁵ALOYSIUS A. LEOPOLD, 4 TEXAS PRACTICE SERIES: LAND TITLES AND TITLE EXAMINATION § 23.75 (3d ed. 2017).

²⁶Browning Oil Co. v. Luecke, 38 S.W.3d 625, 634 (Tex. App.—Austin 2000, pet. denied).

²⁷Gulf Oil Corp. v. Southland Royalty Co., 478 S.W.2d 583, 590 (Tex. Civ. App.—El Paso 1972) *aff'd*, 496 S.W.2d 547 (Tex. 1973); Seagull Energy E & P, Inc. v. R.R. Comm'n, 226 S.W.3d 383, 389 (Tex. 2007).

²⁸Samson Expl., LLC vs. T.S. Reed Properties, Inc., 521 S.W.3d 766, 777–78 (Tex. 2017).

²⁹*Id.*

from a formidably unique common-law doctrine: the cross-conveyance theory.³⁰

C. *The Cross-Conveyance Theory.*

While Texas statutes and regulations governing pooling have a relatively administrative effect, the common-law cross-conveyance theory has several legal consequences. Under this theory, pooling effects a cross-conveyances of interest among the mineral estate owners so that they all own undivided interests under the pooled unit in the proportion their acreage contribution bears to the unit.³¹ This theory differs from the competing contract theory, which states that the agreement to pool merely gives each owner a contractual right to share in the production from premises other than those contributed by the owner.³² While states such as Oklahoma expressly reject the cross-conveyance theory, Texas precedent confirms adoption of the cross-conveyance theory.³³ This section will discuss its legal consequences and the desire by some mineral lessors to negate any perceived intention to invoke it.

1. The Cross-Conveyance Theory's Legal Effects on Pooled Acreage in Texas.

The cross-conveyance theory significantly affects pooled acreage in Texas.³⁴ The most oft-cited case illustrating one of its legal effects is *Veal v.*

³⁰ *Brown v. Smith*, 174 S.W.2d 43, 46 (Tex. 1943).

³¹ *Montgomery v. Rittersbacher*, 424 S.W.2d 210, 213 (Tex. 1968).

³² *Williams & Meyers, Oil and Gas Law*, *supra* note 11, at § 929 (2014).

³³ *Compare Sinclair Crude Oil Co. v. Okla. Tax Comm'n*, 326 P.2d 1051, 1056–57 (expressly rejecting the cross-conveyance theory) with *Veal v. Thomason*, 159 S.W.2d 472, 476 (Tex. 1942); *French v. George*, 159 S.W.2d 566, 569 (Tex. Civ. App.—Amarillo 1942, writ ref'd w.o.m.); *Brown*, 174 S.W.2d at 46; *Belt v. Tex. Co.*, 175 S.W.2d 622, 625 (Tex. Civ. App.—Amarillo 1943, writ ref'd w.o.m.); *Matthews v. Landowners Oil Ass'n*, 204 S.W.2d 647, 652 (Tex. Civ. App.—Amarillo 1947, writ ref'd w.o.m.); *Renwar Oil Corp. v. Lancaster*, 276 S.W.2d 774, 776 (Tex. 1955); *Texaco, Inc. v. Letterman*, 343 S.W.2d 726, 733 (Tex. Civ. App.—Amarillo 1961, writ ref'd n.r.e.); *Minchen v. Fields*, 330 S.W.2d 683, 687 (Tex. Civ. App.—Houston 1959, writ granted), *aff'g in part and rev'g in part*, 345 S.W.2d 282 (Tex. 1961); *Montgomery*, 424 S.W.2d at 213; *MCEN 1996 P'ship v. Glassell*, 42 S.W.3d 262, 263 (Tex. App.—Corpus Christi 2001, pet. denied); *Aery v. Hoskins, Inc.*, 493 S.W.3d 684, 697–98 (all accepting the cross-conveyance theory in Texas).

³⁴ *Kramer & Martin, Law of Pooling*, *supra* note 7, at § 19.02[2][d] (“Texas has been the state where the choice of the cross conveyance theory has had the most influence.”).

Thomason.³⁵ In *Veal*, the plaintiff challenged the title of a lessor within a community lease.³⁶ The plaintiff only served those community lessors whose title he directly attacked; he neither served the remaining community lessors nor the community lessee.³⁷ The defendants contended that the court must dismiss the suit for failure to join all indispensable parties.³⁸ Classifying the non-joined parties as indispensable, the Texas Supreme Court explained:

To our minds, when we look to the substance and intent of this lease contract considered as a whole, the above-recited provisions can have no effect other than to constitute all the lessors of land in the unitized block joint owners, or joint tenants, of all royalties reserved in each of the several leases in such block, the ownership being in the proportion which the acreage of each lease contract bears to the total acreage of the unitized block.³⁹

The *Veal* doctrine stands for the proposition that community leases, pooling clauses, and pooling and unitization agreements create a presumed intent to cross-convey participating lessors' interests.⁴⁰ While *Veal* involved a community lease, Texas courts apply the doctrine to pooling agreements and lease pooling clauses as well.⁴¹

The cross-conveyance theory of title is, in the Texas Supreme Court's own words, "outcome determinative" of several legal issues, four of which are discussed below.⁴² First, the theory affects joinder issues because lawsuits pertaining to activity on tracts within the pooled unit, such as drilling or pooling operations, mandate joinder of parties when a judgment

³⁵ *Id.* ("... *Veal v. Thomason* is perhaps the most oft-cited and important decision, which has clearly placed Texas amount those state that follow the cross-conveyance theory."); *Veal*, 159 S.W.2d at 472.

³⁶ *Veal*, 159 S.W.2d at 472.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 476.

⁴⁰ 116 A.L.R. 1267 (2018).

⁴¹ *Miles v. Amerada Petroleum Corp.*, 241 S.W.2d 822, 825 (Tex. Civ. App.—El Paso 1950, writ ref'd n.r.e.); *Texaco, Inc. v. Letterman*, 343 S.W.2d 726, 733 (Tex. Civ. App.—Amarillo 1961, writ ref'd n.r.e.).

⁴² *Samson Expl., LLC v. T.S. Reed Props., Inc.*, 521 S.W.3d 766, 777–78 (Tex. 2017) (footnote omitted).

necessarily affects their interests.⁴³ The theory's impact on joinder issues can also inhibit the viability of partition actions and class action certifications.⁴⁴ Second, the cross-conveyance theory restricts the proper venue of a civil suit to one exclusive option: the county in which the property lies.⁴⁵ Third, oil and gas leases which effectively cross-convey interests upon an authorized exercise of pooling by a lessee potentially subjects tracts of land to taxation by multiple appraisal districts.⁴⁶ And fourth, the theory implicates the Rule Against Perpetuities.⁴⁷

a. Joinder.

The most notorious of those issues is the indispensable party problem.⁴⁸ The application of the *Veal* doctrine in Texas to determine indispensable parties presented so much difficulty that frustrated prospective plaintiffs "just forget the matter."⁴⁹ However, since *Veal*, a permissive joinder rule replaced these traditional categories of necessary and indispensable parties after an amendment to the Texas Rule of Civil Procedure.⁵⁰ The purpose of the amendment was two-fold: to lessen the number of indispensable parties and to give the trial court discretion to hear the case if doing so did not prejudice non-joined parties.⁵¹

For example, in *Sabre Oil & Gas Corp. v. Gibson*, plaintiffs disputed the validity of a pooled unit.⁵² The lessee-defendant filed a plea in abatement arguing that the plaintiff must join the remaining 60 royalty unit-

⁴³TEX. R. CIV. P. 39.

⁴⁴See MCEN 1996 P'ship v. Glassell, 42 S.W.3d 262, 263–64 (Tex. App.—Corpus Christi 2001, pet. denied) (holding that a pooling agreement's provisions effectively waived the owners' statutory right to demand a partition due to the cross-conveyancing of interests); Matthews v. Landowners Oil Ass'n, 204 S.W.2d 647, 651 (Tex. Civ. App.—Amarillo 1947, writ ref'd n.r.e.) (holding that the plaintiffs failed to meet the requirements for class-action certification).

⁴⁵TEX. CIV. PRAC. & REM. CODE ANN. § 15.011 (West 2015).

⁴⁶TEX. CONST. art VIII, § 11; Chambers v. San Augustine Cty. Appraisal Dist., 514 S.W.3d 420, 423–24 (Tex. App.—Tyler 2017, no pet.).

⁴⁷Kramer & Martin, Law of Pooling, *supra* note 7, at § 19.01[2][b][i].

⁴⁸Kramer & Martin, Law of Pooling, *supra* note 7, at § 19.01[2] ("Perhaps in no other area than the determination of who are indispensable parties has the choice between the contract and cross-conveyance theory led to the greatest doctrinal conflict.") (footnote omitted).

⁴⁹Williams & Meyers, Oil and Gas Law, *supra* note 11, at § 928 (quoting Robert H. Dedman, *Indispensable Parties in Pooling Cases*, 9 SW. L.J. 27, 29 (1955)).

⁵⁰TEX. R. CIV. P. 39.

⁵¹Kramer & Martin, Law of Pooling, *supra* note 7, at § 19.01[2][a][i].

⁵²72 S.W.3d 812, 814 (Tex. App.—Eastland 2002, pet. denied).

owners to the suit.⁵³ Instead of treating the issue as whether it had jurisdiction to hear the case, the court focused its ability to resolve the issue without prejudice to the non-joined parties.⁵⁴ Because the issue at hand was whether the operator had the authority to pool the lessor's interest, the plaintiffs did not need to join the other pooled interest owners.⁵⁵ The court found that the lessee pooled the plaintiffs' interests, and since the unit was not void, the suit did not affect the non-joined parties' interests.⁵⁶ However, if the court found that the lessee did *not* validly pool the plaintiffs' interests, the invalid pooling would significantly affect the non-joined parties' interests. Thus, by virtue of the cross-conveyance theory, the plaintiffs needed to join the non-joined parties in that instance. While the amendment to the Texas Rule of Civil Procedure since *Veal* alleviated some joinder problems, it did not eliminate them.⁵⁷ The cross-conveyance theory significantly affects joinder problems, particularly when a party in a suit attacks the validity of a pooled unit.⁵⁸

b. Venue.

Second, the cross-conveyance theory also determines the proper venue for actions involving a pooling agreement's interpretation or validity. In Texas, parties must bring actions affecting the title of realty in the trial court of general jurisdiction in the county in which all or a part of the property lies.⁵⁹ Because Texas is a cross-conveyance jurisdiction, a suit concerning a lease's pooling provisions greatly affects the titles of realty after

⁵³*Id.* at 815.

⁵⁴*Id.* at 815–16.

⁵⁵*Id.* at 816.

⁵⁶*Id.* at 817.

⁵⁷While a class action lawsuit would seem to avoid the obstacle of the indispensable party problem, parties struggle to meet the requirements for class-action designation under the Texas Rules of Civil Procedure. *See* *Matthews v. Landowners Oil Ass'n*, 204 S.W.2d 647, 651–52 (Tex. Civ. App.—Amarillo 1947, writ ref'd n.r.e.) (holding that plaintiffs attacking the validity of a pooling agreement did not meet class-action status); *Robertson v. Blackwell Zinc Co.*, 390 S.W.2d 472, 472 (Tex. 1965) (per curiam) (holding that plaintiffs under a unitization agreement did not meet class-action status); *Amoco Prod. Co. v. Hardy*, 628 S.W.2d 813, 817 (Tex. App.—Corpus Christi 1981, writ dism'd w.o.j.) (holding that plaintiffs did not meet class-action status).

⁵⁸*Kramer & Martin, Law of Pooling*, *supra* note 7, at § 19.01[2][a][i] (“Courts should pay greater attention to lawsuits asserting that a pooling is invalid because non-pooled owners’ interest may be *permanently harmed* by the exclusion of a leased interest from the pooled or unitized tract.”) (emphasis added).

⁵⁹TEX. CIV. PRAC. & REM. CODE ANN. § 15.011 (West 2015).

interpreting the agreement because royalty owners receive interests in realty of all the other owners' interests.⁶⁰ Practically, no choice of venue therefore exists since judicial interpretation of a pooling agreement necessarily affects titles to real property.⁶¹

In *Renwar Oil Corp. v. Lancaster*, lessors disputed the validity of a unitization agreement in which the lessee entered and alleged underpayment of oil royalties.⁶² While the minerals lied in Nueces County, the plaintiffs filed suit in their county of residence, which was Dallas County.⁶³ The Texas Supreme Court concluded that, despite the plaintiffs' attempt to allege a contract construction issue, the suit actually constituted an effort to remove cloud from title because the parties cross-conveyed interests in realty.⁶⁴ Therefore, the only appropriate venue was in Nueces County.⁶⁵

c. Tax Consequences.

Third, the cross-conveyance theory imposes significant tax consequences on pooled units which contain property located in adjacent counties. The theory allows counties to assess ad valorem taxes against all interest owners participating in a pooled unit (not just tract owners hosting the drill site).⁶⁶ Under the Texas Tax Code, an appraisal district has the authority to assess taxes on behalf of a city located within its county.⁶⁷ A taxing unit may tax real property, which includes a "mineral in place" by definition, if it lies within the unit's boundaries.⁶⁸ In order to collect taxes, the appraisal district must prove "the property it seeks to assess has a

⁶⁰ Kramer & Martin, Law of Pooling, *supra* note 7, at § 19.01[2][b][iii].

⁶¹ *Id.*

⁶² 276 S.W.2d 774, 775 (Tex. 1955).

⁶³ *Id.* at 774–75.

⁶⁴ *Id.* at 776 ("Since these agreements are essentially a conveyance of an interest in realty . . . this constitutes an effort to remove cloud from title, even though alleged as an effort to construe a contract.") (citing *Veal v. Thomason*, 159 S.W.2d 472 (Tex. 1942)).

⁶⁵ *Id.*

⁶⁶ Brief on the Merits for Petitioner at 15, *Samson Expl., LLC v. T.S. Reed Props., Inc.*, 521 S.W.3d 766 (Tex. 2017) (No. 15-0886).

⁶⁷ TEX. TAX CODE ANN. § 6.01 (West 2015).

⁶⁸ TEX. TAX CODE ANN. § 1.04(2)(D) (West 2015); TEX. TAX CODE ANN. § 21.01 (West 2015).

taxable situs within the limits of its boundaries,” or else it lacks the authority to include the property in its tax assessment.⁶⁹

Haider is illustrative of the interplay between this statutory requirement and the cross-conveyance theory.⁷⁰ That court concluded that when a party voluntarily pools a mineral interest located in one county into a unit that contains interests located in an adjacent county, the adjacent county’s appraisal district can assess the interests located outside its boundaries for ad valorem taxes.⁷¹ The appraisal district has this ability due to the effect of the cross-conveyance theory.⁷² The appraisal district may treat the owner of the interest located outside the taxing county as an undivided owner of the interests within the boundaries of the pooled unit, thus including lands located within the taxing county’s boundary.⁷³

d. The Rule Against Perpetuities.

Fourth, the cross-conveyance theory implicates the rule against perpetuities, which states that “no interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of interest.”⁷⁴ The rule does not apply to present or future interests that immediately vest at their creation.⁷⁵ The execution of an oil and gas lease conveys a present interest in fee simple determinable and in the lessor a future interest (the possibility of reverter).⁷⁶ Under the cross-conveyance approach, the rule applies to pooling agreements because it involves a cross-conveyance of property interests.⁷⁷ The rule can also apply to oil and gas leases.⁷⁸ There are only two leading cases on the issue, and neither of

⁶⁹Oake v. Collin Cty., 692 S.W.2d 454, 455 (Tex. 1985); Devon Energy Prod., L.P. v. Hockley Cty. Appraisal Dist., 178 S.W.3d 879, 883 (Tex. App.—Amarillo 2005, pet. denied).

⁷⁰Haider v. Jefferson Cty. Appraisal Dist., No. 09-14-00311-CV, 2016 WL 1468757 at *1 (Tex. App.—Beaumont Apr. 14, 2016, pet. denied) (mem. op., not designated for publication).

⁷¹*Id.* at *4.

⁷²Kramer & Martin, Law of Pooling, *supra* note 7, at § 19.01[2][b][v].

⁷³*Id.*

⁷⁴BP Am. Prod. Co. v. Laddex, Ltd., 513 S.W.3d 476, 479 (Tex. 2017) (quoting Peveto v. Starkey, 645 S.W.2d 770, 772 (Tex. 1982)).

⁷⁵BP Am. Prod. Co., 513 S.W.3d at 480.

⁷⁶Luckel v. White, 819 S.W.2d 459, 464 (Tex. 1991); Jupiter Oil Co. v. Snow, 819 S.W.2d 466, 468 (Tex. 1991).

⁷⁷6 HOWARD R. WILLIAMS & CHARLES J. MEYERS, OIL AND GAS LAW § 936(4) (2017).

⁷⁸See generally Nelson Roach, Note, *The Rule Against Perpetuities: The Validity of Oil and Gas Top Leases and Top Deeds in Texas After Peveto v. Starkey*, 35 BAYLOR L. REV. 399 (1983).

them are Texas cases.⁷⁹ One court adopted the view that, depending on the exact language, the rule might invalidate a lease's pooling clause since property interests are cross-transferred.⁸⁰ The other court reasoned that pooling clause itself does not create remotely vesting future interests.⁸¹ Texas undoubtedly recognizes that the rule applies to oil and gas leases, but case law discusses it mainly in the context of top leases and not pooling clauses.⁸² Due to this uncertainty, parties still draft leases to avoid any potential conflicts with the rule due to their doubt as to the rule's implications in cross-conveyance jurisdictions.⁸³

The legal effect of the cross-conveyance theory does not end with these four areas. Other legal effects of the doctrine include application of the statute of frauds, well density and spacing regulations, recording statutes, and the bona fide purchaser doctrine.⁸⁴ To avoid the theory's proclivity for leaking into other areas of law, some lessors may wish to disclaim the theory's application to a lessee exercising its right to pool under the lease by negating any intent to cross-convey interests to other participating interest owners within the unit. Parties attempt this to achieve this goal by adding an express disclaimer of cross-conveyance to the lease's pooling provision.

⁷⁹4 HOWARD R. WILLIAMS & CHARLES J. MEYERS, OIL AND GAS LAW § 670 (2017) (discussing *Kenoyer v. Magnolia Petroleum Co.*, 245 P.2d 176 (Kan. 1952) and *Phillips Petroleum Co. v. Peterson*, 218 F.2d 926 (10th Cir. 1954), *cert. denied*, 349 U.S. 947 (1955)).

⁸⁰*Phillips Petroleum Co.*, 218 F.2d at 930. However, this case was within a jurisdiction that applied the contract theory. *Id.*

⁸¹*Kenoyer*, 245 P.2d at 179 (Kan. 1952). This case seems to reject the cross-conveyance theory. *Id.*

⁸²*See* BP Am. Prod. Co. v. Laddex, Ltd., 513 S.W.3d 476, 479 (Tex. 2017) (quoting *Peveto v. Starkey*, 645 S.W.2d 770, 772 (Tex. 1982)) (discussing the applicability of the rule against perpetuities to top leases). Top leases are subsequent oil and gas leases covering mineral interests already subject to a valid existing lease. *Id.* at 478 n.1.

⁸³*Kramer & Martin, Law of Pooling*, *supra* note 7, at § 19.01[2][b][i] (“... [T]he fear of the rule is such in the legal profession that parties still draft instruments designed to avoid rule problems.”).

⁸⁴*See* *Dixon v. Amoco Prod. Co.*, 150 S.W.3d 191, 194 (Tex. App.—Tyler 2004, *pet. denied*) (citing *Morrow v. Shotwell*, 477 S.W.2d 538, 539 (Tex. 1972)) (discussing the requisite language needed to satisfy Texas's standard regarding property descriptions); *MCEN 1996 P'ship v. Glassell*, 42 S.W.3d 262, 263–64 (Tex. App.—Corpus Christi 2001) (discussing partition issues); *Exxon Corp. v. R.R. Comm'n*, 993 S.W.2d 704, 710–11 (Tex. App.—Austin 1999, *writ denied*) (discussing Statewide Rule 38); *Martin & Kramer, Oil and Gas Law*, *supra* note 11, at § 929.1(7) (citing *German, Oil and Gas—Formation of Pooling Unit Does Not Defeat Outstanding Equitable Interests*, 31 TEX. L. REV. 340 (1953)).

2. The Express Disclaimer of Cross-Conveyance in a Pooling Provision.

The cross-conveyance theory implicates so many unintended legal consequences that interest owners wish to avoid them altogether. To prevent these unintended consequences, lessors commonly include provisions known as “disclaimers of cross conveyance” within their oil and gas leases.⁸⁵ For example, a lessor may attempt to disclaim using the following language: “Nothing contained in this agreement shall be deemed to result in the transfer of all or any part of any leasing party’s legal title in any tract to any other party.”⁸⁶

A disclaimer using this language clarifies the lessors’ intent not to convey interests within their respective tracts to other interest owners contributing acreage to the pooled unit. Thus, the parties purport to eliminate the application of the cross-conveyance theory to when the lessee exercises its contractually-granted authority to pool tracts.

III. *SAMSON EXPLORATION, LLC v. T.S. REED PROPS., INC.*: PANDORA’S BOX OPENS.

Samson Exploration, LLC (“Samson”) was a lessee under adjacent East Texas Mineral leases.⁸⁷ The lessors authorized Samson under a pooling provision to pool their leases but required that the pooled units be conformed to the terms of the leases’ pooling provisions.⁸⁸ However, Samson’s pooling unit designations generated a dispute about the production attributable to each pooled lease.⁸⁹ This section explains how *Samson* as “Pandora” opened a Box unleashing legal troubles into the realm of oil and gas law.

A. *The Facts.*

Samson first created the Black Stone Minerals A No. 1 Gas Unit (Black Stone Minerals Unit), containing boundaries of 6,000 to 13,800 feet

⁸⁵ Kramer & Martin, *Law of Pooling*, *supra* note 7, at § 8.02 (“It is not uncommon to include in a pooling clause language that is designed to negate a cross-conveyance of property interests.”).

⁸⁶ LEO J. HOFFMAN, *VOLUNTARY POOLING AND UNITIZATION* 168 n.43 (1954).

⁸⁷ *Samson Expl., LLC vs. T.S. Reed Props., Inc.*, 521 S.W.3d 766, 771 (Tex. 2017).

⁸⁸ *Id.*

⁸⁹ *Id.*

subsurface.⁹⁰ Samson obtained production from two wells within the unit's boundaries.⁹¹ The first well produced from 12,304 to 12,332 feet subsurface, and the second well produced from 13,150 to 13,176 feet subsurface.⁹² The Joyce DuJay lease hosted the second well.⁹³ Upon obtaining production from the unit's two wells, Samson unilaterally amended the unit's boundaries to reduce surface acreage committed to the unit and to change the unit's depths to 12,400 feet and below.⁹⁴ This amended unit, renamed the Joyce DuJay No. 1 Gas Unit (the "Amended Unit"), effectively excluded the first, shallower well from its boundaries.⁹⁵

After amending the unit, Samson drilled a third well on the same DuJay lease, and it produced from 12,197 to 12,342 feet subsurface.⁹⁶ Then, Samson retroactively designated a new unit covering the same depth at which the third well produced: the Joyce Dujay A No. 1 Gas Unit (the "Overlapping Unit").⁹⁷ Although the third well produced above the Amended Unit's subsurface boundaries, the Overlapping Unit's boundaries extended to "production occur[ing] below a depth of 12,000 feet," therefore encompassing subsurface depths that overlapped the Amended Unit's depths.⁹⁸ Consequentially, Samson included the second well in both the Amended Unit and the Overlapping Unit.⁹⁹

Samson paid royalties on the second well only to the Amended Unit stakeholders and not to the Overlapping Unit stakeholders.¹⁰⁰ Under a breach-of-contract claim, the Overlapping Unit stakeholders contended Samson breached its obligations under the lease and pooling unit designation by failing to pay royalties from the second well.¹⁰¹ Samson denied any intent to create overlapping units and claimed its failure to

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* Samson amended the unit because the lessee of the first well exercised a contractual right against pooling its mineral interests. Samson did not attribute any production from the first well to the Amended Unit. *Id.*

⁹⁶ *Id.* at 772.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 773.

designate a depth limitation in the Overlapping Unit designation was a mistake.¹⁰²

B. The Outcome.

Before the Texas Supreme Court, Samson presented its main contract-avoidance theory:

- (1) pooling necessarily effects a cross-conveyance of title;
- (2) a pooled unit is not valid unless title is cross-conveyed;
- (3) the production zone for the disputed well was previously committed to another pooled unit; (4) title cannot be conveyed twice; and (5) as a result, the subsequently pooled unit is invalid for purposes of the agreement to pay royalties.¹⁰³

Samson relied on the argument that a contractual obligation to pay royalties on the second well is unenforceable unless the unit designation was capable of effecting a cross-conveyance of title of the related subsurface depths.¹⁰⁴

The Overlapping Unit stakeholders countered that argument by first explaining that the suit was a contract dispute rather than a title dispute.¹⁰⁵ Moreover, they asserted that parties may expressly disclaim cross-conveyance of title, and therefore pooling does not require a cross-conveyance between lessors.¹⁰⁶

Affirming the Ninth Court of Appeals in Beaumont, the Texas Supreme Court sided with the royalty owners and briefly touched on the cross-conveyance theory in Texas:

In Texas, the cross-conveyance theory originated as a theory of contractual intent . . . *Though we have never expressly considered whether cross-conveyance of title may be contractually disclaimed . . .* Samson' argument in this case is a theoretical construct that holds no water. . . . [W]e discern no impediment to enforcing Samson's obligations in this case under a contract theory even if the pooling

¹⁰²*Id.*

¹⁰³*Id.* at 770. Several other issues and theories were presented, but they are irrelevant to this discussion.

¹⁰⁴*Id.* at 776.

¹⁰⁵*Id.*

¹⁰⁶*Id.* at 777 (footnote omitted).

designation failed to effect a conveyance of title. The other issues the parties raise are interesting, but ultimately immaterial to the one narrow issue presented.¹⁰⁷

The reluctance by the court to expressly answer whether a lessor may expressly disclaim a cross-conveyance of title without adversely affecting the validity of a pooled unit creates uncertainty as to how Texas law would answer the question. While no Texas courts definitively address this issue, other state courts do.¹⁰⁸ Examining those cases first requires an evaluation of Samson's argument and its merits.

C. Samson's Argument: Legitimate or an Inadvertent Opening of the Box?

In its petition for review, Samson set forth its argument that a pooled unit is not valid unless title is capable of effecting a cross-conveyance and that the Texas Supreme Court rejects the application of contract principles to pooling in lieu of cross-conveyancing principles.¹⁰⁹ Citing the seminal Texas cases clearly adopting the cross-conveyance theory to pooling, Samson's aim was to successfully argue that tracts already contributing to a pooled unit cannot simultaneously re-cross-convey interests in title and contribute to a second pooled unit.¹¹⁰ To achieve this conclusion, Samson first had to establish that a cross-conveyance of interests is a prerequisite to a proper pooling of acreage, and the failure to do so invalidates the unit.

Samson veiled lessors' ability to expressly disavow cross-conveyancing principles as "questionable[.]" The petition doubted that a party may, "by agreement, convert a transaction involving property interests into a mere contractual arrangement."¹¹¹ It is the view of this Comment that Samson's position is not legitimate. Samson cited two authorities to support its view.¹¹² One was a treatise frequently cited by the Texas Supreme Court

¹⁰⁷*Id.* at 777–78 (emphasis added) (footnotes omitted) (quotation omitted).

¹⁰⁸6 HOWARD R. WILLIAMS & CHARLES J. MEYERS, OIL AND GAS LAW § 930.8 (2017) ("None of the [Texas] cases directly speak to the issue of can the parties by express agreement choose to enter into a contract-based, rather than a property-based, relationship.").

¹⁰⁹Petition for Review at 9–10, *Samson Expl., LLC v. T.S. Reed Properties, Inc.*, 521 S.W.3d 766 (Tex. 2017) (No. 15-0886).

¹¹⁰*Id.* at 8–9.

¹¹¹*Id.* at 11.

¹¹²*Id.*

indicating that the authors were “not so sanguine on the matter.”¹¹³ The authors correctly pointed out that parties to an agreement may not displace certain laws for any and all purposes.¹¹⁴ Their position doubted a party’s ability to characterize an agreement as a “mere” contract to effectively determine important legal consequences, such as joinder issues or the rule against perpetuities.¹¹⁵ However, this treatise simply stated that the legal viability of a disclaimer was “uncertain.”¹¹⁶ A present legal uncertainty does not equate with impossibility.

Samson then cited *Wagner & Brown* as its second authority to point out that leases containing disclaimers in their pooling provisions have come before the Texas Supreme Court before and that the court did not determine the effect of such language.¹¹⁷ *Wagner & Brown* fails to substantially bolster Samson’s position.¹¹⁸ While true that the court did not comment on a disclaimer’s effect, the pooling provision in *Wagner & Brown* actually contained explicit language disclaiming any intent to effect a cross-conveyance of interests.¹¹⁹ Yet, the court held that the pooled unit did not terminate as to the leased acreage in dispute.¹²⁰ *Wagner & Brown* is also distinguishable because that case addressed whether the lease’s automatic termination also terminated the lease’s participation in a unit.¹²¹ Furthermore, the court declined to decide the legal questions based on general principles “rather than the terms of the particular documents involved.”¹²² This approach by the Texas Supreme Court supports

¹¹³*Id.* See also e.g., *Hysaw v. Dawkins*, 483 S.W.3d 1, 12 (Tex. 2016) (citing 2 HOWARD R. WILLIAMS & CHARLES J. MEYERS, OIL AND GAS LAW § 327.2 (Patrick H. Martin & Bruce M. Kramer eds., 2015)); *Exxon Corp. v. Emerald Oil & Gas Co.*, 348 S.W.3d 194, 211 (Tex. 2011) (citing 4 HOWARD R. WILLIAMS & CHARLES J. MEYERS, OIL AND GAS LAW § 671.4 (3d ed. 2008)); *Arkoma Basin Expl. Co. v. FMF Assocs. 1990-A, Ltd.*, 249 S.W.3d 380, 389 n.31 (Tex. 2008) (citing 8 HOWARD R. WILLIAMS & CHARLES J. MEYERS, OIL AND GAS LAW 769 (2005)); *Coastal Oil & Gas Corp. v. Garza Energy Trust*, 268 S.W.3d 1, 18 n.59 (Tex. 2008) (citing 5 HOWARD R. WILLIAMS & CHARLES J. MEYERS, OIL AND GAS LAW § 825.2 (2007)).

¹¹⁴ 6 HOWARD R. WILLIAMS & CHARLES J. MEYERS, OIL AND GAS LAW § 929.2 (2017).

¹¹⁵*Id.*

¹¹⁶*Id.*

¹¹⁷Petition for Review at 12, *Samson Expl., LLC vs. T.S. Reed Props., Inc.*, 521 S.W.3d 766 (Tex. 2017) (No. 15-0886).

¹¹⁸282 S.W.3d 419 (Tex. 2008).

¹¹⁹*Id.* at 422 (“Pooling hereunder shall not constitute a cross-conveyance of interests.”).

¹²⁰*Id.* at 423.

¹²¹*Id.* at 424.

¹²²*Id.*

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upholding express contractual language more than what Samson advocated. Samson's conclusion that *Wagner & Brown* bolstered its argument is therefore rather perfunctory upon closer scrutiny.

Samson, attempting to avoid paying double royalties on the same production, presented every legal argument possible to evade its unintentional blunder. By arguing that a pooling must cause a cross-conveyance of interests to be valid, Samson's theory essentially means that the mere presence of a disclaimer within a lease renders any pooling of that acreage invalid *per se*. Like Pandora herself, Samson inadvertently opened a Box. This Box needs closing, and the first step to closing it is to examine relevant jurisprudence.

IV. CLOSING THE BOX: JURISPRUDENCE AND ARRIVING AT THE RIGHT ANSWER.

Before proposing an answer to closing this Pandora's Box, examining other states' solutions sheds light on what result is most appropriate. In light of these illustrations, this section then sets forth the solution proposed by this Comment and the reasons supporting this position.

A. Discussion of Illustrative Case Law.

Three examples of courts' recognition of disclaimers of cross-conveyance in other jurisdictions support upholding units' validity when leased acreage is subject to a cross-conveyance. While Texas law does not squarely address disclaimers' effect on a pooled unit's validity, there are some cases that aid in predicting what the Texas Supreme Court would likely hold.

1. Recognition of Disclaimers in Other Jurisdictions.

These three cases point to a conclusion that disclaimers do not invalidate a pooled unit, but for reasons discussed below, they are inadequate to predict a concrete holding under Texas law. One of the earliest cases addressing the parties' rights to structure their relationship is *Phillips Petroleum Co. v. Peterson*.¹²³ Applying Utah law, the court concluded that the effect of unitization did not cause cross-transfers of interests because the unitization agreement's disclaimer clearly so

¹²³218 F.2d 926 (10th Cir. 1954), *cert. denied*, 349 U.S. 947.

provided.¹²⁴ Then, in California, “a state firmly committed to the cross-conveyance theory,” courts recognize that parties are free to contain express language indicating a choice between the two theories.¹²⁵ The rule in *Tanner* states that absent express language indicating a choice of theories, the cross-conveyance theories applies by default.¹²⁶ Lastly, in a federal case applying Montana law, the court in *Stumpf v. Fidelity Gas Co.* used a unitization agreement’s provision to correctly conclude that the parties did not intend to cross-convey property interests.¹²⁷

The cases, while illustrative, are alone insufficient because their results conflict with the nature of Texas oil and gas principles. First, unlike Utah, Texas adopted the cross-conveyance theory over the contract theory.¹²⁸ The Tenth Circuit in *Phillips Petroleum Co. v. Peterson* followed what it believed to be the more persuasive case authority adopting the contract-theory doctrine rather than the cross-conveyance theory.¹²⁹ In fact, no state court in Utah currently has decisions that expressly adopt either theory.¹³⁰ Second, the California court in *Tanner* analyzed a compulsory pooling statute and concluded that the legislature did not intend to effect a cross-conveyance upon use of the state’s compulsory pooling procedure.¹³¹ Texas encourages the use of voluntary pooling agreements over compulsory pooling, and its compulsory pooling statute is distinct from other states’ controlling statutes, such as that of California.¹³²

¹²⁴*Id.* at 930.

¹²⁵Kramer & Martin, Law of Pooling, *supra* note 7, at § 19.02[2][a].

¹²⁶*Tanner v. Title Ins. & Trust Co.*, 129 P.2d 383, 386 (Cal. 1946); Kramer & Martin, Law of Pooling, *supra* note 7, at § 19.02[2][a]. (“The *Tanner* rule merely states that where the community lease or pooling or unitization agreement does not contain express language indicating a choice of theories, the courts will find that a cross-conveyance of property interests has occurred.”).

¹²⁷294 F.2d 886, 894–95 (9th Cir. 1961). The provision read in part: “that nothing herein contained shall be construed as affecting or passing title to any lands, leases, or permits, but the Operator shall acquire operating rights only.” *Id.*

¹²⁸*See supra* note 33.

¹²⁹*Phillips Petroleum Co.*, 218 F.2d at 931 n.7; Kramer & Martin, Law of Pooling, *supra* note 7, at § 19.02[1][c].

¹³⁰Kramer & Martin, Law of Pooling, *supra* note 7, at § 19.02[1][c] (“While no state court decision has adopted either theory, an opinion of the Tenth Circuit applying Utah law apparently assumes that Utah would adopt a contract theory rather than a cross-conveyance theory.”).

¹³¹Kramer & Martin, Law of Pooling, *supra* note 7, at § 19.02[2][a].

¹³²*Am. Operating Co. v. R.R. Comm’n of Tex.*, 744 S.W.2d 149, 153 (Tex. App.—Houston [14th Dist.] 1987, writ denied) (stating that the purpose of the compulsory pooling legislation of

And third, Texas differs from Montana in that Texas is clear as to which theory it follows.¹³³ Labeled as “a practitioner’s nightmare and a law professor’s dream,” *Stumpf* presents a plethora of problems.¹³⁴ Along with states like Louisiana, Montana’s results contain inconsistent applications of the cross-conveyance or contract theory.¹³⁵ While the court discussed the *Veal* doctrine at great length, it failed to clearly adopt or reject it.¹³⁶ Additionally, the express disclaimer is one of four imprecise reasons that explains the court’s ultimate holding.¹³⁷ Whether Montana follows the cross-conveyance or contract theory is “unclear at best.”¹³⁸ Thus, we must examine whether an answer lies in Texas’s case law.

2. The Lack of Authorities Addressing the Result in Texas.

No Texas cases directly close the Box opened by Samson, but five relevant cases help identify the correct approach Texas courts would use to determine a disclaimer’s effect on a unit’s validity.¹³⁹ These cases are: (1) *Howell* in 1968, (2) *Atlantic Richfield* in 1983, (3) *Puckett* in 1985, (4) *HS Resources* in 2003, and (5) *Chambers* in 2017.¹⁴⁰

The Fifth Circuit in *Howell* laid out and discussed controlling oil and gas principles in Texas law to resolve a dispute involving communitization.¹⁴¹ It cited a Texas Supreme Court explanation supporting

the Mineral Interest Pooling Act known as “MIPA” is to provide incentive or encouragement to voluntary pooling among parties).

¹³³ See *supra* note 33.

¹³⁴ Kramer & Martin, *Law of Pooling*, *supra* note 7, at § 19.02[3][b].

¹³⁵ *Id.*

¹³⁶ *Stumpf v. Fid. Gas Co.*, 294 F.2d 886, 894–95 (9th Cir. 1961).

¹³⁷ Kramer & Martin, *Law of Pooling*, *supra* note 7, at § 19.01[3] (“[T]he express clause language is merely one of several alternative holdings that explains the ultimate result.”).

¹³⁸ *Id.* at § 19.02[1][c].

¹³⁹ 6 HOWARD R. WILLIAMS & CHARLES J. MEYERS, *OIL AND GAS LAW* § 930.8 (2017) (“None of the [Texas] cases directly speak to the issue of can the parties by express agreement choose to enter into a contract-based, rather than a property-based, relationship.”).

¹⁴⁰ *HS Res., Inc. v. Wingate*, 327 F.3d 432 (5th Cir. 2003); *Howell v. Union Prod. Co.*, 392 F.2d 95 (5th Cir. 1968); *Chambers v. San Augustine Cty. Appraisal Dist.*, 514 S.W.3d 420 (Tex. App.—Tyler 2017, no pet.); *Puckett v. First City Nat’l Bank*, 702 S.W.2d 232 (Tex. App.—Eastland 1985, writ ref’d n.r.e.); *Atl. Richfield Co. v. Exxon Corp.*, 663 S.W.2d 858 (Tex. Civ. App.—Houston [14th] Dist. 1983), *rev’d on other grounds*, 678 S.W.2d 944 (Tex. 1984).

¹⁴¹ *Howell v. Union Prod. Co.*, 392 F.2d 95, 98 (5th Cir. 1968). The purpose of unitization agreements is to maintain pressure levels, to conduct repressuring operations, and/or to conduct

the notion that legal consequences first hinge on whether there are express agreements contrary to default common law rules.¹⁴² The court then noted potential flexibility in the cross-conveyance theory's application in *Jurek*.¹⁴³ *Jurek* possibly indicates approval of applying the contract theory in pooling contexts outside of community and joint leases.¹⁴⁴ Characterizing the discussion of these two theories in Texas as a "theoretical dialogue[,]” the court observed that Texas jurisprudence indicates a “willingness to temper property principles with contract principles and thus avoid potentially harsh results . . .”¹⁴⁵ This Fifth Circuit opinion is significant because it supports holding that disclaimers of cross-conveyance in pooling provisions do not invalidate a pooled unit.¹⁴⁶

Then, in *Atlantic Richfield*, the Houston Court of Civil Appeals found that the terms of a joint operating agreement prevented a cross-conveyance of interests in natural gas.¹⁴⁷ The plaintiff, defendant, and other oil companies executed joint operating agreements to expand a gasoline plant and construct additional gas gathering facilities.¹⁴⁸ Pursuant to one of the agreements, the parties agreed to apportion ownership of the produced gas in proportion to the ownership interest in the gas reserves in the field.¹⁴⁹ The defendant sought to exercise a termination clause within the contract.¹⁵⁰ To avoid the termination clause, the plaintiff argued that the original joint operating agreements effected a cross-conveyance of gas in place, similar to

secondary recovery operations. 1A NANCY SAINT-PAUL, SUMMERS OIL & GAS § 6:25 (3d ed. 2017). This purpose differs from the purpose of pooling. *See infra* Section II.A.

¹⁴²*Howell*, 392 F.2d at 98. (quoting Justice Calvert of the Texas Supreme Court in *Southland Royalty Co. v. Humbler Oil & Ref. Co.*, 249 S.W.2d 914, 916 (Tex. 1952)).

¹⁴³*Id.* at 103 n.13 (citing *Sohio Petroleum Co. v. Jurek*, 248 S.W.2d 294 (Tex. Civ. App.—Fort Worth 1952, writ ref'd n.r.e.)). Although it stands as an outlier in Texas case law, *Jurek* rejected the application of the cross-conveyance theory to the pooling of acreage by means other than community and joint leases. *Jurek*, 248 S.W.2d at 298.

¹⁴⁴*Jurek*, 248 S.W.2d at 298.

¹⁴⁵*Howell*, 392 F.2d at 103 n.13.

¹⁴⁶This opinion is particularly significant when viewed in light of the Texas Supreme Court's disposition of *Jurek* as writ refused, no reversible error.

¹⁴⁷*Atl. Richfield Co. v. Exxon Corp.*, 663 S.W.2d 858, 868 (Tex. Civ. App.—Houston [14th Dist.] 1983), *rev'd on other grounds*, 678 S.W.2d 944 (Tex. 1984).

¹⁴⁸*Id.* at 861.

¹⁴⁹*Id.* at 868.

¹⁵⁰*Id.* at 861. The reasons for the defendant seeking termination of the contract are not relevant to this discussion.

that of a pooling provision within an oil and gas lease.¹⁵¹ The court affirmed the trial court's decision in that the contract's express language did not show an intent to convey an interest in the gas in place.¹⁵²

Next, in *Puckett*, the court interpreted a lease's royalty payment language (located within a pooling clause) to sufficiently negate an intent to cross-convey royalty interests.¹⁵³ In that case, the plaintiffs argued that the pooling of their acreage in a gas production unit resulted in a cross-conveyance between all royalty owners under the *Veal* doctrine.¹⁵⁴ The court disagreed because the lease expressly treated the entire acreage pooled in the unit as if it were included in the lease for all purposes except royalty payments from the pooled unit's production.¹⁵⁵ The relatively broad leasehold language sufficiently disclaimed an intent to cross-convey interests.¹⁵⁶

While *HS Resources* was a federal case in the Fifth Circuit, the federal rules under which the parties brought the issues mirror that of the Texas Rule of Civil Procedure governing joinder.¹⁵⁷ In that case, the lessee sought a declaratory judgment that the lessee properly pooled the lessor's interest under the lease terms.¹⁵⁸ The lessor argued that the suit required joinder of the other royalty owners because the lease effected a cross-conveyance of interests.¹⁵⁹ However, the Fifth Circuit rejected that argument because the lease language sufficiently disclaimed any intention to cross-convey interests.¹⁶⁰

Finally, in *Chambers*, the court concluded that a lease's pooling clause with language stipulating that an exercise of pooling did not transfer any interest sufficiently negated an intent to cross-convey any pooled interests.¹⁶¹ The lessee pooled the plaintiff-lessors in a cross-county unit.¹⁶²

¹⁵¹ *Id.* at 865–66.

¹⁵² *Id.* at 869.

¹⁵³ *Puckett v. First City Nat'l Bank*, 702 S.W.2d 232, 237 (Tex. App.—Eastland 1985, writ ref'd n.r.e.).

¹⁵⁴ *Id.* at 237.

¹⁵⁵ *Id.*

¹⁵⁶ *Kramer & Martin, Law of Pooling*, *supra* note 7, at § 19.01[3].

¹⁵⁷ *HS Res., Inc. v. Wingate*, 327 F.3d 432, 439 n.13 (5th Cir. 2003).

¹⁵⁸ *Id.* at 437.

¹⁵⁹ *Id.* at 438.

¹⁶⁰ *Id.*

¹⁶¹ *Chambers v. San Augustine Cty. Appraisal Dist.*, 514 S.W.3d 420, 425 (Tex. App.—Tyler 2017, no pet.).

The San Augustine Appraisal District appraised the lessors' land for ad valorem taxes even though their interests lied in Shelby County.¹⁶³ The lessors asserted that even though the lessee pooled their interest in a unit containing acreage in both counties, their leases expressly barred a cross-conveyance of any interest.¹⁶⁴ The court agreed and concluded that the leases authorized pooling but prohibited cross-conveyance of interests.¹⁶⁵ The Appraisal District, therefore, failed to establish that the plaintiffs owned an interest in pooled minerals located within San Augustine County and thus owed no taxes to the Appraisal District.¹⁶⁶

These cases weigh in favor of the position that pooling leased acreage subject to a disclaimer does not strip a unit of its validity because pooling does not necessitate a cross-conveyance of interests. Unfortunately, they are not conclusive. Since *Howell* involved a community lease, the court applied Texas doctrines that are only relevant in particular contexts.¹⁶⁷ Additionally, its reliance on *Jurek* stands on shaky grounds because *Jurek* is contrary to the weight of Texas authority and stands alone as an outlier.¹⁶⁸ *Atlantic Richfield* differs from pooling clauses in that a lease creates a lessor-lessee relationship, whereas joint operating agreements are between lessees; there is no presumed intent to cross-convey in the latter relationship like there is in the former.¹⁶⁹ In *Puckett*, the court only addressed whether the cross-conveyance of interest impacted the means of calculating royalty payments, and not whether the disclaimer *itself* invalidated the pooling.¹⁷⁰ While *HS Resources* strongly supports advocating that parties in Texas can expressly disclaim the cross-conveyance theory without making a pooling void, this case still did not specifically answer whether a disclaimer renders the actual

¹⁶²*Id.* at 422.

¹⁶³*Id.*

¹⁶⁴*Id.* at 423.

¹⁶⁵*Id.* at 425.

¹⁶⁶*Id.*

¹⁶⁷*Howell v. Union Prod. Co.*, 392 F.2d 95, 98 (5th Cir. 1968). A discussion of these doctrines exceeds the scope of this Comment.

¹⁶⁸*See supra* at note 33.

¹⁶⁹Kramer & Martin, Law of Pooling, *supra* note 7, at § 19.02[2][d] (“While community leases, pooling clauses, and pooling and unitization agreements create a presumed intent to cross-convey, joint operating agreements between lessees do not.”).

¹⁷⁰*Puckett v. First City Nat'l Bank*, 702 S.W.2d 232, 237 (Tex. App.—Eastland 1985, writ ref'd n.r.e.).

pooling invalid *per se*.¹⁷¹ And in *Chambers*, the ultimate result and the notion that a disclaimer renders a pooling invalid *per se* are not mutually exclusive.¹⁷² The result in that case, that the Shelby County lessors did not have to pay taxes in San Augustine County, was rooted in the court's conclusion that the leases prohibited cross-conveyance of interests.¹⁷³ An alternative conclusion that the leases' disclaimer rendered the cross-county pooling invalid because there was no cross-conveyance of interests achieves the same result: the Shelby County lessors owned no interest in any acreage lying in San Augustine County subject to ad valorem taxes.¹⁷⁴

This illustrative Texas case law, even coupled with jurisprudence from other jurisdictions, is still not enough to close the Pandora's Box opened in *Samson*. Resolving the issue is still possible, however.

B. The Proposed Answer: Express Disclaimers of Cross-Conveyances Do Not Adversely Affect the Validity of a Pooled Unit in Texas

The assertion that disclaimers of cross-conveyance are not fatal to a pooled unit is rooted in three sources: (1) support in Texas contract law and jurisprudence; (2) support in long-recognized Texas public policy; and (3) support in the "Common Interest Distinction Theory" proposed by this Comment, which recognizes the unique relationship created between lessor and lessee by the oil and gas lease in light of the particularized meaning of terms used to describe each party's respective "interests" under the lease.

1. Support in Texas Contract Law and Precedent.

The Texas Supreme Court should not hold that disclaimers invalidate a pooling based on Texas courts' interpretation of oil and gas instruments. First, courts should view the effect of pooling, which implicates property law, in light of the lease, which is a contract governing the manner in which the leased premises should be developed and the parties' express rights and duties.¹⁷⁵ Second, rules of contract interpretation also apply to oil and gas

¹⁷¹ HS Res., Inc. v. Wingate, 327 F.3d 432, 439 (5th Cir. 2003).

¹⁷² *Chambers v. San Augustine Cty. Appraisal Dist.*, 514 S.W.3d 420, 425 (Tex. App.—Tyler 2017, no pet.) (holding that the Appraisal District failed to establish that the Shelby County lessors had an obligation to pay taxes in San Augustine County).

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ 55 Tex. Jur. 3d *Oil and Gas* § 180 (2018).

leases, and the courts should honor parties' rights and express intent to protect their interests through application of long-recognized rules of construction.¹⁷⁶ Third, courts should continue to permit reasonable abrogation and displacement of common law doctrines through explicit language because express provisions better convey the parties' intent than applying blanket common law doctrines.¹⁷⁷ Fourth, the disclaimer does not violate contract interpretation principles or policy favoring protection of lessees' legal rights and economic values.¹⁷⁸ And fifth, reconciliation of conflicting Texas appellate case opinions in light of subsequent Texas Supreme Court opinions points to the conclusion that it would not hold that a disclaimer invalidates a pooling *per se*.¹⁷⁹

a. Conjunctive Application of Contract Law and Property Law in Oil and Gas Jurisprudence Requires Courts to View the Legal Effects of Pooling in Light of the Lease.

Oil and gas jurisprudence rests on a combination of essential common law concepts rooted in contract law and property law.¹⁸⁰ The use of "oil and gas law" is a bit of a misnomer because there is no distinct body of law (like there is in environmental law or water law, for example).¹⁸¹ The unique makeup of Texas oil and gas law thus requires conjunctive application of contract law and property law to reconcile any potential clashes between the two. *Samson* correctly points out that while pooling agreements give rise to interests in realty, thus implicating property law, authority to pool emanates from the lease, thus implicating contract law.¹⁸² The general rule is that an oil and gas lease is a contract and its terms are therefore interpreted as contract terms.¹⁸³ Property law should govern the voluntary pooling of acreage only when the lessee validly exercises its *contractual* right to pool under the authority of the lease.¹⁸⁴ Lessees have no

¹⁷⁶*Browning Oil Co., Inc. v. Luecke*, 38 S.W.3d 625, 640 (Tex. App.—Austin 2000, no pet.).

¹⁷⁷*Id.*

¹⁷⁸*Id.*

¹⁷⁹*HS Res., Inc. v. Wingate*, 327 F.3d 432, 439 (5th Cir. 2003).

¹⁸⁰55 Tex. Jur. 3d *Oil and Gas* § 1 (2018).

¹⁸¹*Id.* ("These rules are not, for the most part, a body of law of, or peculiar to, oil and gas.").

¹⁸²*Samson Expl., LLC v. T.S. Reed Props.*, 521 S.W.3d 766, 774 (Tex. 2017).

¹⁸³*Exxon Corp. v. Emerald Oil & Gas Co., L.C.* 348 S.W.3d 194, 210–11 (Tex. 2011).

¹⁸⁴*Howell*, discussed *supra* note 141, also provides legal support in a conjunctive application of property and contract law. *Howell v. Union Prod. Co.*, 392 F.2d 95 (5th Cir. 1968).

inherent ability to voluntarily pool acreage; the authority to pool must be explicitly granted in the lease.¹⁸⁵ Courts should construe any legal consequences (rooted in property law) of pooling leasehold acreage in light of the lease's explicit terms since, as a contract, it governs the rights and duties of the parties.¹⁸⁶ Therefore, if a pooling clause disclaims any intention of cross-conveying interests, then any actual pooling of that leased acreage should not activate application of a theory rooted in property law.

b. Justification Lies in Judicial Contract Interpretation.

Since an oil and gas lease is a contract and courts interpret its terms as such, most of the traditional judicial rules of contract interpretation apply to oil and gas leases.¹⁸⁷ The proper construction of an oil and gas lease that is unambiguous is a question of law, and a court will ascertain the intention of the parties as it is expressed within the four corners of the lease.¹⁸⁸ Pooling clauses, in particular, are a matter of contract, and they are liberally construed to achieve the result intended by the parties.¹⁸⁹ In the presence of clear language indicating the clause should be construed in a narrow or limited sense, the courts will do so.¹⁹⁰

A disclaimer narrows or limits the pooling provision, and – assuming the language is clear and unambiguous – it evidences the parties negating any intent to effect a cross-conveyance of interests if the lessee pools the leased acreage.¹⁹¹ Plainly stated, it is the parties' intent to *not* intend any transfer or conveyance. Therefore, since the court should determine the pooling's legal effect (under property law) in light of the terms of the lease (a contract), the court should honor the parties' intended effect of including a disclaimer in the lease's pooling provision and uphold the pooling as valid. This view is entirely consistent with Texas courts' strong preference

¹⁸⁵Tittizer v. Union Gas Corp., 171 S.W.3d 857, 860 (Tex. 2005) (explaining that valid pooling “must be done in accordance with the terms of the methods and the *purposes specified* in the lease.” (emphasis added)); Browning v. Luecke, 38 S.W.3d 625, 634 (Tex. App.—Austin 2000, pet. denied).

¹⁸⁶Amoco Prod. Co. v. Alexander, 622 S.W.2d 563, 571 (Tex. 1981).

¹⁸⁷Anadarko Petroleum Corp. v. Thompson, 94 S.W.3d 550, 554 (Tex. 2002).

¹⁸⁸*Id.*

¹⁸⁹Wagner & Brown, Ltd. v. Sheppard, 282 S.W.3d 419, 424 (Tex. 2008); Banks v. Mecom, 410 S.W.2d 303 (Tex. Civ. App.—Eastland 1966, writ ref'd n.r.e.).

¹⁹⁰Mengden v. Peninsula Prod. Co., 544 S.W.2d 643, 647 (Tex. 1976).

¹⁹¹French v. George, 159 S.W.2d 566, 569 (Tex. Civ. App.—Amarillo 1942, writ ref'd).

for freedom of contract.¹⁹² Specifically, in the context of oil and gas contracts, the Texas Supreme Court opines that mineral owners “may protect their estates by express stipulation.”¹⁹³

Furthermore, to support the contrary view would be inconsistent with commonly-accepted precedent outlining valid pooling in Texas. Texas courts hold that the voluntary pooling of oil and gas leases is valid only if done in accordance with the method and purposes specified in the leases.¹⁹⁴ The legally-recognized rules governing the “validity” of a pooled unit only turn on whether the lessee’s exercise of that authority was proper in light of the lease’s pooling provision.¹⁹⁵ Those rules do not speak to a unit’s validity in terms of whether a cross-conveyance of interests occurred.¹⁹⁶ Therefore, courts should continue to determine valid exercises of pooling from a contractual perspective and not from a property perspective.

*c. Express Language May Abrogate, Modify, or Displace
Certain Common Law Doctrines.*

Third, courts should view the cross-conveyance theory, a judicial common law doctrine, as a rebuttable presumption capable of abrogation. The *Veal* doctrine’s proposition that lessors have a presumed intent to cross-convey their interests to other owners within the unit is simply that—a *presumed* intent.¹⁹⁷ Parties should have the right to rebut that presumption with an explicit, different desired intent. Oil and gas law frequently allows abrogation of common law rules.¹⁹⁸ Allowing abrogation of the doctrine

¹⁹² *Wagner*, 282 S.W.3d at 424.

¹⁹³ *Southland Royalty Co. v. Humble Oil & Ref. Co.*, 249 S.W.2d 914, 917 (Tex. 1952) (footnote omitted) (“Just as owners and operators generally must agree to create a pool, they should also be able to agree when one terminates. If the parties want pooling to expire (or not) upon termination of one lease, they should be free to say so.”).

¹⁹⁴ *Tittizer v. Union Gas Corp.*, 171 S.W.3d 857, 860 (Tex. 2005).

¹⁹⁵ *Id.*; *Yelderman v. McCarthy*, 474 S.W.2d 781, 782 (Tex. Civ. App.—Houston [1st Dist.] 1971, writ ref’d n.r.e.); *Pampell Interests, Inc. v. Wolle*, 797 S.W.2d 392, 394 (Tex. App.—Austin 1990, no writ).

¹⁹⁶ At minimum, they are silent to the issue of whether a cross-conveyance is necessary to qualify a pooling as valid.

¹⁹⁷ *Kramer & Martin, Law of Pooling*, *supra* note 7, at § 19.02[2][d].

¹⁹⁸ For example, when lessees enter into a joint operating agreement to explore and develop wells, the express agreement abrogates common laws of cotenancy. Continuous development clauses in leases abrogate the application of the continuous development doctrine. Statutory provisions in the Natural Resources Code governing when royalty payments by lessees are due to lessors are only meant to serve as gap-fillers in the absence of a controlling express lease

supports legal recognition of permitting parties to a lease to define its terms so as to achieve their special intent.¹⁹⁹ It is the better approach to ascertain the party's intent as expressed within the lease than to bind unwilling parties to a judicial doctrine.²⁰⁰

d. Contractual Abrogation of the Cross-Conveyance Theory Yields no Additional or Undesirable Burdens for Lessees.

Fourth, holding that an express disclaimer does not invalidate a pooling is also in harmony with the rule of lease interpretation that a court will not hold a contract's language to impose a greater burden or special limitation on any grant of authority unless the language is so clear, precise, and unequivocal that the court can reasonably give it no other meaning.²⁰¹ The disclaimer's language imposes no additional or new burdens on the lessee's granted pooling authority. The purpose of the disclaimer is to limit the *legal effect* of pooling by negating the intent to effect a cross-conveyance; it does not purport to stipulate limitations on the lessee's contractually-granted *authority* to pool acreage. The disclaimer's desired effect is very surgical in its limitation because it only applies to the act of pooling. Furthermore, the disclaimer does not heighten, add to, or modify the lessee's common law standards requiring that an exercise of pooling strictly comply with the lease terms and be in good faith.²⁰² Nor does a disclaimer impose upon the lease a risk of violating an express condition or limitation causing automatic lease forfeiture, a result Texas courts generally try to avoid.²⁰³

provision governing royalty payments. The act of pooling itself essentially abrogates the common law rule of capture because pooling allows owners of non-producing tracts to share in production from the producing tract.

¹⁹⁹Freeman v. Magnolia Petroleum Co., 171 S.W.2d 339, 342 (Tex. 1943).

²⁰⁰Howell v. Union Prod. Co., 392 F.2d 95, 114 (5th Cir. 1968); Andretta v. West, 415 S.W.2d 638, 640 (Tex. 1967).

²⁰¹Anadarko Petroleum Corp. v. Thompson, 94 S.W.3d 550, 554 (Tex. 2002).

²⁰²Pampell Interests, Inc. v. Wolle, 797 S.W.2d 392, 394 (Tex. App.—Austin 1990, no writ); Amoco Prod. v. Underwood, 558 S.W.2d 509, 512 (Tex. Civ. App.—Eastland 1977, writ ref'd n.r.e.).

²⁰³Blackmon v. XTO Energy, Inc., 276 S.W.3d 600, 605 (Tex. App.—Waco 2008, no pet.).

e. Texas Precedent is Highly Indicative of a Future Texas Supreme Court's Decision.

Lastly, despite the conflicting decisions in Texas regarding disclaimers, the majority of the relevant appellate cases weigh in favor of the Texas Supreme Court holding that they do not invalidate a pooled unit, especially in light of subsequent Texas Supreme Court opinions. The primary case opposing the position that a cross-conveyance can be expressly disclaimed is *Luecke*.²⁰⁴ There, the Austin Court of Appeals held that lessors were not entitled to royalties on production from a pooled unit because the lessees invalidly pooled the Luecke's land.²⁰⁵ The court reasoned that the failure to validly pool prevented a necessary cross-conveyance of interests, so the Luecke's could not demand royalties on a pro rata share of production to which they had no legal or contractual entitlement.²⁰⁶ However, the court was not faced with a disclaimer of cross-conveyance in that case, and the opinion did not discuss how a disclaimer would affect their analysis, if at all. The context of the case was an insufficient jury charge instructing the jury on the correct measure of damages rather than the validity of a pooled unit in light of judicial interpretation of an express disclaimer.²⁰⁷

Six years later, the Tyler Court of Appeals in *Chambers* held as a matter of law that the relevant oil and gas leases authorized pooling but not the cross-conveyance of mineral interests.²⁰⁸ While not discussing a disclaimer in the context of its effect on the validity of a pooled unit, it points to other cases suggesting that the pooling would remain proper.²⁰⁹ One of those cases was *Puckett*, which held that language in the lease evidenced an intent not to transfer interests.²¹⁰ The five cited Texas Supreme Court cases, *Hager*, *Southland*, *Montgomery*, *Wagner & Brown*, and *Hooks*, are decisions highly indicative that the court's conclusion would hold that disclaimer of cross-conveyance is a "specific rejection" of the cross-

²⁰⁴*Browning Oil Co., Inc. v. Luecke*, 38 S.W.3d 625, 643 (Tex. App.—Austin 2000, pet. denied).

²⁰⁵*Id.*

²⁰⁶*Id.*

²⁰⁷*Id.*

²⁰⁸*Chambers v. San Augustine Cty. Appraisal Dist.*, 514 S.W.3d 420, 425 (Tex. App.—Tyler 2017, no pet.).

²⁰⁹*Id.* at 424–25.

²¹⁰*Id.* (citing *Puckett v. First City Nat'l Bank of Midland*, 702 S.W.2d 232, 237 (Tex. App.—Eastland 1985, writ ref'd n.r.e.)).

conveyance of interests that does not adversely affect the validity of a properly pooled unit.²¹¹

2. Support in Texas Public Policy.

Texas public policy also supports holding that disclaimers preventing a cross-conveyance do not invalidate a pooling. As previously mentioned, there is a strong policy favoring freedom of contract (tempered with reasonable limitations) over judicial intervention in private transactions.²¹² Express language in a contract is a better indication of the parties' true intent than common law rules that are increasingly used as gap-fillers in ambiguous or missing language. This preference is not limited to the context of the judiciary because the Texas Legislature also has a historical predisposition to promote oil and gas activities within the state.²¹³

Disclaimers do not violate longstanding prioritization of oil and gas development, an industry of "substantial importance" in Texas, and Texas law generally encourages development of hydrocarbons.²¹⁴ The express language negating a cross-conveyance also does not frustrate the basic purposes and incentives behind pooling acreage.²¹⁵ Nor does it really effect

²¹¹ *Chambers*, 514 S.W.3d at 425 (citing *Hager v. Stakes*, 294 S.W. 835, 841 (Tex. 1927) (upholding an explicit specific negation of an intent to convey certain interests)); *Southland Royalty Co. v. Humble Oil & Ref. Co.*, 249 S.W.2d 914, 916–17 (Tex. 1952) (ascertaining legal effects in the absence of contrary express agreements); *Montgomery v. Rittersbacher*, 424 S.W.2d 210, 213 (Tex. 1968) (holding that parties are subject to the pooling agreement); *Wagner & Brown, Ltd. v. Sheppard*, 282 S.W.3d 419, 422 (Tex. 2008) (failing to hold lease language disclaiming intent to cross-convey interests rendered a pooling invalid); *Hooks v. Samson Lone Star, Ltd. P'ship*, 457 S.W.3d 52, 63 (Tex. 2015) (reiterating that courts must give effect to the parties' intentions as expressed in the document).

²¹² *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 129–30 n.11 (Tex. 2004).

²¹³ TEX. NAT. RES. CODE ANN. § 101.002 (West 2018) ("None of the provisions in this chapter restrict any of the rights that a person now may have to make and enter into unitization and pooling agreements."); *Gulf Oil Corp. v. Southland Royalty Co.*, 478 S.W.2d 583, 589 (Tex. Civ. App.—El Paso 1972, writ granted), *aff'd*, 496 S.W.2d 547 (Tex. 1973) (discussing how the Texas Legislature declared the conservation and development as a policy of Texas and that the Legislature recognizes the public interest in the hydrocarbon production).

²¹⁴ 55 Tex. Jur. 3d *Oil and Gas* § 1 (2018); *Trapp v. Shell Oil Co.*, 198 S.W.2d 424, 428 (Tex. 1946); *TXOGA Announces Priorities for 85th Legislature*, TEXAS OIL & GAS ASSOCIATION, <https://www.txoga.org/txoga-announces-priorities-85th-legislature/> (last visited May 4, 2018); Tex. H.B. 40, 84th Leg., R.S. (2015).

²¹⁵ See 56 Tex. Jur. 3d *Oil and Gas* § 611 (2018).

on the primary legal consequences of pooling acreage.²¹⁶ Contrary to Samson's allegations, holding that a disclaimer does not invalidate a pooled unit would not "violat[e] the spirit and purpose of pooling."²¹⁷ As this Comment previously noted, the express pooling clause provides the lessee's basis and authority to pool or combine acreage, the method of designation of the pooled acreage, the effect of production within the unit upon acreage within and outside of the unit, and the allocation of production.²¹⁸ The pooling of acreage is a vehicle used to prevent excessive drilling, to reduce economic and natural resource waste, and to encourage production.²¹⁹ Disclaimers do not impact the basic nature of pooling under Texas law and are therefore not fatal to the validity of a pooled unit.²²⁰

3. Support in the "Common Interest Distinction Theory."

Under this Comment's proposed "Common Interest Distinction Theory," disclaimers do not fatally affect a pooled unit due to the notion that a change in the doctrine's effect on one type of interest does not mean that the change should have an effect on a different type of interest. This theory rests on two legally-recognized principles: (1) the "common interest" that the lessor and lessee hold in the oil and gas in place is a general term describing a unique relationship created by the oil and gas lease and (2) the lessor's royalty interest in the mineral estate is specifically distinct from that of the lessee's leasehold interest in the mineral estate.²²¹ Because the cross-conveyance theory only causes a cross-conveyance as to the lessor's

²¹⁶There are essentially three primary legal consequences of the actual pooling of acreage in Texas. 56 Tex. Jur. 3d *Oil and Gas* § 635 (2018). First, production and operations anywhere within the pooled unit are treated as if they have taken place on each tract within the unit, thereby indirectly amending the habendum clause during the lease's secondary term. *Southeastern Pipe Line Co. v. Tichacek*, 997 S.W.2d 166, 170 (Tex. 1999). Second, causes the payment and distribution of royalties on the basis of the proportionate acreage each party contributes to the unit. *Browning Oil Co., Inc. v. Luecke*, 38 S.W.3d 625, 634 (Tex. App.—Austin 2000, no pet.). Third, it displaces the common law rule of capture by enabling owners of non-producing tracts (i.e. those owners whose tracts do not host the drillsite) to share in production from the drillsite tract. *Id.*

²¹⁷*Samson v. T.S. Reed Prop., Inc.*, 521 S.W.3d 766 (Tex. 2017).

²¹⁸See *supra* Section II.B.; Hemingway, *Oil and Gas*, *supra* note 21, at 430–31.

²¹⁹*Wagner & Brown, Ltd. v. Sheppard*, 282 S.W.3d 419, 420–21 (Tex. 2008).

²²⁰*Id.*

²²¹While different types of royalty interests exist, such as "non-participating royalty interests" and "overriding royalty interests," this theory speaks of a lessor's "leasehold royalty interest" when referencing "royalty interest." See generally 55A Tex. Jur. 3d *Oil and Gas* §§ 346–353 (2018) (discussing different types of royalty interests).

royalty interest (and not the lessee's leasehold interest), a disclaimer of the cross-conveyance theory's effect on that royalty interest should not render a pooling of leasehold interests fatal *per se*.

As initially mentioned in this Comment, it is critical to remember the basic relationship between the lessor and lessee and each party's incentives underlying the oil and gas lease's provisions.²²² The primary purpose of an oil and gas lease is to optimize production of the leased mineral estate for the mutual profit of the parties.²²³ The lease is both a contract and a conveyance of a fee simple determinable interest from the lessor to the lessee.²²⁴ When the lessor-landowner conveys to the lessee-operator this present possessory interest in the mineral estate, he or she is left with the future interest of the possibility of reverter in the mineral estate.²²⁵ Both the lessee and the lessor have a "common interest" in the oil and gas in place (the "mineral estate") as real property, and they owe this common interest to the relationship established by the oil and gas lease; each party's respective interests are in the mineral estate.²²⁶

Upon execution of the lease, the lessor owns a "royalty interest," which is defined as the right to a non-cost bearing share in the production of oil and/or gas during the duration of the lease.²²⁷ The royalty interest owes its origin to the "mineral interest," which is a landowner's right to exploit the minerals under his or her land, known as the "mineral estate."²²⁸ This mineral estate encompasses five rights and attributes, and its owner owns the minerals "in place."²²⁹

²²² See *infra* Section II..

²²³ *Miles v. Amerada Petroleum Corp.*, 241 S.W.2d 822, 826 (Tex. Civ. App.—El Paso 1950, writ ref'd n.r.e.).

²²⁴ *Anadarko Petroleum Corp. v. Thompson*, 94 S.W.3d 550, 554 (Tex. 2002).

²²⁵ *Luckel v. White*, 819 S.W.2d 459, 464 (Tex. 1991); *Jupiter Oil Co. v. Snow*, 819 S.W.2d 466, 468 (Tex. 1991).

²²⁶ *Nancy Saint-Paul*, 1A SUMMERS OIL AND GAS § 6:30 (3d ed. 2017); *Elliott v. Davis*, 553 S.W.2d 223, 226–27 (Tex. Civ. App.—Amarillo 1977, writ ref'd n.r.e.).

²²⁷ *Luckel*, 819 S.W.2d at 463.

²²⁸ *French v. Chevron U.S.A. Inc.*, 896 S.W.2d 795, 797 (Tex. 1995). This royalty interest can be one of multiple incidents of mineral ownership, or it can be severed from the some (or all) of the incidents and stand alone. *Altman v. Blake*, 712 S.W.2d 117, 118–19 (Tex. 1986).

²²⁹ The five attributes of ownership of the mineral estate are: (1) the right to develop; (2) the right to lease, known as the "executive right," (3) the right to receive bonus payments; (4) the right to receive delay rental payments; and (5) the right to receive royalties. *Altman*, 712 S.W.2d at 118. Texas recognizes ownership of oil and gas in place. *Brown v. Humble Oil & Ref. Co.*, 83 S.W.2d 935, 940 (Tex. 1935).

By contrast, the lessee obtains a “leasehold interest” in the mineral estate (also known as a “working interest”), which is defined as the right to explore for and produce oil and gas from the property; it bears exploration, development, and operation costs.²³⁰ Unlike the lessor’s present non-possessory, cost-free royalty interest, the leasehold interest it is a present possessory cost-bearing interest subject to express and implied duties under the lease’s terms and common law.²³¹

Under this theory, this is the full extent of the “common interest” that the lessor and lessee have in the oil and gas lying beneath the lessor’s surface. The two interests are only “common” in that both are born from leasing the mineral estate.²³² But the two interests have more differences than similarities when compared to each other. When a lessee is granted the power to pool in the lease, the lessee holds that power coupled with an interest and duty to exercise that power to pool in good faith.²³³ The lessee’s express authorization by the lease to pool acreage ordinarily means that the lessee is pooling *leasehold* interests.²³⁴ However, the cross-conveyance theory applies to a presumed intent by the lessor-landowners within the pooled unit to effect a cross-conveyance of their *royalty* interests to the other participating royalty interest owners.²³⁵ Leasehold interests have a generally accepted meaning in the context of oil and gas that is not synonymous with the generally accepted meaning of royalty interests, which is an interest in production free of costs that is an attribute of mineral interest ownership.²³⁶

²³⁰Paradigm Oil, Inc. v. Retamco Operating, Inc., 372 S.W.3d 177, 180 n.2 (Tex. 2012).

²³¹*Id.*

²³²55 Tex. Jur. 3d *Oil and Gas* § 183 (2018) (“Although there are differences in the nature of the interests of the lessee, as operator of the lease, and those of the lessor, as royalty owner, they have in common the right to share, in varying proportions, in the profits issuing from the land in consequence of operating the lease.”); Frost v. Standard Oil Co., 107 S.W.2d 1037, 1038 (Tex. Civ. App.—Galveston 1937, no writ).

²³³Amoco Prod. Co. v. First Baptist Church, 579 S.W.2d 280, 284 (Tex. Civ. App.—El Paso 1979) *writ ref’d n.r.e. per curiam*, 611 S.W.2d 610 (Tex. 1980).

²³⁴Ladd Petroleum Corp. v. Eagle Oil and Gas Co., 695 S.W.2d 99, 106–07 (Tex. App.—Fort Worth 1985, writ ref’d n.r.e.) (“[L]eases expressly authorized the lessees to pool their *leasehold* interests” (emphasis added)).

²³⁵Browning Oil Co. v. Luecke, 38 S.W.3d 625, 634 (Tex. App.—Austin 2000, pet. denied); Brown v. Smith, 174 S.W.2d 43, 46 (Tex. 1943).

²³⁶Sabre Oil & Gas Corp. v. Gibson, 72 S.W.3d 812, 816–817 (Tex. App.—Eastland 2002, pet. denied).

This distinction between the “common interests” of the lessee and lessor under an oil and gas lease and the particularized types of interests held by each party is crucial. If a disclaimer of cross-conveyance only effects royalty interests, it follows logically that the disclaimer should not impact a valid pooling of leasehold interests by the lessee. Yes, the leasehold interest and royalty interest are both present interests in the “mineral estate,” but the interests are held by different parties to the lease and have different legal characteristics.²³⁷ Thus, the Common Interest Distinction Theory supports the assertion that a lessor’s disclaimer of cross-conveyance of *royalty* interests does not invalidate the lessee’s pooling of *leasehold* interests to form a unit.²³⁸

V. POTENTIAL RAMIFICATIONS OF A TEXAS SUPREME COURT
DECISION HOLDING THAT DISCLAIMERS INVALIDATE A POOLING
DUE TO THE FAILURE TO EFFECT A CROSS-CONVEYANCE.

A decision by the Texas Supreme Court to hold that disclaimers invalidate a pooling due to the absence of a cross-conveyance of interests would cause unwelcome consequences. That holding gives rise to legal uncertainty, a direct attack on the ideal balance of certainty and fairness underlying oil and gas law.²³⁹ Also, it would subsequently impose Sisyphean burdens on both lessees and lessors because the holding would undermine lessees’ implementation of natural resource conservation methods and disadvantage lessors.

²³⁷ 55 Tex. Jur. 3d *Oil and Gas* § 183 (2018) (“Although there are differences in the nature of the interests of the lessee, as operator of the lease, and those of the lessor, as royalty owner, they have in common the right to share, in varying proportions, in the profits issuing from the land in consequence of operating the lease.”); *Frost v. Standard Oil Co.*, 107 S.W.2d 1037, 1038 (Tex. Civ. App.—Galveston 1937, no writ).

²³⁸ The applicability of this theory depends on the specific pooling provision’s exact language. If the provision authorizes the lessee to pool certain “premises” and “lands” and not just their leasehold interests, then the disclaimer may affect pooled interests and not solely the lessor’s royalty interest. *See Wagner & Brown, Ltd. v. Sheppard*, 282 S.W.3d 419, 422–23 (Tex. 2008) (holding that the termination of a lease that was within a pooled unit did not terminate the lessor’s participation in the unit because the lessee had authorization to pool “premises” and “lands” in addition to their “leased interests”).

²³⁹ Contract law tends to promote fairness while property law tends to promote certainty, but the courts strive to balance these two equally important goals. *Chase Manhattan Bank, N.A. v. Greenbriar N. Section II*, 835 S.W.2d 720, 723 (Tex. App.—Houston [1st Dist.] 1992, no writ); *State v. Brownlow*, 319 S.W.3d 649, 653 (Tex. 2010); *Trapp v. Shell Oil Co.*, 198 S.W.2d 424, 442 (Tex. 1946).

Rendering a fatal judicial blow to express disclaimers in pooling provisions unleashes uncertainty onto the area of oil and gas law governing pooling. Holding pooled units as invalid because the disclaimer prevented a necessary cross-conveyance of interests could lead to a few different scenarios, all of which would be undesirable. While leases are generally standard in that they commonly include similar provisions, pooling provisions are not always uniform.²⁴⁰ Some leases located within the same unit might contain express disclaimers while others might not.²⁴¹ Therefore, should the presence of a disclaimer invalidate a pooled unit, it begs the question: is the unit invalid as to those leases which contain the disclaimer, or does it invalidate the unit in its entirety? The advocacy pushed by Samson in its appellate briefs seems to point towards the former, but if a valid pooling necessarily affects a cross-conveyance of *all* interests comprising the unit, even just one lease with a disclaimer would prevent a unanimous cross-conveyance. This result suggests that the two outcomes are equally plausible, depending on the supreme court's holding and rationale.

Another result is viable if the court applies certain rules of contract interpretation. Although courts favor upholding contracts as valid, parties may not insert stipulations in an agreement which violate law or public policy.²⁴² The doctrine of severability authorizes a court in certain instances to sever an unenforceable contract provision and enforce the remainder of the contract.²⁴³ If the Texas Supreme Court rendered the disclaimer unenforceable because it cannot prevent the cross-conveyance of interests, it would preserve the unit's validity and boundaries because the interests are now capable of cross-conveyance. This result appears the most preferable option, but it still hinders protecting freedom of contract and honoring the parties' intent as expressed in the lease.

The second ramification of this holding would be to undermine the advantages of pooling that incentivize lessees to implement natural resource conservation practices. Unless pooled, one lease cannot be used for the benefit of another lease, even if the lessee on both leases is the same. Both

²⁴⁰Kramer and Martin, *Law of Pooling*, *supra* note 7, at § 8.02 (“There is no standard pooling clause, but most follow a similar pattern.”).

²⁴¹Hemingway, *Oil and Gas*, *supra* note 21, at 428 (“The [pooling] clauses differ greatly in coverage and provisions.”).

²⁴²*Phila. Indem. Ins. Co. v. White*, 490 S.W.3d 468, 475 (Tex. 2016).

²⁴³*Sec. Serv. Fed. Credit Union v. Sanders*, 264 S.W.3d 292, 300 (Tex. App.—San Antonio 2008, no pet.).

contractual and implied duties are owed by the lessee to the lessor on a lease-by-lease basis. One of the benefits of pooling leases is that the pooled acreage may be used collectively for the benefit of the entire acreage within the unit. Therefore, if acreage is not included within a unit, it cannot be used for purposes of operating and developing the unit. The lessee must now operate and develop the “un-pooled” acreage pursuant to the terms of the individual lease, effectively diminishing the lessee’s ability to implement natural resource conservation practices, opening the potential for waste to occur, and negatively impacting lessees’ profit margins.

For example, one of the main effects of the pooling clause on lease operations is that the clause amends the habendum clause.²⁴⁴ Upon pooling, operations for drilling and production on any part of the unit, as well as production from a well within the unit (whether located on the lessor’s tract or not), is considered operations on production from the lease.²⁴⁵ Because that acreage is no longer within a pooled unit, the lessee must now expend time, effort, and expenses to drill and develop that “un-pooled” acreage or risk automatic termination as to that un-pooled acreage.²⁴⁶ Contrary to Texas public policy, this result opens the door to potential physical waste and economic waste.²⁴⁷

Another example would be that the “un-pooled” lessor is likely to demand an offset well under the terms of the lease. Under Texas law, the lessee owes to the lessor an implied duty to protect the leasehold from local and field-wide drainage.²⁴⁸ Complying with this duty may include pooling acreage or drilling an offset well.²⁴⁹ If the acreage can no longer be pooled, the lessee may be forced to drill an offset well to comply with its duty to protect against drainage. Even worse, should the lease contain an express

²⁴⁴Se. Pipe Line Co. v. Tichacek, 997 S.W.2d 166, 170 (Tex. 1999).

²⁴⁵*Id.*

²⁴⁶Samano v. Sun Oil Co., 621 S.W.2d 580, 581 (Tex. 1981) (explaining that absent an express time limitation in the lease for continuous drilling operations, a lease terminates upon a cessation of production for an extended period of time after the primary term).

²⁴⁷“Physical waste” includes the unnecessary production practices that reduce or tend to reduce the total ultimate recovery of hydrocarbons from any pool. TEX. NAT. RES. CODE ANN. § 85.046 (West 2018). “Economic waste” refers to the drilling of unnecessary wells and production in excess of reasonable market demand. *Id.*

²⁴⁸Amoco Prod. Co. v. Alexander, 622 S.W.2d 563, 568 (Tex. 1981).

²⁴⁹*Id.*

provision requiring the drilling of an offset well under circumstances, the lessee's failure to do so could result in a breach of contract claim.²⁵⁰

The holding adversely affects lessors as well. First, a lessor's interest that can no longer validly contribute to the acreage comprising the unit is not entitled to any share in production from that unit.²⁵¹ Second, depending on its location relative to the unit boundaries, the leased premises is now susceptible to drainage. To obtain legal relief, the lessor must prove that the lessee failed to perform a contractual obligation, such as drilling an offset well, or attempt to prove the lessee breached its implied duty to protect the leased land from drainage. Proving monetary damages under either theory carries a very high burden and is often unsuccessful. Third, the lessor's inability to include a disclaimer within its lease unilaterally subjects him or her to the ancillary legal hurdles previously discussed in this Comment, such as joinder issues or additional ad valorem tax mandates.²⁵² Stripping lessors of the ability to disclaim a cross-conveyance of interest only makes it more difficult to seek legal and equitable protection of their rights through the judicial process.

VI. CONCLUSION.

The Greek myth ends with a mortal Pandora trying to quickly put back the lid, only managing to trap Hope in it.²⁵³ Hope is found in the absence of a Texas Supreme Court decision holding that a disclaimer invalidates a pooling *per se* because pooling necessarily effects a cross-conveyance of interests. But the court's present reluctance to address the issue of disclaimers' effect on units' validity robs this legal issue of its clarity and certainty. This failure by the Texas judiciary to clarify this nuanced area within oil and gas principles runs afoul a constitutionally-imposed duty to ascertain and construe laws.²⁵⁴ Therefore, this Comment calls upon the Texas Supreme Court to clarify once and for all that disclaimers of cross-

²⁵⁰ *Se. Pipe Line Co.*, 997 S.W.2d at 170.

²⁵¹ *Browning Oil Co. v. Luecke*, 38 S.W.3d 625, 645 (Tex. App.—Austin 2000, pet. denied) (“Without valid pooled units, the leases do not and cannot award the [lessors] royalties on oil and gas produced from tracts they do not own.”).

²⁵² *See supra* II.C.1.

²⁵³ Michael Karas & Charilaos Megas, *Pandora*, GREEK MYTHOLOGY (May 3, 2018), <https://www.greekmythology.com/Myths/Mortals/Pandora/pandora.html>.

²⁵⁴ Tex. Const. art V, § 1 interp. commentary (West 2007).

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conveyance does not invalidate a unit because parties may negate any intention to cross-convey interests. The time has come to close the Box.