**NO. D-1-GN-20-000099**

**IN THE DISTRICT COURT OF TRAVIS COUNTY, TEXAS**
**53RD JUDICIAL DISTRICT**

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ELSIE OPIELA AND ADRIAN OPIELA, JR.,

Plaintiffs,

vs.

RAILROAD COMMISSION OF TEXAS,

Defendant.

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On Appeal from an Order by the Railroad Commission of Texas

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# BRIEF OF AMICUS CURIAE TEXAS LAND & MINERAL OWNERS ASSOCIATION IN SUPPORT OF PLAINTIFFS

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## TABLE OF CONTENTS

## IDENTITY AND INTEREST

The **Texas Land & Mineral Owners Association** ("TLMA"), is a statewide advocacy association whose members are farmers, ranchers, and royalty owners. TLMA advocates for a business and legal environment that promotes the production of oil and gas in a manner that respects the property rights of landowners. TLMA has in interest in this case because the actions of the Railroad Commission of Texas have deprived Texas mineral and royalty owners of their right to consent to whether their property is pooled or not.

TLMA respectfully submits this brief in support of the positions urged by Plaintiffs and urge this court to rule in their favor. TLMA has paid for the preparation of this brief, and a copy has been served on all parties.

## INDEX OF AUTHORITIES

### Cases



### Statutes

**Legislative Materials**



**Other Cites**

## INTRODUCTION AND SUMMARY

Amicus Curiae Texas Land & Mineral Owners Association ("Amicus") takes the unusual step of filing this brief in a district court proceeding due to the unusual importance of the underlying issue presented to this court. This underlying issue transcends the specific disagreements of the parties, including the semantic debate of whether so-called "allocation wells" and "production sharing wells" are technically the same as "pooled unit wells."

For Amicus, the real underlying issue in this case is the oil and gas industry's end-run on the rights of Texas mineral owners. The industry has used the Railroad Commission of Texas to accomplish administratively, and without formal APA rulemaking, what it could not accomplish legislatively, *viz.*, the ability to drill a well that crosses separate tracts without securing the consent of the mineral owner. What such ability is ultimately called (be it "pooling" or "allocation well" or "production sharing agreement well") is irrelevant, despite the arguments put forth by the Railroad Commission of Texas and Intervenor Magnolia Oil & Gas Operating, LLC (referred to herein respectively as "RRC" and "Magnolia"). What matters is that mineral owner consent has *always* been a prerequisite for the permitting of any well that crosses separate tracts until the RRC recently decided, without rule or explanation, that it was not.

The continuing mandate of Amicus is to protect the private property rights of Texas mineral owners and to guard their freedom of contract against constant industry encroachment. The RRC's removal of landowner consent as a prerequisite for crossing separate tracts is a new rule, and Amicus and its constituent mineral owners are entitled to both comment upon and oppose such rule in formal APA rulemaking proceedings. They are entitled to a full explanation from the RRC if their comments are not incorporated. All of this was denied, and not because of the convoluted reasoning given by the RRC and Magnolia, but because the industry did not want a fair fight—a fight they knew they might lose. Amicus therefore files this brief and asks that this court protect the rights of Texas mineral owners and require the RRC to comply with APA procedures.

## ARGUMENT

### I. Mineral owner consent has always been a prerequisite for permitting a well that will cross separate tracts

As pointed out by all parties to this case,[1] until the "creation" of allocation wells and production sharing agreement wells (referred to herein as "PSA wells"), the only method available for drilling a well that crossed separate tracts was to create

[1] "Sometimes horizontal wells are permitted as pooled unit wells. . . . Horizontal wells are sometimes permitted as allocation or Production Sharing Agreement ("PSA") wells." Magnolia Resp. at 6-7; "the Commission does not require pooling authority for either an allocation well or a production sharing agreement well." Commission Resp. at 22; *See generally*, Plaintiffs Brief at 6-10.

a pooled unit pursuant to Statewide Rule 40.[2] Rule 40 requires that the applying operator represent to the RRC that it has "appropriate contractual authority" to pool the tracts.[3] Rule 40's "contractual authority" requirement derives from the common law property rights of Texas mineral owners. As the Supreme Court of Texas has stated:

> Oil and gas leases in general, and pooling clauses in particular, are a matter of contract. A lessee's authority to pool ***requires the lessor's consent***, which is typically furnished via a pooling provision in a mineral lease. Pooling is valid only if done in accordance with the method and purposes specified in the lease. A pooled unit that does not comply with the terms of the pooling agreement is invalid and unenforceable absent the lessor's ratification.[4]

The reason that pooling authority ultimately rests in the hands of the mineral owner is because pooling can drastically alter the mineral owner's property rights and the terms of the underlying oil and gas lease. Among other effects, pooling changes the method in which royalties are paid. No longer is the mineral owner receiving payment for volumes produced from his land alone, but from multiple tracts. The mineral owner's interest is diluted throughout the pool and volumes must

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[2] 16 Tex. Admin. Code § 3.40.

[3] 16 Tex. Admin. Code § 3.40(a). "An operator may pool acreage, in accordance with appropriate contractual authority and applicable field rules, for the purpose of creating a drilling unit or proration unit by filing an original certified plat delineating the pooled unit and a Certificate of Pooling Authority, Form P-12." *Id.* This fact alone shows the absurdity of the RRC's statement that "the Commission's role is not to determine who has pooling authority in leases." Commission Resp. at 29. The Commission, by the language of their own rule, should have engaged in that determination *for every pooled unit formed under Rule 40.*

[4] *Samson Exploration, LLC v. T.S. Reed Props., Inc.* 521 S.W.3d 766, 744 (Tex. 2017) (internal citations omitted) (emphasis added).

be allocated to each owner. As holder of the pooling authority, the mineral owner has the ability to protect itself against potential adverse effects by consenting (or not consenting) to any proposed allocation and by placing other restrictions in the pooling provision.[5]

Even the Mineral Interest Pooling Act ("MIPA"),[6] the closest thing Texas has to a "forced pooling" statute, recognizes that free negotiation and landowner consent has always been the primary goal regarding pooling, and MIPA should only be invoked as a last resort after the required negotiations fail:

> This requirement [to make a good faith offer], probably more than any other aspect of MIPA, makes the Texas Act unique, compared to the compulsory pooling acts of other states. The obvious intent of the legislature is to encourage voluntary pooling. The Act, then, is more aptly described as "an Act to encourage voluntary pooling—rather than an Act to provide compulsory State action."[7]

However, with the explosion of horizontal drilling in unconventional reservoirs, pooling authority became an increasingly pressing issue for the industry.

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[5] For example, the mineral owner may want to protect itself from unreasonable dilution by including an anti-dilution provision: "Since royalty from production in a pooled unit is proportioned in accordance with the amount of land contributed to the unit, anti-dilution clauses are intended to protect the lessor against being pooled into a unit where only a small fraction of production will be attributed to the lessor's land. These clauses must be drafted to strike an appropriate balance between protecting the lessor's interest and giving the lessee sufficient flexibility to form a unit of the size and shape appropriate to its operations." Smith & Weaver, *1 Texas Law of Oil & Gas* § 4.8[C][2].

[6] Tex. Nat. Res. Code § 102.001, *et seq.*

[7] *Railroad Com. Of Texas v. Pend Oreille Oil & Gas Co.*, 817 S.W.2d 36, 40 (Tex. 1991); *See also Am. Operating Co. v. Railroad Com. Of Texas*, 744 S.W.2d 149, 154 (Tex. App.—Houston [14th Dist.] 1987) ("The fact that the MIPA was enacted to encourage voluntary pooling would seem to contemplate a process of negotiations among the parties.").

Many leases drafted before the wide prevalence of horizontal drilling did not anticipate the new development methods and contained pooling provisions which did not accommodate horizontal wells. Additionally, as mineral owners became more sophisticated, new leases began to include pooling provisions drafted to maximize income and control for the mineral owner. In either case, the only legal options available for the operator were to either (a) pool pursuant to the existing pooling authority (if possible); (b) negotiate an amendment of the pooling provision with the mineral owner; or (c) refrain from drilling. As negotiating with the mineral owner was unacceptable, and refraining from drilling wells was out of the question, the industry began to search for ways to by-pass the property rights of Texas mineral owners.[8]

## II. The Railroad Commission reversed its longstanding policy without engaging in formal APA rulemaking

As the industry's multiple attempts to secure broad forced pooling rights through the legislature all ended in failure,[9] the industry turned to the RRC. At some point, the RRC began to allow an operator to drill a well that crossed lease lines

[8] *See* Bob Campbell, *Forced pooling stumps oil business*, In the Pipeline (April 28, 2019), *available at* https://www.oaoa.com/inthepipeline/oil_gas/forced-pooling-stumps-oil-business/article_f05c6da6-693b-11e9-ae2e-3ba00c2fe07b.html ("Perryman said combining interests is a common practice in Texas, but occasions often arise when owners refuse. . . . There are legitimate property rights issues to consider, but the merits [of forced pooling] from an economic perspective include greater efficiency and lower costs.")

[9] *See, e.g.,* Tex. H.B. 100, 83rd Leg., R.S. (2013); Tex. S.B. 177, 85th Leg., R.S. (2017); Tex. H.B. 1552, 84th Leg., R.S. (2015).

without invoking Rule 40 if 100% of the royalty and mineral owners agreed to execute a "production sharing agreement."[10] However, this did not placate the industry, as mineral owner consent was their fundamental grievance—not the *form* of pooling. If 100% consent was required, any holdout could still spike the well.[11] Therefore, in 2008, the RRC approved the granting of "production sharing agreement permits" if "65% of the working and royalty ownership in each tract had agreed to a 'production sharing agreement.'"[12] This was the first time in RRC history (other than cases involving MIPA) that the RRC allowed a well to be drilled crossing separate tracts without either compliance with Rule 40 or the consent of 100% of the mineral owners.

But even this unprecedented gift by the RRC did not satiate the industry, as the consent of 65% of the minerals owners was still 65% too much. Therefore, several years later EOG demanded the RRC grant a permit for a well that would cross separate tracts *without the requirement to secure any mineral owner consent at all*.[13] This power had previously been requested by Devon in 2008 and soundly

[10] Plaintiffs Reply at 6.
[11] *See, e.g.,* Max B. Baker, *Texas lawmaker pushes majority rules in the oilfield*, Fort Worth Star-Telegram (Nov. 25, 2016) ("Currently, a single owner, or group, can block the redevelopment of an oil reservoir, according to [Senator Van Taylor].") Available at https://www.star-telegram.com/news/business/article117065623.html.
[12] Tex. R.R. Com'n, Formal Comm'n Actions, Hearings Div., Status #665639 (Sept. 9 2008).
[13] *See* Plaintiffs Brief at 11.

rejected by the RRC. The relevant passage from the RFD has been quoted by Plaintiffs, but deserves repetition:

> Devon is not the owner of minerals under the various tracts it operates . . . It is the lessee and its rights are controlled by the terms of the leases it took from owners of the mineral. Devon itself acknowledges that those lease terms do not authorize it to pool the tracts as it desires. Devon is seeking a Commission field rule that would endorse its desires to effectively amend the terms of its agreements with the mineral owners, authorize it to combine the tracts and direct that the mineral owners be paid in a manner different than is provided in the lease contracts. **Such a field rule would be unprecedented in Commission practice and would far exceed the Commission's statutory authority**.[14]

However, when asked for the second time by EOG, the RRC made an about face and created, without rule or the opportunity for public comment, a method for permitting a well which crosses separate tracts without any obligation to secure mineral owner consent.

## III. The Railroad Commission's current policy conflicts with established rules and practice

According to the RRC and Magnolia, the Commission has never concerned itself about mineral owner consent. They argue that "the Commission's role is not to determine who has pooling authority in leases"[15] and "the *only authority* the RRC has is "to determine that an operator seeking a permit has a good faith claim to

[14] Plaintiffs Brief at 9 (emphasis added).
[15] Commission Resp. at 29.

title."[16] However, if this were true, why has the RRC always required that operators certify that they have contractual pooling authority under Rule 40? If this were true, why does the RRC require that 65% of royalty owners agree on a method of allocation before a PSA well permit is granted? If this were true, why have Texas courts stated that the RRC has the obligation to determine mineral owner consent?[17] The answer is, of course, that it is **not** true. The RRC has authority to inquire into landowner consent—Rule 40 and the 65% threshold for PSA well permits ***explicitly require it***.

This makes sense, as a determination of "good faith" is determination of the legality of the well, not merely the legality of the lease. As stated by the Texas Supreme Court, "The Railroad Commission of Texas should not do the ***useless thing of granting a permit*** to drill an oil well to one who does not claim the property in good faith."[18] While title to the lease is one aspect of good faith, the point of the requirement is to ensure that the RRC only grants a permit for wells that can be legally drilled—otherwise, the permit is pointless. As wells that cross separate tracts require mineral owner consent under Texas law, the RRC must engage in a determination of mineral owner consent in order to determine if the well can be

[16] *Id.* (emphasis added).
[17] *Cheeseman v. Amerada Petroleum Corp.*, 227 S.W.2d 829, 831 (Tex. Civ. App.—Austin 1950, no writ) (ruling that the RRC should evaluate whether the applicant made a "reasonably satisfactory showing of good faith" of pooling authority).
[18] *Magnolia Petroleum Co. v. Railroad Commission*, 170 S.W.2d 189, 191 (Tex. 1943).

legally drilled. If the RRC's position had always been that good faith only required "a valid oil and gas lease," there would never have been a need to show contractual pooling authority under Rule 40, and there would never have been the need for PSA wells.[19] The fact that these two things exist is logically incompatible with the assertations made by the RRC and Magnolia, and clearly show that the RRC's current position is a post-hoc fabrication.

## IV. The RRC's new policy regarding allocation wells and PSA wells are new rules that require formal APA rulemaking

The RRC's current policy that mineral owner consent is not required, and has never been required, for the issuance of a permit to drill a well that crosses lease lines is a completely novel position, as Plaintiffs and Amicus have shown. This new position qualifies as a rule, as it is "an agency statement of general applicability that implements, interprets or prescribes law or policy or describes a state agency's procedure or practice requirements."[20] It certainly represents the RRC's "authoritative position in matters that impact personal rights," as it has removed the rights of the mineral owner from the equation completely.[21]

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[19] As Magnolia points out, why would any operator opt to apply for a PSA Well Permit when the same result could be achieved, at much less cost and expense, by applying for an Allocation Well Permit? "The only operative difference between the two sorts of permits is the requirement for PSA wells that 65% of the mineral interest owners to agree to a method for dividing proceeds." Magnolia Resp. at 44.

[20] Tex. Gov't Code 2001.003(6)(A)-(C).

[21] *Tex. State Bd. Of Pharmacy v. Witcher*, 447 S.W.3d 520, 527 (Tex. App.—Austin 2014, pet. withdrawn).

It is readily apparent that the factual, legal and regulatory confusion which permeates all aspects of this case is a direct consequence of the RRC's failure to engage in formal rulemaking. In a moment of unintentional irony, Magnolia appears to mock Plaintiffs because of this confusion:

> What's more, it is not entirely clear what, specifically, the Opielas contend is the invalid "rule" the Commission applied in permitting the Audioslave Well. They complain of the Commission's "policy" that "allocation well and PSA well permits are granted without any evaluation of pooling authority or production sharing agreements" and its "mandatory policy regarding allocation permits," but what is the specific "policy" they contend is the improper "rule"?[22]

Magnolia unwittingly hits the nail on the head: *there is no formal "rule."* Instead, the rules governing these wells are "hidden in the arcana of Railroad Commission forms, rejected staff Proposals for Decision, individual well permits and disclaimers."[23] This is the exact problem Plaintiffs and Amicus complain of. If Magnolia were to read Plaintiffs' briefing, they would see that Plaintiffs are, quite literally, *asking the Commission to engage in rulemaking*:

> Since 2009, the Commission has issued thousands of drilling permits for both PSA wells and allocation wells. But the Commission has not adopted any formal rules pursuant to the APA regarding PSA or allocation wells. In fact, the Commission rejected a prior request to initiate rulemaking on the subject.[24]

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[22] Magnolia Resp. at 24.
[23] Smith & Weaver, *2 Texas Law of Oil & Gas* §9.9(B).
[24] Plaintiffs Brief at 13.

The RRC's refusal to engage in formal rulemaking, which would bring much needed clarity to the regulation of horizontal drilling, would be utterly baffling without the assumption that such refusal is being directed by another party—a party with a vested interest in avoiding public comment. But this is all the more reason to require the RRC to engage in formal rulemaking. As succinctly stated by Plaintiffs:

> Before the APA, if the agency wanted to make a rule, the agency could do so without input from anyone, with no explanation at all, and keep the rules in its files where only the insiders even knew of its existence. Now, however, because of the APA, an agency must publish a notice that meets detailed statutory standards; must provide a meaningful opportunity for interested persons to comment on the proposed rule, its bases, and alternatives; and it must explain, in its published order adopting the rule, its reasoned justification for the rulemaking choices it made, including why it rejected the comments it rejected.[25]

For the very reasons the industry does not wish the RRC to engage in formal rulemaking, the RRC is duty bound to do so.

## CONCLUSION AND PRAYER

The RRC is not an industry tool—it is a regulatory body that is mandated to both "prevent waste" and "protect correlative rights."[26] It cannot alter state policy without adhering to the APA. PSA well and allocation well permitting constitute a complete reversal of policy by the RRC, which severely interferes with the right of Texas mineral owners to dictate how, when and if their minerals are produced, and

[25] Plaintiff's Brief at 5.
[26] *See generally, Railroad Comm'n v. Lone Star Gas Co.*, 884 S.W.2d 679 (Tex. 1992).

from protecting their interests from the adverse consequences of pooling. Under the APA, Texas mineral owners are entitled to have a seat at the table when such sweeping policy changes are contemplated. The RRC's informal rulemaking has deprived Texas mineral owners of the opportunity to have a say in the shaping of state policy. Amicus therefore respectfully asks this court, on behalf of itself and its constituents, to rule in favor of Plaintiffs.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

Pursuant to Travis County District Court Local Rule 10.5, which requires briefs in administrative appeals to conform to the limits on length set forth in Tex. R. App. P. 9.4(i), I certify that the foregoing document complies with the word count limitations set out in Tex. R. App. P. 9.4. It contains 3,128 words, excluding parts exempted by Tex. R. App. P. 9.4(i)(1) and the Travis County District Court Local Rules. In making this Certificate of Compliance, I am relying on the word count provided by the software used to prepare the document. This is a computer-generated document created in Microsoft Word, using 14-point Times New Roman typeface for body and 12-point Times New Roman typeface for footnotes.

*/s/ Robert M. Park*

## CERTIFICATE OF SERVICE

I hereby certify that on April 12, 2021, a true and correct copy of the foregoing was served on counsel shown below via electronic service, with courtesy copies via email, as shown below:

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