

Forced Pooling and Dispute Resolution

Karen Cox, WVU Extension Agricultural and Natural Resources Agent, Ohio County

Joshua Fershee, Associate Dean for Faculty Research and Development and Professor, WVU College of Law, Center for Energy and Sustainable Development

***Disclaimer:** This publication is made available by the West Virginia University Extension Service and the authors for educational purposes only. The purpose of this fact sheet is solely to inform about forced pooling, and neither WVU nor WVU Extension are advocating for or against any potential forced pooling law. As with any dynamic legal issue not yet written into law, you should fully research the current facts and policies in your particular area.*

This publication does not provide legal advice. It provides general information and seeks to provide you with a general understanding of relevant issues. This publication does not create an attorney-client relationship, and this publication is not a substitute for competent legal advice from a licensed, professional attorney in your state.

Williams and Meyers' *Manual of Oil & Gas Terms 783 (15th ed.)* defines pooling as, "the bringing together of small tracts sufficient for the granting of a well permit under applicable spacing rules." This is distinguished from unitization, which describes the joint operation of all or some part of a producing reservoir. Pooling, when used with horizontal drilling, allows multiple well heads to be placed on a single area or pad. Pooling can either be voluntary (negotiated) or compulsory. Compulsory pooling, also known as forced pooling, is where a mineral owner is required or forced to join a mineral lease by a law or regulation. Thirty-nine states have some form of forced pooling laws or regulations, which is almost all oil and gas producing states.

Forced Pooling in West Virginia

West Virginia does not have a forced pooling law for the Marcellus Shale formation, which is where most of the current oil and gas drilling activity in the state is occurring. However, there is a West Virginia forced pooling statute that applies to deep wells, which according to WV Code Chapter 22c, Article 9, would include wells drilled in the Utica formation. The Utica formation is likely the next big drilling opportunity in the state. In 2015, House Bill 2688 went before the West Virginia House of Delegates and Senate. The bill was narrowly defeated and a similar bill, likely with some changes, is expected to be introduced in the next legislative session.

The History of Severed Mineral Rights

Traditionally, if a person owned land, they owned the surface, the air above and the ground below. However, the surface rights can be, and in many cases have been, separated from the minerals lying underground. This creates what is known as a severed or separated estate, with mineral rights and surface rights held by separate owners. If there is any question, the deed states what minerals were separated and how.

In the case of separation, the surface owner owns a subservient estate. That is, they have rights to farm or build a home, but cannot block the mineral owners from doing what is reasonably necessary to get their minerals. State laws can provide some small protections and payments for surface owners in regard to mineral extraction but most of the benefit goes to the mineral owners.

It is common for mineral rights to be held by a family and handed down from generation to generation. Some deeds have tens or even hundreds of owners, with some entitled to only a fraction of a percent. All of the owners must agree before a lease for oil or gas production can be entered.

Mineral Disputes

Because land and minerals can have multiple owners, disputes often arise. For example, if person A owns minerals on 2.6 acres (2.6%) of a 100-acre tract, under current law that individual can restrict the rights of the remaining owners and prevent the development of all mineral rights, therefore blocking 97.4% of the mineral owners from entering a mineral lease.

Forced pooling laws are one way for solving these types of disputes. The laws provide a way to decide whose rights should be enforced when a group of mineral owners cannot agree. Ideally, the mineral holders bargain until they can agree. Though if they cannot reach an agreement, someone must decide which side will win and which side will lose.

Under current law for Marcellus-depth minerals, if all mineral owners cannot agree to a lease, minerals cannot be removed and none of the owners can be paid royalties. The only way to resolve this kind of dispute is through a partition suit, which generally ends in a forced sale of the parcel. The process was designed for surface disputes, so it can be hard to apply to minerals. Partition suits can also mean that an owner may have to sell their mineral rights instead of keeping the option to get royalty payments.

Forced pooling laws are one way to decide who wins in a property dispute over mineral rights. From the example above, if forced pooling were available, it would mean the owners of 97.4% of the mineral rights could force the 2.6% owner to join the lease. Deciding whether to have a forced pooling law requires a balancing of interests, and there is no clear, correct answer. With or without a forced pooling law, one mineral owner is able to determine the options of another mineral owner when they cannot agree. The key to choosing a good dispute resolution process is ensuring that people believe the process is fair and consistent.

Important Considerations for Possible Forced Pooling Legislation

How a forced pooling law is written is important, as there are many options of what to include. For example, surface owner protections can be built into a forced pooling law. Currently, surface owners have few protections when mineral rights are sold or leased under them. A forced pooling law can prevent surface disturbances, such as construction of roads, wells or storage facilities, on land over minerals that were forced into the pool.

However, these protections for land subjected to a forced pooling decision would not apply if a mineral owner enters the pool by choice, unless the law extended protections to all surfaces. Those who enter leases voluntarily should negotiate the protections they want in their leases.

The percentage of mineral ownership needed to force a pool varies by state. Some states require or prefer greater than 90% of the owners to request forced pooling while some only require 25%. Typically, the state or regulatory body determines the royalty rate and how costs and revenues will be shared in the pooled area. A statute can provide for reasonable or comparable payments and define payment calculations. Costs and third-party sales may also be covered.

If a forced pooling law is passed, it should have plain rules, clear and transparent decision-making processes and protections for the bargaining process. Such a law should ensure that mineral owners are forced into a pool only as a last resort. Though not the only option, with appropriate protections, forced pooling can be one reasonably efficient way to solve mineral rights disputes. Without such protections, such laws run the risk of abuse.

Date Created (11/2015)

ANR-O&G-15-002

For more information, contact Karen G. Cox, WVU Extension Agent – ANR, Karen.Cox@mail.wvu.edu; 304-234-3673. www.anr.ext.wvu.edu/oil_gas

Programs and activities offered by the West Virginia University Extension Service are available to all persons without regard to race, color, sex, disability, religion, age, veteran status. Political beliefs, sexual orientation, national origin and marital or family status. Issued in furtherance of Cooperative Extension work, Acts of May 8 and June 30, 1914, in cooperation with the U.S. Dept. Of Agriculture, Director, Cooperative Extension Service, West Virginia University.

The WVU Board of Governors is the governing body of WVU. The Higher Education Policy Commission in West Virginia is responsible for developing, establishing and overseeing the implementation of a public policy agenda for the state's four-year colleges and universities.

