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The Plague of Net Profits Payments: Possible Texas Solutions and Recommendations

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THE PLAGUE OF NET PROFITS PAYMENTS: POSSIBLE TEXAS SOLUTIONS AND RECOMMENDATIONS

*Christopher Gambini**

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I. INTRODUCTION

DUE to the lucrative prospect of finding oil and gas, mineral estates are deeply fractionalized among multiple owners. The multiplicity of owners creates barriers of inefficiencies for oil and gas development and thus hinders Texas's industry.¹ The problem is aggravated by the common issue of dormant interests where interest owners cannot be found.² Without a doubt, much scholarship has been written to remedy these industry-wide plagues. However, at root, Texas's issue does not concern the multiplicity of owners or dormant mineral interest.³

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1. See Ernest E. Smith, *Methods for Facilitating the Development of Oil and Gas Lands Burdened with Outstanding Mineral Interests*, 43 TEX. L. REV. 129, 129-30 (1964).

2. *Id.*

3. *Id.* at 131. Texas has adopted the majority view that cotenant mineral interest holders may drill without the consent of others. Those owners who withhold consent will hereinafter be referred to as nonconsenting owners.

Rather, the main barrier to oil and gas development is paying net profits to nonconsenting cotenants by virtue of accounting.⁴ In Texas, even when there is a multiplicity of owners or owners cannot be found, development by cotenants is possible, so long as proper accounting is made to nonconsenting cotenants. Thus, where the nonconsenting owners have large fractional interests, their claim to net profits will proportionally reflect the same. This causes two possible negative consequences: (1) the cotenant seeking development must bear the burden and receive a lower royalty from the oil and gas producer to secure a lease; or (2) the producer must bear the burden and see its margins decrease to secure the lease from the consenting cotenants. In either situation, the producer or consenting cotenant will be burdened and disincentivized to develop the mineral estate, thus hindering Texas's industry.

This comment will discuss this issue and possible solutions for Texas cotenants seeking to develop their minerals. Part II will explain the legal background of accounting in mineral development and expose how states often limit personal property rights to facilitate oil and gas development. In light of Part II, Part III will propose a drastic change to personal property rights to eliminate net profit payments in Texas. Part IV will discuss less drastic alternatives that may mitigate net profit payments that require only minor extensions of preexisting law. Part V will conclude with a summary of Texas's options to avoid net profit payments and a long-term speculation on where Texas law is heading.

II. BACKGROUND: WHY NET PROFITS?

Cotenancy is created when multiple people concurrently own a piece of real property.⁵ Because each person is a concurrent owner, each cotenant has a right to use the property.⁶ Moreover, perhaps contrary to intuition, cotenants do not owe fiduciary duties to one another and may not act for one another without permission.⁷ However, there are some implied duties that arise in a cotenancy. For example, cotenants in actual use of the property are liable to the non-user cotenants for any waste committed and losses resulting therefrom.

In Texas, cotenants are required to share income and expenses from the jointly owned property according to each tenant's proportional interest in the property.⁸ Moreover, it is permissible to deduct the expenses

4. *Id.* at 131–32. There is ambiguity regarding what expenses may be properly deducted, which further causes barriers to oil and gas development. However, this comment will not touch greatly on this topic.

5. Caleb A. Fielder, Esq., *Blood and Oil: Exploring Possible Remedies to Mineral Cotenancy Disputes in Texas*, 50 TEX. TECH L. REV. 173, 176 (2017).

6. *See id.*

7. *See id.* While a cotenancy may appear to create an implied partnership among the parties, this is not so.

8. *See* I-10 Colony, Inc. v. Chao Kuan Lee, 393 S.W.3d 467, 478–79 (Tex. App.—Houston [14th Dist.] 2012, pet. denied) (citing *Williams v. Shamburger*, 638 S.W.3d 639, 640 (Tex. App.—Waco 1982, writ ref'd n.r.e.)).

from the income.⁹ Particularly, within the context of oil and gas leases, these same rules generally apply; thus, nonconsenting owners are paid their proportional income accrued by the property development minus proportional expenses.¹⁰ Interestingly enough, the courts make an exception to favor nonconsenting cotenants. Rather than strictly applying the general rules, Texas courts do not require nonconsenting owners to burden their proportional expenses if they result from “money speculatively spent” and the expenses cannot be deducted from the share of actual production.¹¹ Thus, the cotenancy rules of accounting in oil and gas further pose a barrier to development because the producer or consenting cotenant cannot seek reimbursement for expenses from, for example, drilling dry-hole wells.¹²

As explained above, it is often the case that settled property law conflicts with the policy goal of promoting industry and efficiency. Accounting among cotenants is no different. In the next sections, this part will analyze the moving force behind property law and how settled personal property is often undermined and changed to further economic goals. In turn, this part will hopefully sanitize the idea of changing, modifying, or abridging Texas cotenancy law for the sake of promoting mineral development.

A. THE UNDERLYING PRINCIPLES OF PROPERTY

Emerging from the late nineteenth century, property has been commonly classified as a bundle of legal “sticks.”¹³ That is, owning property is an entitlement to a bundle of legal rights and privileges.¹⁴ Among the most basic legal rights in property ownership are the rights to possess, use, transfer, and exclude nonowners.¹⁵ It is important to note the modern American conception of property developed through the era of capitalism in the twentieth century.¹⁶ It appears the current state of property law is a response to the increasingly complex forms of wealth, the desire to promote economic growth, and the desire to better regulate diverse property ownership.¹⁷

As property law developed in the twentieth century, it became increasingly clear to legal realists that property ownership is not grounded in natural law or supernatural rights.¹⁸ Rather, it was the legal sovereign—

9. *See id.* at 479.

10. *See Neeley v. Intercity Mgmt. Corp.*, 732 S.W.2d 644, 646 (Tex. App.—Corpus Christi 1987, no writ) (citing *Cox v. Davison*, 397 S.W.2d 200, 201 (Tex. 1965)).

11. *See id.* (citing *Shaw & Estes v. Tex. Consol. Oils*, 299 S.W.2d 307 (Tex. App.—Galveston 1957, writ ref'd n.r.e.)).

12. *See id.*

13. *See Anna di Robilant, Property: A Bundle of Sticks or a Tree?*, 66 VAND. L. REV. 869, 877 (2013).

14. *See id.*

15. *See id.* at 879.

16. *See id.* at 878.

17. *See id.*

18. *See id.* at 883–84.

the state—which granted and secured these rights to private property owners.¹⁹ Moreover, property rights became increasingly thought of as relational; that is, owners did not have rights to objects but had rights with or against other individuals.²⁰

The relational nature of property law implied property rights are naturally shared among individuals.²¹ For example, early scholars have described property rights as merely one's right to use and another's correlative duty or obligation to not use.²² However, this concept of "sharing" property rights can be better explained in another way. Right to property not only entails rights and corresponding obligations, but it also entails correlative rights shared by all people within a legal community with preferential rights given to the "property owner."²³ Insofar as property rights are relational and correlative, property rights are conditional and "property ownership" can easily change among those who share the correlative rights.²⁴ For example, property ownership is recognized to the extent the owner is reasonably using the object. Once unreasonable use is exhibited, the property owner's rights are forfeited, lessened, or made subservient to another's claims to the property.²⁵

Moreover, that property law exists by virtue of the sovereign's will suggests an interesting view of the nature of property law. It suggests property law is mutable as much as the sovereign's will is mutable. Thus, insofar as the sovereign reflects a community's standard of relationship, or rather a code of conduct between individuals, then property law naturally reflects such relationships.²⁶ As the nature of relationships change, defined property rights will also change under the sovereign's watch.²⁷

The Supreme Court of the United States partially echoed this idea of property. In *Penn Central Transportation Co. v. New York City*, the Court explained that a public taking is not the mere denial of property use.²⁸ The Court ultimately took a holistic view when analyzing property rights and implicitly found correlative rights were the basis of public takings. That is, the community also had a property interest in the publicly taken

19. *See id.*

20. *See id.* at 880.

21. *See id.* at 880–82.

22. *See id.*

23. *See id.* While the early scholars of the twentieth century did not find this characteristic of property law evident, it is becoming increasingly articulated by modern scholars who are advocating to modify the bundle of sticks concept of property law. *See id.* at 889.

24. *See id.*

25. *See id.* at 884. What comes to mind is the common practice of civil forfeiture and public takings. Civil forfeiture is the practice by which the sovereign body seizes assets involved in illegal activity and thus implicitly declares the property owner has forfeited his right to the asset. The property is thereby placed under the community's ownership according to its correlative rights. *See* Stephen Schneider, *Civil Forfeiture*, ENCYCLOPÆDIA BRITANNICA (Apr. 17, 2018), <https://www.britannica.com/topic/civil-forfeiture> [<https://perma.cc/74F2-8ACW>].

26. *See* di Robilant, *supra* note 13, at 880–82.

27. *See id.*

28. *See* *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 130 (1978); di Robilant, *supra* note 13, at 888.

object. Thus, it appears the conceptual framework of property law outlined earlier is the moving force of modern property law. As relationships and policy goals change, it is obligatory that property law should also change. The same should hold when considering changes to cotenancy accounting rules. The next section of this part will provide examples of legislatures and courts abridging property rights to facilitate oil and gas development.

B. HISTORY OF FRICTION WITH OIL AND GAS POLICY GOALS

States have a history of abridging property rights so as to accomplish their policy goals—especially to promote the oil and gas industry. For example, states have increasingly adopted dormant mineral acts where severed mineral estates would revert to the surface owner if the mineral interests are not “used” for a period of time.²⁹ In *Texaco, Inc. v. Short*, the Supreme Court of the United States took up the issue whether such dormant mineral acts were unconstitutional takings.³⁰ The Court ultimately upheld the state’s statute, finding the state did not take any property, but rather, the state was merely statutorily defining abandonment.³¹ While the Court strained to make clear that the case was not about “destruction of a right,” the Court recognized dormant mineral acts were “extinguishing” rights and withdrawing remedies.³² More importantly, the Court focused on the enacting state’s legitimate goal to develop the mineral estate.³³ In summary, the Court stated, “The State surely has the power to condition the ownership of property on compliance with conditions that impose such a slight burden on the owner while providing such clear benefits to the State.”³⁴

Moreover, states, including Texas, have adopted certain rules of oil and gas production that invariably limit property rights. For example, the widespread adoption of the rule of capture.³⁵ In a groundwater case, the Texas Supreme Court adopted the rule of capture whereby landowners are not liable for taking minerals on their own land though the minerals initially belonged to an adjacent owner.³⁶ In this landmark opinion, how-

29. Terrell Fenner, *A Problem Lurking Just Below the Surface: The Need in Texas for Dormant Mineral Legislation*, 2 TEX. A&M L. REV. 501, 504–05 (2015).

30. See *Texaco, Inc. v. Short*, 454 U.S. 516, 522–23 (1982).

31. See *id.* at 529–30.

32. See *id.* at 528.

33. See *id.* at 529–30.

34. See *id.*

35. Eric Opiela, *The Rule of Capture in Texas: An Outdated Principle Beyond Its Time*, 6 U. DENV. WATER L. REV. 87, 103 (2002). Texas initially adopted the rule of capture as a matter of water law, but Texas soon adopted it for application in oil and gas production. See *id.* at 89.

36. *Hous. & T.C. Ry. Co. v. East*, 81 S.W. 279, 281–82 (1904). But for the rule of capture, the common law principle *cujus est solum, ejus est usque ad coelum et ad infernos* would apply in its entirety. See Opiela, *supra* note 35, at 90. The principle roughly translates as “to whomever the soil belongs, he owns also to the sky and to the depths.” See *id.* Thus, under this principle, a landowner would be liable for trespass or conversion in property law, if minerals were taken from adjacent lands. See *id.* at 90–91.

ever, the court did not discuss the rule of capture in terms of property law or qualified ownership. Rather, it discussed the doctrine in terms of tort non-liability.³⁷ Nonetheless, the court intended its ruling to limit actions regarding property to promote industry, agriculture, and utility.³⁸

It was not until later that the court refined the rule of capture and squarely spoke of the doctrine in terms of property ownership.³⁹ Furthermore, the lower Texas courts followed suit and likewise recognized the rule of capture as a property law doctrine.⁴⁰ While there is debate whether the more recent Texas Supreme Court cases have turned the rule of capture doctrine into one of tort law, it remains clear that the rule of capture may very well be a property law doctrine.⁴¹

The acceptance of the rule of capture illustrates that property law is a malleable field of law meant to reflect the changing relationships between individuals with each other and individuals with the state.⁴² The rule of capture was a modification—a large exception—to the common law principle *cujus est solum, ejus est usque ad coelum et ad infernos*.⁴³ However, within Texas jurisprudence, it appears the exception has become the general rule in the context of mineral development.⁴⁴ The fact that the rule of capture is limited by showing malice or waste indicates the rule is complex, is deserving of its own jurisprudence, and has replaced the common law rule of mineral ownership.⁴⁵ It is an indication that property law dramatically changes according to changing societal standards.

Furthermore, it is important to note the development of the rule of capture contains hints of equity.⁴⁶ When the rule of capture is limited by showings of malice or waste, the rule reflects fundamental presumptions of property law articulated earlier in this comment.⁴⁷ That is, ownership in mineral property is not absolute, and the coextensive rights of others and the community in the property must be taken into account. To make clear, when the rule of capture declares non-liability for taking ownership over minerals that otherwise would be improper under common law principles, the rule is recognizing a landowner's right to property. However, when the rule makes exceptions to a landowner's right to minerals if

37. See Opiela, *supra* note 35, at 95.

38. See *id.* at 96 (citing *East*, 81 S.W. at 280–81).

39. See *id.* at 96–97 (citing *Tex. Co. v. Burkett*, 296 S.W. 273, 278 (Tex. 1927)) (arguing that the court's discussion of exclusive property rights and citations to certain cases indicates the court's view of the rule of capture as a matter of property law).

40. See *id.* (citing *Pecos County Water Ctrl. & Imp. Dist. No. 1 v. Williams*, 271 S.W.2d 503, 505 (Tex. App.—El Paso 1954, writ ref'd n.r.e)). In a more explicit fashion, the appellate court described the rule of capture and called it a “concept of property ownership.” See *Williams*, 271 S.W.2d at 505.

41. See Opiela, *supra* note 35, at 100–01 (comparing *Friendswood Dev. Co. v. Smith-Sw. Indus., Inc.*, 576 S.W.2d 21 (Tex. 1978), with *Sipriano v. Great Spring Waters of Am., Inc.*, 1 S.W.3d 75 (Tex. 1999)).

42. See *id.* at 101–02.

43. See *id.* at 90.

44. See *id.* at 101–02.

45. See *id.*

46. See *id.*

47. See *id.*

waste or malice was committed, the rule will refuse to prioritize the landowner's property rights but will recognize another's claim to the minerals.⁴⁸ As it stands, it appears the rule of capture represents a departure from the presumption that owners have absolute ownership over their minerals to the presumption that minerals are coextensively owned, in different degrees, by the mineral estate owner, adjacent landowners, and the sovereign at large.⁴⁹

All this to say, within the context of mineral ownership, property law is more about reflecting the relationships between community members and equities than about absolute ownership. Thus, it should not be startling that other facets of mineral ownership should be subject to change so as to better reflect community standards and interests. In particular, cotenancy accounting rules should be analyzed with this in mind and changed to facilitate mineral development.

III. A PROPOSAL: RISK PENALTIES

Considering the flexibility of property law in the oil and gas context, outright changing the accounting rules towards nonconsenting cotenants is a solution. Namely, a sort of risk penalty should be imposed on net profits.⁵⁰ An example of a statutorily defined risk penalty can be found in Texas's Mineral Interest Pooling Act.⁵¹ Under this Act, a mineral interest owner who is forced to pool and demands net profits may be charged a risk penalty not exceeding 100% of the production costs.⁵² Another example can be found in Ohio's compulsory pooling statute.⁵³ In that act, the nonconsenting landowner who is forced to pool may suffer a 200% risk penalty.⁵⁴

Changing accounting rules can also be viewed as a proposal to expand compulsory pooling acts to include any fractionalized mineral estate where one cotenant is attempting to develop the minerals. The hope, at least, is that the risk penalties will sufficiently mitigate the burden that the producer or cotenant will suffer and thus facilitate mineral development. However, even if risk penalties of 100% or 200% of production costs are implemented, doubt exists whether this may be a sufficient burden-relieving solution. For one matter, the production costs are generally

48. *See id.*

49. *See id.*

50. *See* Abby Harder, *Compulsory Pooling Laws: Protecting the Conflicting Rights of Neighboring Landowners*, NAT'L CONF. ST. LEGISLATURES (Oct. 24, 2014), <http://www.ncsl.org/research/energy/compulsory-pooling-laws-protecting-the-conflicting-rights-of-neighboring-landowners.aspx> [<https://perma.cc/76JD-XNNZ>]. The risk penalty regime is meant to encourage production and discourage nonconsenting tenants from being hold outs. *See id.* Traditionally, the risk penalty is suffered only when production is successful. *See id.*

51. *See* TEX. NAT. RES. CODE ANN. § 102.052 (West 2018). The Mineral Interest Pooling Act is meant to encourage voluntary pooling among mineral owners who do not have enough land to fulfill a drilling unit.

52. *See id.*

53. *See* Lucas P. Baker, *Forced into Fracking: Mandatory Pooling in Ohio*, 42 CAP. U.L. REV. 215, 217 (2014) (citing OHIO REV. CODE ANN. § 1509.27 (West Supp. 2013)).

54. *See id.*

fixed amounts.⁵⁵ Thus, when risk penalties are calculated, the penalty will only be effective until those production costs or a percentage thereof are covered. This imposes a great limitation on risk penalties for the purpose of facilitating mineral development. Since the proposed risk penalty will only affect initial production costs, the penalty does not affect costs thereafter and thus eats into the long-term profits cotenants or producers are attempting to secure.

This limitation is particularly aggravated by the terms of many leases which anticipate long-term production. What comes to mind is the common secondary clause which provides that the lease will remain in effect “as long thereafter as oil or gas is produced from the leased premises or operations.”⁵⁶ With such a clause, a potential mineral development will entail fixed production costs with long-term revenue.⁵⁷ Thus, while a risk penalty will mitigate paying high net profits to nonconsenting cotenants initially, it will not mitigate the high payouts long term, which is where the lease derives much of its value.⁵⁸

A proposal to impose a risk penalty should not be limited to a percentage of production costs. Rather, a more appropriate risk penalty includes imposing a percentage of production and post-production costs, imposing a penalty which effectively imitates a lease royalty if the nonconsenting cotenant enters into a lease, or requiring the nonconsenting cotenant to enter into a lease.⁵⁹ These types of penalties better consider the long-term revenue that may be lost to a calculation of net profits. For example, if a risk penalty is also based on post-production costs, then net profits will be burdened by all costs incurred throughout the duration of a lease.⁶⁰ If the risk penalty requires the nonconsenting cotenant to enter into the lease or imposes penalties that imitate the royalty clause of the lease, then paying net profits will effectively be avoided.⁶¹ While these

55. See 55 TEX. JUR. 3D OIL & GAS § 351 (2018) (first citing *Blackmon v. XTO Energy*, 276 S.W.3d 600 (Tex. App.—Waco 2008, no pet.); then citing *Cartwright v. Cologne Prod. Co.*, 182 S.W.3d 438 (Tex. App.—Corpus Christi 2006, pet. denied)). In Texas, production costs are expenses “incurred in exploring for mineral substances and in bringing them to the surface.” See *Cartwright*, 182 S.W.3d at 444. Unless changed by the lease terms, these costs are generally burdened by the producer, and any “post-production costs” are burdened proportionately by the producer and mineral estate owner. See *id.* Post-production costs, for example, include the following: “[T]axes, treatment costs to render the gas marketable, compression costs to make it deliverable into a purchaser’s pipeline, and transportation costs.” See *id.* at 444–45.

56. See John McFarland, *The Oil and Gas Lease—Part II: The Primary Term*, OIL & GAS LAW BLOG (Dec. 2, 2014), <https://www.oilandgaslawyerblog.com/the-oil-and-gas-lease-part/> [<https://perma.cc/XUZ3-F4NR>].

57. See *id.*

58. See *id.*

59. See Harder, *supra* note 50. Forcing nonconsenting cotenants into a lease is not commonly found alone in compulsory pooling statutes. See *id.* Rather, forced leasing is usually part of an “options” statute where the nonconsenting cotenants may elect their form of payment if forced pooled. See *id.* Moreover, this sort of “penalty” is not typically referred to as a risk penalty but, nonetheless, operates as a penalty in some sense. See *id.*

60. See *Cartwright*, 182 S.W.3d at 444–46; McFarland, *supra* note 56.

61. See *Neeley v. Intercity Mgmt. Corp.*, 732 S.W.2d 644, 646 (Tex. App.—Corpus Christi 1987, no writ).

sorts of risk penalties may be an adequate solution to tenants refusing to enter into a lease with their cotenants, there may be constitutional issues that must first be overcome before implementing these solutions.

A. CONSTITUTIONAL BARRIERS

As with most legal proposals that entail government involvement, the imposition of risk penalties is subject to constitutional attack. However, these attacks are not insurmountable. Since the proposals suggested above require the Texas government to impose penalties and burden property, constitutional questions necessarily arise. Moreover, since these proposals are similar to compulsory pooling statutes, which have raised and overcome constitutional attack, it is likely imposing risk penalties will experience the same fate.⁶²

Among the first questions usually hurled at compulsory pooling, and likely against the proposed risk penalties, is whether due process is fulfilled.⁶³ Under United States Supreme Court precedent, the government must provide “notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”⁶⁴ While the Court’s interpretation of due process does not require actual notice,⁶⁵ there is debate as to what due process necessarily requires.⁶⁶ However, circuit courts have found forced pooling orders indeed comply with due process.⁶⁷ Since imposing risk penalties would be akin to forced pooling statutes, it is likely the proposed risk penalties can satisfy due process.

Another constitutional question that may arise is whether the state government is overstepping its police powers when it imposes a risk penalty on nonconsenting cotenants. While Texas courts have not directly adjudicated the constitutionality of forced pooling statutes, other state courts have.⁶⁸ An overview of these cases sheds light on whether it is a permissible use of a state’s police powers to impose risk penalties upon nonconsenting cotenants who need not be pooled.⁶⁹

62. See Bruce M. Kramer, *Common Problems Attendant to Compulsory Pooling*, 27 ENERGY & MIN. L. FOUND. § 7.03 (2006).

63. See *id.* Under compulsory pooling statutes, and as would be the case in the proposed risk penalties, a state regulatory body is empowered to issue orders to compel pooling and authorize mineral production. See *id.* To compel pooling, the regulatory body must provide adequate notice. See *id.*

64. See *id.* (citing *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950)).

65. See *id.*; *Dusenbery v. United States*, 534 U.S. 161, 170 (2002) (“We note that none of our cases cited by either party has required actual notice in proceedings such as this.”).

66. See Kramer, *supra* note 62 (citing *Jones v. Flowers*, 547 U.S. 220, 223–26 (2006)).

67. See *id.* (citing *Katter v. Ark. La. Gas Co.*, 765 F.2d 730, 732–35 (8th Cir. 1985)) (noting that the Eighth Circuit upheld a forced pooling order where the agency mailed a notice of the hearing to the last known address of the nonconsenting mineral owner).

68. See Patrick Henry, *Unleased and Unjoined Owners—Forced Pooling and Cotenancy Issues*, 56 ROCKY MTN. MIN. L. INST. § 18.01 (2010) (noting courts in Oklahoma and Utah have made adjudications whether the local government may appropriately impose penalties or force cotenants to surrender their interests).

69. See *id.*

Bennion v. ANR Production Co. was a case of first impression in the Utah Supreme Court concerning whether imposing risk penalties on non-consenting mineral interest owners is permissible under forced pooling acts.⁷⁰ As a preliminary matter, the court found that the penalties were “entirely consistent” with protecting correlative rights, implementing a reasonable way to allocate and compensate risk, providing each mineral interest holder their fair share of minerals without waste, and promoting oil and gas recovery.⁷¹

On the matter of unconstitutional takings, the *Bennion* court considered whether imposing a penalty was “unconstitutional on its face and as applied because it [was] a taking of a property right without just compensation.”⁷² Ultimately, the court found this argument lacking because taking a vested property right is substantively different than imposing an obligation to pay a share of drilling costs.⁷³ Furthermore, the court elaborated that “[a]ny right he has to a statutory share of production . . . [is] subject to the payment of a share of costs and expenses, including a share of risk compensation”⁷⁴

The court’s decision to uphold penalties relied in part on protecting correlative rights.⁷⁵ Namely, the party being forced to pool had the right to burden costs of drilling or the right not to burden such costs.⁷⁶ However, since *not* burdening the cost would be at the working interest owners’ expense, the penalty would operate to rectify this inequitable situation and thus protect correlative rights.⁷⁷

Since the state is protecting correlative rights, the court reasoned the risk penalty was a valid exercise of its police powers.⁷⁸ Moreover, the court found the police power was justified since the nonconsenting party received a royalty from production and initially had an opportunity to participate in the drilling costs without suffering a risk penalty.⁷⁹ Furthermore, the court noted that protecting correlative rights, preventing waste, and “fairly distributing among them the costs of production and of the

70. See *Bennion v. ANR Prod. Co.*, 819 P.2d 343, 344, 346 (Utah 1991). The statute dictates a penalty range of 150% to 200% of production costs. See *id.* at 349.

71. See *id.* at 346–47. These objectives were outlined in Utah’s forced pooling statute and required compliance. *Id.*

72. See *id.* at 348.

73. See *id.*

74. See *id.*

75. See *id.*

76. See *id.* In the usual situation of forced pooling, the nonconsenting mineral interest owner becomes a cotenant to the producer who leased the mineral estate from the other pooled tracts. See *id.* As a nonconsenting cotenant to production, the cotenant may fully cooperate with the producer and burden a share of operating costs, or receive net profits where costs are only suffered, if revenue is secured. See *id.*

77. See *id.* (citing *Anderson v. Corp. Comm’n of Okla.*, 327 P.2d 699, 703 (Okla. 1957)) (noting the Utah statute recognized correlative rights); *In re SAM OIL, Inc.*, 817 P.2d 299, 302 (Utah 1991) (describing the protection of correlative rights as promoting mutual benefits, protecting the public good generally, and ensuring “nonparticipating owners do not benefit from the successful outcome of risks they do not take”).

78. See *SAM OIL*, 817 P.2d at 348–49.

79. See *id.* at 348.

apportionment” were valid state interests that are furthered in a forced pooling statute.⁸⁰

In *Anderson v. Corporation Commission of Oklahoma*, a forced pooling statute was invoked against a nonconsenting mineral interest owner.⁸¹ The penalty in question involved forcing the nonconsenting owner to participate in drilling costs or surrender his interest for an \$800 per acre bonus and leasehold.⁸² Among the many protests issued by the nonconsenting owner, he contended the imposed penalty constituted an unconstitutional taking for private use and a due process violation.⁸³

The Oklahoma Supreme Court ultimately upheld the penalties as constitutional.⁸⁴ As a preliminary matter, the court was sure to lay down the fundamental principles that would guide its reasoning:

All property is held subject to the valid exercise of the police power; nor are regulations unconstitutional merely because they operate as a restraint upon private rights of person or property or will result in loss to individuals. The infliction of such loss is not a deprivation of property without due process of law; the exertion of police power upon subjects lying within its scope, in a proper and lawful manner, is due process of law.⁸⁵

The Oklahoma court elaborated on Texas Supreme Court precedent by deciding a forced pooling statute is not a taking because the government granted the nonconsenting owner a right to participate in production with conditions or receive a bonus.⁸⁶ Moreover, the forced pooling order did not constitute a taking because the producer was granted permission to drill upon paying the nonconsenting interest owner.⁸⁷

As a final matter in this overview of constitutional principles that may affect the proposed risk penalties, it would be instructive to mention one last Oklahoma Supreme Court case. In the much-cited *Patterson v. Stanolind Oil & Gas Co.*, the court provided a deep analysis on the nature of correlative rights that justify forced pooling statutes.⁸⁸ In part, the opinion quoted the following from *Ohio Oil Co. v. Indiana*:

But there is a coequal right in them all to take from a common source of supply the two substances which in the nature of things are united, though separate. It follows from the essence of their right and

80. *See id.* at 348–49 (citing *Hunter Co. v. McHugh*, 320 U.S. 222, 227 (1943)). This line of reasoning was in response to a due process argument. *See id.* Due process was fulfilled because Utah’s forced pooling statute reasonably related to a permissible state interest. *See id.*

81. *See Anderson*, 327 P.2d at 700–01.

82. *See id.*

83. *See id.* at 701. The nonconsenting owner also contended the forced pooling statute unconstitutionally compelled him to contract against his will and impaired his vested contractual rights. *See id.*

84. *See id.* at 704.

85. *See id.* at 702 (quoting *Lombardo v. City of Dallas*, 73 S.W.2d 475, 478 (Tex. 1931)).

86. *See id.* at 702–03.

87. *See id.* at 703.

88. *See Patterson v. Stanolind Oil & Gas Co.*, 77 P.2d 83, 88 (Okla. 1938).

from the situation of the things as to which it can be exerted, that the use by one of his power to seek to convert a part of the common fund to actual possession may result in an undue proportion being attributed to one of the possessors of the right to the detriment of . . . others, or by waste by one or more to the annihilation of the rights of the remainder. Hence it is that the legislative power, from the peculiar nature of the right and the objects upon which it is to be exerted, can be manifested for the purpose of protecting all the collective owners, by securing a just distribution, to arise from the enjoyment, by them, of their privilege to reduce to possession, and to reach the like end by preventing waste.⁸⁹

As the *Patterson* case implied, the constitutionality of forced pooling and imposing penalties is generally not a matter of unconstitutional takings but rather of protecting individuals and their correlative rights.⁹⁰

Thus, it is likely that imposing risk penalties on nonconsenting cotenants will pass constitutional muster. The expositied jurisprudence relies heavily on state interests and protecting correlative rights, which are present factors if a state were to impose risk penalties on nonconsenting cotenants. The risk penalty proposal seeks to limit net profit payments in order to prevent waste and promote mineral development.⁹¹ Furthermore, correlative rights are certainly at play since one cotenant is hindered from securing his equitable share of minerals from the common supply.⁹² That is, the nonconsenting cotenant is effectively barring or making mineral development unreasonably difficult for cotenants seeking mineral development. Furthermore, an unconstitutional taking would not occur either. Courts stressed that taking a vested property right is different than imposing conditions to participate in production.⁹³ Likewise here, the state is arguably granting the right to share in production with the condition that net profits be limited so as to further reasonable state interests. Thus, the proposal would merely be an appropriate exercise of the state's police powers.⁹⁴

However, there are clear differences between constitutionally sanctioned penalties within forced pooling statutes and the penalties proposed here, which may affect the constitutional analysis. For example, forced pooling statutes involve granting a mineral interest owner, fractional or otherwise, an opportunity to produce minerals where a gas and oil regulation would otherwise prohibit.⁹⁵ Whereas, the situation to which this comment is concerned does not involve regulatory prohibitions that ini-

89. *See id.* (quoting *Ohio Oil Co. v. Indiana*, 177 U.S. 190, 209–10 (1900)).

90. *See id.*

91. *See Bennion v. ANR Prod. Co.*, 819 P.2d 343, 348–49 (Utah 1991).

92. *See id.* at 348.

93. *See id.* at 348–49.

94. *See Anderson v. Corp. Comm'n of Okla.*, 327 P.2d 699, 702 (Okla. 1957).

95. *See Porter Wright, Oil & Gas Terms. . . Confused? You Aren't the Only One*, OIL & GAS LAW REP. (Nov. 19, 2012), <https://www.oilandgaslawreport.com/2012/11/19/oil-gas-terms-confused-you-arent-the-only-one/> [<https://perma.cc/92SZ-Q4Q6>]. State conservation agencies commonly create “drilling units” to promote conservation efforts and correlative rights. *See id.* A drilling unit is the minimum amount of acreage required to pursue mineral

tially bar production. That is, the issue does not presume drilling units are a barrier to production; rather, cotenants are. Furthermore, since cotenants are jointly and severally owners of property, they are already entitled to the profits and accountable to costs incurred by the property. Thus, the state cannot grant a right to production that cotenants already have by virtue of the cotenancy and impose conditions on this right. This is the fundamental difference between penalties imposed pursuant to forced pooling and penalties imposed pursuant to a merely nonconsenting cotenant. Since much of the jurisprudence outlined above relies on the premise that forced pooling entails granting a right to production with conditions, there is doubt whether the penalties proposed here do not constitute a taking. However, a more nuanced understanding of cotenancy and a state's police powers may suggest a taking is not occurring after all.

For one, the state is providing a right to production akin to forced pooling statutes, albeit through common law.⁹⁶ The Texas Supreme Court has reiterated its longtime rule that cotenants have the right to extract minerals from the property without securing consent of the other cotenants.⁹⁷ Furthermore, the nonconsenting cotenant is owed their reasonable portion of the value of minerals taken, less reasonable costs of production and marketing.⁹⁸ Through the Texas Supreme Court's interpretation of the common law, Texas ensured a nonconsenting cotenant's right to their share of production. This idea is likely bolstered by the fact that Texas does not consider mineral development as actionable waste and, thus, protects nonconsenting cotenants to participate against possible injunctions by other nonconsenting cotenants.

Moreover, this sort of reasoning appears in line with the underlying principles of property discussed earlier. Many modern legal thinkers believe property law is founded upon the sovereign's will.⁹⁹ It is the state, and its use of its police powers, that creates property rights.¹⁰⁰ Therefore, a cotenant's right to accounting is a grant of rights that may be conditioned; thus, risk penalties on net profits would not constitute a taking—at least where modifying methods of accounting do not fundamentally alter an individual's possessory interest in the property. Finally, especially in Texas, it is more likely the case that cotenancy accounting rights are derived from the state and thus may have conditions placed upon them due to precedent. For example, in *Lombardo v. City of Dallas*, the Texas Supreme Court cogently described the nature of property in this way: “All property is held subject to the valid exercise of the police power; nor are regulations unconstitutional merely because they operate as a re-

production. *See id.* Thus, if a mineral interest owner has less than the required acreage to produce, the owner must pool in order to pursue production on their land. *See id.*

96. *See Wagner & Brown, Ltd. v. Sheppard*, 282 S.W.3d 419, 426 (Tex. 2008).

97. *See id.*

98. *See id.*

99. *See di Robilant, supra* note 13, at 883–84.

100. *See id.*

straint upon private rights of person or property or will result in loss to individuals.”¹⁰¹ Thus, per *Lombardo*, while imposing risk penalties is a “taking” of sorts, it nonetheless falls within the state’s police powers.

However, some may argue that the heavy reliance on state police power to justify risk penalties goes too far. That is, if modernists are right and their realist view is adopted, then the sovereign grants any and all property rights. Thus, any regulation on property would be permissible because regulations are merely conditions and could never constitute a taking. Indeed, it would be reasonable to doubt the modernists when they say the sovereign is the alpha and the omega. One should always be cautious when their rationale denies some sort of natural or super-sovereign law. To abide by the modernist view that all things come from the sovereign would necessarily entail eschewing an objective moral code by which law should be based on.

While the heavy doctrinal reliance on the modernist view is worrisome, it need not be the exclusive justification for imposing risk penalties on nonconsenting covenants. Rather, the modernist view can rightfully be discarded and objective principles governing cotenancy can still be acknowledged. Instead of justifying risk penalties on the sovereign’s all-encompassing power, penalties can be justified upon *discoveries* and *determinations* of the natural law as applied to joint ownership. Thus, imposing risk penalties on net profits is still a doctrinally sound solution to promoting mineral development.

Some may further argue the constitutionality of forced pooling statutes involves different property rights than those involved in the proposed solution. It may be argued that correlative rights, used in the narrower sense common in oil and gas law, are not an issue when attempting to impose risk penalties. As stated above, correlative rights within the oil and gas context refer to ensuring mineral interest owners have a fair opportunity to secure their equitable share of minerals.¹⁰² Where drilling units are not an issue and do not bar production, covenants indeed have an opportunity to secure value from their minerals; thus, correlative rights are protected.¹⁰³ That is, covenants may begin production or may lease to a producer, if they desire, without hindrance. Nonconsenting covenants receiving net profits is not a prohibition on production, like a drilling unit may pose, but rather a mere inconvenience.

Furthermore, correlative rights usually refer to those rights property owners have against other owners who share a common source of minerals but occupy different tracts of land.¹⁰⁴ Since covenants own property jointly and severally, then covenants are more likely seen as a single entity that owns the property.¹⁰⁵ Since covenants are not separate owners who

101. See *Lombardo v. City of Dallas*, 73 S.W.2d 475, 478 (Tex. 1934).

102. See *Bennion v. ANR Prod. Co.*, 819 P.2d 343, 348 (Utah 1991).

103. See *id.*

104. See *Patterson v. Stanolind Oil & Gas Co.*, 77 P.2d 83, 88 (Okla. 1938).

105. See *I-10 Colony, Inc. v. Chao Kuan Lee*, 393 S.W.3d 467, 478–79 (Tex. App.—Houston [14th Dist.] 2012, pet. denied).

separately share a source of minerals, it is hard to imagine they have correlative rights as to each other.

Despite these arguments, there is good reason to expand these notions of correlative rights and justify risk penalties on net profits. Correlative rights, in a broader sense, can refer to the relativity of property ownership. That is, while certain individuals may have a primacy to property, this does not exclude other individuals or entities from having a secondary or contingent right that may still be enforced. The relativity of property ownership is found in the law of nuisance and in civil forfeiture, as mentioned earlier, and it is equally applicable in the context of mineral development.¹⁰⁶ Applying the principle to the circumstances, it appears cotenants have correlative rights even against each other. While cotenants are seen as joint owners, they are still separate entities who have correlative rights to ensure property is being used reasonably. Moreover, while it is the community that defines correlative rights and what constitutes reasonable use, it is reasonable to believe current accounting rules hinder reasonable use of mineral estates and thus violate correlative rights. There is reason to not limit correlative rights to only owners of different tracts. Rather, imposing risk penalties on net profits would indeed protect correlative rights.

In sum, it appears imposing risk penalties on net profit payments will pass constitutional muster and be a wise application of underlying property law. The objective of risk penalties is to present the most effective way to promote mineral development despite nonconsenting mineral owners—simply change accounting rules. However, despite its simplicity, the solution may prove more difficult to actually implement since Texas lawmaking is reluctant to burden property rights. Nonetheless, there are preexisting property and mineral law doctrines that *could* avoid net profit payments and facilitate mineral development.

IV. OTHER POSSIBLE SOLUTIONS

In light of the legal hurdles of implementing risk penalties on nonconsenting cotenants, it would be wise to consider other solutions. Some solutions may require a modification of Texas law allowing application to nonconsenting cotenants. Other solutions may merely require fortuitous circumstances. That is, the solution may already exist in law but is only effective in limited circumstances. The solutions can be derived from the following preexisting areas of Texas law: (a) dormant mineral acts; (b) marketable title acts; (c) statutory prescriptions; (d) compulsory pooling; (e) judicial partitions; and (f) receiverships.

A. DORMANT MINERAL ACTS

In general, dormant mineral acts are statutes meant to divest “dormant” or unused mineral interests and vest them into the surface interest

106. *See* di Robilant, *supra* note 13, at 884.

owner who sits on top of the minerals.¹⁰⁷ Like many other legislative acts that regard divestiture, these sorts of acts have been challenged as unconstitutional.¹⁰⁸ However, the Supreme Court of the United States has found dormant mineral acts do not constitute an unconstitutional taking.¹⁰⁹ Rather, the Court found such acts were justified on a state's power to "condition the permanent retention of that property right on the performance of reasonable conditions that indicate a present intention to retain the interest."¹¹⁰ Since dormant mineral acts were merely statutory definitions of abandonment, the acts were placing reasonable conditions on permanent ownership and defining indicators of present intention to retain ownerships.¹¹¹

While Texas currently has not adopted a dormant mineral act, it is a possible solution to avoid paying net profits.¹¹² An aggressive dormant mineral act that defines abandonment broadly, is self-executory, and vests the mineral interest in a cotenant may prove very useful.¹¹³ While many dormant mineral acts adopted by other states vest the mineral interest into the surface owner, it does not appear to be an issue if it were vested in the mineral cotenant.¹¹⁴ After all, cotenants are jointly and severally owners of an interest, and so it appears an abandoned interest will naturally go to the other co-owners.

However, even with an aggressive dormant mineral act, there are inherent limitations that may prove inefficient in avoiding net profit payments. Since statutorily defined abandonment must be reasonable, long periods of nonuse will likely be required before an interest is officially declared dormant. This waiting period may be too burdensome and ultimately fail to effectively facilitate oil and gas development. Yet, since reasonableness is usually defined by the political community, a dormant mineral act can be optimized to effectively avoid net profit payments. Indeed, a dormant mineral act which pushes the limit on what is reasonable may be enough to dramatically facilitate oil and gas development.

B. MARKETABLE TITLE ACTS

Similar to dormant mineral acts, marketable title acts are commonly used to facilitate oil and gas transactions.¹¹⁵ While marketable title acts do not extinguish mineral interests like dormant mineral acts, they achieve similar results because they bar mineral interest claims if certain conditions are met.¹¹⁶ For example, a Michigan statute made all marketable

107. See Fenner, *supra* note 29, at 504.

108. See *id.* at 504–05.

109. See *id.* at 505.

110. See *id.* (citing *Texaco, Inc. v. Short*, 454 U.S. 516, 526 (1982)).

111. See *id.* at 504–06.

112. See *id.* at 502.

113. See *id.* at 506 (discussing the Court's finding in *Texaco* that a self-executory dormant mineral act was not unconstitutional itself).

114. See *id.*

115. See Smith, *supra* note 1, at 151–52.

116. See *id.*

ble titles “free and clear of any and all interests, claims and charges whatsoever the existence of which depends . . . upon any act, transaction, event or omission that occurred” before the forty-year recording period unless such claims or interests were recorded in that period.¹¹⁷ This type of statute appears to impose a recurring obligation to record the mineral interest every forty years or else the act bars the interest owner’s claims.¹¹⁸

Thus, marketable title acts could have a role in facilitating development among nonconsenting cotenants. If a cotenant leases the property, the producing cotenant may withhold net profit payments, hoping the forty-year recording period passes without the cotenant rerecording his interest. When this occurs, the cotenant’s claim for net profits may be barred by a marketable title act.

However, like the difficulties arising from dormant mineral acts, relying on marketable title acts to avoid net profit payment is risky. In the scenario described above, the producing cotenant must wait forty years before producing or else accept the risk of litigation. Moreover, common marketable title acts have recording periods ranging from twenty to fifty years.¹¹⁹ These periods may be too long and push away producers who refuse the overhanging risk of litigation, hampering oil and gas development. However, these limitations are not inherent in all marketable title acts. Texas can adopt a marketable title act with a relatively short recording period and economic solutions can be found for rising litigation costs, such as insurance plans. Thus, a Texas marketable title act can be useful in avoiding net profit payments.

C. STATUTORY PRESCRIPTION

Statutory prescription involves classifying what would otherwise be mineral interests as simple servitudes on land.¹²⁰ Thus, an individual owns minerals insofar as she has a servitude. As adopted by Louisiana, the system of servitudes is accompanied by the doctrine of liberative prescription.¹²¹ The doctrine of liberative prescription in many ways achieves the same results as dormant mineral acts: extinguishing servitudes upon non-use during a prescriptive period.¹²² For example, failure to produce or perform good faith drilling will not constitute a “use” and thus not toll the prescriptive period.¹²³ Upon expiration of the servitude, the rights are returned to the surface estate owner.¹²⁴

It is readily apparent how liberative prescription can facilitate oil and gas development, despite nonconsenting cotenants. If the prescription is

117. *See id.* at 151 n.116.

118. *See id.* at 151–52.

119. *See id.* at 151.

120. *See id.* at 161–62.

121. *See id.*

122. *See id.*

123. *See id.*

124. *See id.*

not used, as might be the case with dormant mineral interest cotenants, then the interest will be lost. While in Louisiana the interest is typically given to the surface estate owner, it may be possible to prefer the other mineral interest cotenant.¹²⁵ Moreover, the doctrine of liberative prescription can be legislatively implemented so as to shorten the prescription period.¹²⁶

However, there are some obstacles with using this solution to facilitate oil and gas development. As alluded to earlier, this solution would entail abolishing Texas's traditional classification that mineral ownership is ownership in the fee itself, as opposed to an ownership of a servitude. This would overthrow the extensive case law and legal reasoning predicated upon mineral ownership being actual ownership.

Moreover, even if Texas were to overhaul its classification system, liberative prescriptions will only mitigate *dormant* nonconsenting cotenants and the net profits that would be owed to them. While a shortened prescriptive period may catch a negligent nonconsenting cotenant who is not dormant, it is unlikely to catch enough to facilitate development as hoped for. Since this Louisianan solution is based on nonuse, it is unlikely to mitigate the problem that arises when cotenants actively withhold consent and demand net profits. While unlikely to be a viable solution in Texas to mitigate net profit payments, it is nonetheless a solution Texas has at its disposal that may facilitate some mineral development.

D. COMPULSORY POOLING

Compulsory pooling as a solution in itself has yet to be considered but may help avoid paying net profits. As mentioned above, Texas has adopted a compulsory pooling statute to remedy the "small tract problem," wherein mineral interest owners are able to produce despite not fulfilling drilling unit regulations.¹²⁷ To take advantage of this statute, a mineral interest owner must provide a "fair and reasonable" offer to an adjacent tract owner and the reservoirs desired to be produced must have been discovered after March 8, 1961.¹²⁸ If the offer is not taken, a mineral owner may force pool, and the forced party may be subject to risk penalties.¹²⁹

While the Texas compulsory pooling act appears to have all the tools necessary to mitigate net profit payments, it is severely limited since it may only be applied in certain circumstances. At least as the Texas act is

125. *See id.*

126. *See* La. Petroleum Co. v. Broussard, 135 So. 1, 2 (La. 1931); Keebler v. Seubert, 120 So. 591, 592 (La. 1929). At the time of these cases, the legislature appeared to provide a ten-year prescription period. Presumably, if this system of prescriptive mineral rights were adopted in Texas, the local legislature may adopt similar—or shorter—prescriptive periods, notwithstanding any local constitutional issues.

127. *See generally* Gina S. Warren, *Pooling Clauses and Statutes*, TEX. A&M L. SCHOLARSHIP (2014), <https://scholarship.law.tamu.edu/facscholar/711> [<https://perma.cc/LB6X-733K>].

128. *See id.*

129. *See id.*

concerned, only certain interests may be pooled and subject to risk penalties. That is, the interest must cover reservoirs discovered after 1961. Furthermore, forced pooling will only be permitted after a fair offer is given, which can lead to litigation on what constitutes “fair and reasonable.”¹³⁰

Furthermore, the Texas compulsory pooling act, and other similar acts in general, are limited to forced pooling against adjacent tract owners. This limitation immediately makes such pooling acts unhelpful when a cotenant wants to develop despite a nonconsenting cotenant on the same tract. However, there may be a unique circumstance where a cotenant can utilize forced pooling to limit net profit payments. What is imagined is a fractional mineral interest owner who desires to have the forced pooling act used against them. If this occurs, the fractional owner may opt into the lease so producers are not deterred by having to pay net profits, and the other fractional owners’ net profit payments will be burdened by risk penalties. Even if cotenants could use the forced pooling act against cotenants on the same tract, many compulsory pooling acts only provide limited risk penalties. With this in mind, it appears the Texas compulsory pooling act may not be useful in facilitating oil and gas production against nonconsenting cotenants. However, the Texas legislature may modify the current compulsory pooling act such that the risk penalties are more effective. With slight modification, compulsory pooling acts may be useful in Texas.

E. JUDICIAL PARTITION

Perhaps the simplest preexisting solution to circumvent the nonconsenting cotenant is to seek judicial partition.¹³¹ Partition is a remedy usually available to fractional interest owners and is only available in-kind or by sale.¹³² That is, the property can be equitably distributed among the owners either by actually dividing the property or by selling the property and distributing the funds.¹³³ While partition may be pursued voluntarily, forced partition can be gained through judicial proceedings.¹³⁴ In Texas, partition in kind is preferred when concerning mineral estates.¹³⁵ However, upon sufficient showing of inequity, a court may grant partition by sale.¹³⁶

130. See *Carson v. R.R. Comm’n of Tex.*, 669 S.W.2d 315, 318 (Tex. 1984) (holding an offer was unreasonable when a forced party had already started production and the offer would require the forced party to decrease his interest in production by about 66%).

131. See *Smith*, *supra* note 1, at 136–37.

132. See *id.* at 137–42.

133. See *id.*

134. See 55 TEX. JUR. 3D OIL & GAS § 57 (2018).

135. See *id.*

136. See *id.* While partition in kind is preferred, it is usually not the given remedy. See *Champion v. Robinson*, 392 S.W.3d 118, 132 (Tex. App.—Texarkana 2012, pet. denied). Texas courts presume minerals are equally distributed and thus prefer to grant partition in kind. See *id.* at 125. However, as many reservoirs are not uniform, the presumption can easily be overcome. See *id.* Thus, courts are likely to grant partition by sale, finding partition in kind may lead to inequitable distribution. See *id.*

At first glance, it appears a forced partition in kind would be a suitable way to secure a producer, extract value from the land, and facilitate the oil and gas industry. However, given the unlikelihood of uniform mineral estates, partition in kind is expected to be rare. Moreover, even if partition in kind can be achieved, a cotenant must have sufficient interest to obtain a sufficient partition that could attract producers. If a cotenant has a small mineral interest or is given a partition in a poor location,¹³⁷ the cotenant may be hard pressed to find a producer to lease or purchase the property.

Furthermore, a partition by sale may also seem like a suitable solution. After all, the entire mineral estate would be sold to the highest bidder, the consenting cotenant can secure the property, or the once-cotenant can secure value if another individual purchases the property. In turn, this promotes alienation and facilitates the industry. However, a cotenant desiring to produce may loathe the idea of parting with their property as opposed to merely leasing it and retaining ownership. Moreover, the desiring cotenant may rightly fear that outright selling the land would be less profitable than leasing it for production. While a producer lessee may think this is the simple solution to avoid net profits to nonconsenting cotenants, the consenting cotenants may think this is no solution at all due to the monetary sacrifice they must make to secure production. Thus, while expanding partition rules is a solution to avoid net profit payments and facilitate mineral development, it has its limitations.

F. RECEIVERSHIP

Courts of equity are generally empowered to appoint receivers to resolve disputes between cotenants.¹³⁸ These court-appointed receivers could be a viable solution to facilitate production despite nonconsenting cotenants. Generally, if a receiver is appointed, the receiver acts as the undivided interest owner of the disputed property and is given authority to lease the land in total.¹³⁹ Thus, if the receiver is authorized to enter the property into a lease, the original nonconsenting cotenant will not be owed net profits.¹⁴⁰

In Texas, a statute outlines a court's authority to appoint a receiver.¹⁴¹ Generally, when there is an action between cotenants and the property is in danger of injury, a cotenant may apply for a receivership.¹⁴² A classic example of a court granting a receivership is *United North & South Oil Co. v. Meredith*.¹⁴³ In this Texas case regarding partition and the validity

137. A poor location is one that may be outside a drilling or spacing unit. Thus, a potential lessor may not desire that tract since it would require them to comply with drilling and spacing regulations, and essentially make them suffer from the small tract problem.

138. See 55 TEX. JUR. 3D OIL AND GAS § 314 (2018).

139. See *id.*

140. See *id.*

141. See TEX. CIV. PRAC. & REM. CODE ANN. § 64.001 (West 2018).

142. See *id.*

143. See 272 S.W. 124, 124–25 (Tex. Comm'n App. 1925).

of a prior lease, the court appointed a receiver because the property was in danger of drainage and a cotenant was impeding the necessary, immediate plan to mitigate drainage.¹⁴⁴ More specifically, since the litigation caused the property interests to be in dispute while drainage was imminent, the court found this was a sufficient impediment to justify a receiver.¹⁴⁵

While court-appointed receivers can be used to control the property for the benefit of all the cotenants—and thereby facilitate oil and gas development when beneficial to all parties—there are important limitations to granting receiverships. Perhaps the clearest limitation is that receiverships cannot be the sole remedy requested.¹⁴⁶ “A receiver will not be appointed except in a proceeding ancillary to some action for permanent or other relief.”¹⁴⁷ Thus, this rule prohibits a cotenant from seeking a court-appointed receiver only because a cotenant is nonconsenting. Rather, the cotenant desiring production must also seek, for example, judicial partition. This limitation is a great impediment in facilitating oil and gas development, as receiverships can only be sought in very limited circumstances.

Moreover, receiverships are generally only granted when the property is in danger of substantial harm. This further imposes a limitation on using receiverships to facilitate development. While early Texas precedent suggested no danger of property damage is necessary,¹⁴⁸ the revised Texas statute clarifies that such danger is a prerequisite.¹⁴⁹ Thus, the obstacles posed by a nonconsenting cotenant are not enough to constitute a danger to the property. Rather, the danger of drainage of some sort must be shown to obtain a receivership and to authorize leasing the property.¹⁵⁰

While receiverships as a preexisting remedy are a sufficient solution to avoid net profit payments to nonconsenting cotenants, application restrictions pose a great obstacle as a viable solution to facilitating mineral development. Not only is danger of property necessary to appoint a receiver, but a receivership cannot stand alone as a remedy. This introduces litigation costs that must be incurred simply to obtain a receivership and avoid net profit payments. Unless the Texas legislature attempts

144. *See id.* at 125–26.

145. *See id.* at 126.

146. *See* Staggs v. Pena, 133 S.W.2d 212, 214 (Tex. App.—San Antonio 1939, no writ).

147. *Id.*

148. *See* Smith, *supra* note 1, at 143–44 (citing Gilles v. Yarbrough, 224 S.W.2d 720 (Tex. App.—Fort Worth 1949, no writ)). Gilles concerned a mineral estate with about 200 fractional owners. *See* Gilles, 224 S.W.2d at 720–21. After determining the parties’ mineral interests, the trial court granted a receivership to lease the minerals as it otherwise would be impossible to gain consent from all the cotenants. *See id.* at 720–22.

149. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 64.001(b) (West 2018). The new Texas statute explicitly states that a party applying for a receivership must show “the property or fund must be in danger of being lost, removed, or materially injured.” *Id.*

150. *See* Smith, *supra* note 1, at 143–44.

to grant courts more authority in their receivership-granting powers,¹⁵¹ receiverships are of little use to facilitate mineral production. However, receiverships can currently be a solution, if the producing cotenant finds himself in the right circumstance.

V. CONCLUSION

In conclusion, Texas has many solutions within its arsenal to help cotenants avoid paying net profits and thus facilitate oil and gas development. Moreover, Texas lawmakers have the constitutional and property law principles behind them if they were to overhaul its accounting system and outright impose risk penalties on nonconsenting cotenants. While a complete overhaul of the accounting system is a drastic measure, Texas nonetheless has preexisting solutions which may require slight modifications. Though one should be doubtful for legislation that further encumbers property rights in Texas, one thing is for sure: the best way to facilitate mineral development among jointly owned mineral estates is to address the burdensome net profit payments nonconsenting cotenants are owed.

151. What is imagined is the legislature permitting courts to grant receiverships as a matter of equity. Thus, if a court were to find a cotenant's nonconsent grossly unreasonable and causing waste, then a court could more freely grant receiverships to use the property in a more equitable manner.