

C. Paragraph 5 is a Covenant Regarding Formation of a Pooled Unit, Not a Conveyance of Property.

In the matter before the Court, TMBR/Sharp and the Lessors of the Original Stokes Leases have a contract with a covenant that requires TMBR/Sharp to file unit designations in the county where the property is located. *See Exhibits "A" and "B" at Paragraph 5.* This covenant is not an act of changing ownership in the property, but rather, a means to satisfy the OCD well permitting requirements and by which all parties to the Original Stokes Leases may ascertain with certainty what lands will be included in the unit designation. *See Uhden v. New Mexico Oil Conservation Commission*, 112 N.M. 528; 817 P.2d 721 (1981) (holding OCD's order authorizing 320 acre spacing was a condition precedent to pooling tracts).<sup>4</sup> Such filing memorializes TMBR/Sharp's pooling of the Stokes acreage with other lands and informs the Lessors of the property covered by the unit designation. The filing does not affect ownership of the property subject to the unit designation, but instead, effectuates TMBR/Sharp's pooling

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<sup>4</sup> Defendant may argue that the pooling is a conveyance of real property and, therefore, subject to various requirements of New Mexico law, including certain filing requirements in the Lea County Records. Such a position is contrary to the holding of numerous courts. For instance, the Tenth Circuit held that the rule of perpetuities does not apply to the power to pool because such power does not accomplish a cross-transfer of property. *See Phillips Petroleum Co. v. Peterson*, 218 F.2d 926, 931 (10th Cir. 1954). In Kansas, the court held that the power to pool does not violate the rule against perpetuities because all the estates in interests are vested upon execution of the lease and that the rights thereunder are capable of definite ascertainment. *Kenoyer v. Magnolia Petroleum Co.*, 245 P.2d 176 (Kan. 1952). As noted by Kuntz, "a lessor does not acquire property interest in other land included in the unit created by an exercise of the pooling power. Instead of modifying the respective property rights of lessors in the unit, an exercise of the pooling power serves to modify only the rights that exist between each lessor and his lessee." 4 Eugene Kuntz, *Treatise on the Law of Oil and Gas* § 48.3(3), at 216 (1972). Kuntz goes on to state that "instead of modifying property rights of lessors in the unit, the exercise of the pooling power modifies only the rights between each lessor and his lessee by modifying the covenants and special limitations contained in the lease." *Id.*